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106 CALIFORNIA APPELLATE REPORTS, 2d SERIES

Cal.App. Page	P.2d Vol.	P.2d Page
1	234	705
6	234	269
8	234	736
16	234	245
19	234	61
21	234	242
25	234	754
34	234	240
35	234	745
42	234	642
51	234	716
57	234	729
61	234	712
68	234	1019
74	234	732
80	234	666
92	234	695
105	234	720
112	234	711
114	234	766
126	234	673
134	234	647
160	234	693
162	234	62
163	234	708
168	234	987
176	234	702
181	234	691
185	234	724
189	234	782
194	234	1012
198	234	774
204	234	742
208	234	759
221	234	687
226	234	662
232	234	995
232	236	141
254	234	1036
260	235	25
265	234	1009
271	235	56
281	235	64
286	235	45
294	235	32
304	235	76
312	234	992
317	235	39
321	235	51
329	235	43
333	234	1031
341	235	236
350	235	28
358	234	1039
364	235	89
373	235	125
378	235	225
381	235	113
391	235	101
403	235	71
412	235	62
415	235	119
421	235	220
426	235	232
430	235	84
438	235	42
440	235	81
445	235	123
449	235	229
454	235	234
458	235	107
467	235	217
471	235	261
480	235	247
490	235	242
500	235	223
504	235	266
514	235	227
518	235	396
528	235	402
531	235	424
537	235	439
549	235	427
554	235	410
556	235	409
559	235	416
565	235	434
572	235	620
578	235	656
585	235	403
589	235	422
593	235	420
597	235	406
599	235	431
604	235	407
607	235	843
612	235	630
616	235	627
621	235	837
630	235	645
638	235	614
647	235	660
650	235	857
657	235	619
660	235	609
663	235	650
669	235	635
686	235	632
690	235	612
694	235	847
699	236	4
703	235	855
707	236	19
709	235	864
711	235	846
714	236	2
716	236	9
720	236	171
725	236	6
729	236	192
735	236	1
738	236	27
744	236	20
748	236	22
755	236	30
760	236	181
768	236	189
770	236	201
775	236	212
782	236	208
787	236	199
791	236	196
796	236	180
798	236	216
805	236	174
815	236	190
817	236	386
823	236	206
827	236	211
829	236	206
830	236	205
831	236	205
833	236	236

107 CALIFORNIA APPELLATE REPORTS, 2d SERIES

Cal.App. Page	P.2d Vol.	P.2d Page
1	236	412
5	236	403
8	236	613
21	236	383
25	236	424
31	236	427
38	236	408
44	236	396
55	236	626
58	236	891
60	236	884
71	236	591
75	236	623
78	236	586
81	236	634
90	236	661
98	236	593
105	236	855
125	236	604
129	236	393

Cal.App. Page	P.2d Vol.	P.2d Page
135	236	415
140	236	846
148	236	823
155	236	651
161	236	625
163	236	667
171	236	597
175	236	588
179	236	630
181	236	632
184	236	606
188	236	628
192	236	654
200	236	621
204	236	603
206	236	840
209	236	838
211	236	821
215	236	828
217	236	905
220	237	76
225	236	810
235	236	892
243	236	837
245	236	834
250	236	910
253	237	51
256	236	823
257	236	912
260	237	32
268	236	906
274	236	842
280	236	829
284	236	851
292	237	8
298	237	28
304	237	320
308	237	284
312	237	287
313	237	329
322	237	309
328	237	315
332	237	344
334	237	301
346	237	335
351	237	38
356	237	278
361	237	295
364	237	68
367	237	287
372	237	20
377	236	898
382	237	12
391	237	59
395	237	73
402	237	24
405	237	49
407	237	568
436	237	338
447	237	25
451	237	325
457	237	57
461	237	17
463	237	62
466	237	18
469	237	45
476	237	70
480	237	273
483	237	546
487	237	64
495	237	297
501	237	725
514	237	281
519	237	345
523	237	80
531	237	291
537	237	312
541	237	525
550	237	539
554	237	322
558	237	318
562	237	548
570	237	561
581	237	679
586	237	558
592	237	699
599	237	536
604	237	673
614	237	706
624	237	682
627	237	689
631	237	712
635	237	691
642	237	686
647	237	275
652	237	66
656	237	54
659	237	53
662	237	52
670	237	72
674	237	71
677	237	98
682	238	6
688	238	8
692	237	99
710	238	2
718	238	7
727	237	70
732	238	8
736	238	8
738	238	12
758	237	98
765	238	9
778	238	4
790	237	69
794	238	10
799	238	59
811	238	78
816	238	62
823	238	70
826	238	72
827	237	98
831	238	15
845	238	33
846	238	81
847	236	91

WEST KEY NUMBER SYSTEM

CALIFORNIA REPORTER

COVERING CASES REPORTED IN

PACIFIC REPORTER
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239 P.2d – 240 P.2d

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CASES REPORTED

	Vol.		Page
Abbey v. Schaefer, App.	239	P.2d	44
Abrams; People v., App.	239	P.2d	75
Affleck; Western Surgical Supply Co. v., App.	240	P.2d	656
Alhambra Gold Mine Corp.; Alhambra Shumway Mines v., App.	240	P.2d	340
Alhambra Shumway Mines v. Alhambra Gold Mine Corp., App.	240	P.2d	340
Alkow v. State Bar of Cal., Sup.	239	P.2d	871
Alles v. Hipp, App.	239	P.2d	451
Altadena Community Church v. State Bd. of Equalization, App.	240	P.2d	322
Alvarez; Estrada v., Sup.	240	P.2d	278
Ames; Luna v., App.	239	P.2d	18
Andrews; Clark v., App.	240	P.2d	330
Angel; MacIntyre v., App.	240	P.2d	1047
Angelonides; Vaganas v., App.	240	P.2d	387
Arnold; People v., App.	239	P.2d	449
Atchison, T. & S. F. Ry. Co.; Carpenter v., App.	240	P.2d	5
Atkinson v. Pacific Fire Extinguisher Co., App.	240	P.2d	651
Baird v. Bradley, App.	240	P.2d	1016
Bank of America Nat. Trust & Sav. Ass'n; Fountain v., App.	240	P.2d	414
Barba; Dorsey v., Sup.	240	P.2d	604
Barkley; Shorb v., App.	240	P.2d	337
Barnard; Strecker v., App.	240	P.2d	345
Barton; Niel v., App.	239	P.2d	912
Bazzoli v. Nance's Sanitarium, App.	240	P.2d	672
Beal; People v., App.	239	P.2d	84
Becker; People v., App.	239	P.2d	898
Bemis v. People, three cases, App.	240	P.2d	638
Bennett & Armour; Heffernan v., App.	239	P.2d	129
Benton v. Sloss, Sup.	240	P.2d	575
Bertone; Lacey v., App.	240	P.2d	395
Betts v. City and County of San Francisco, App.	239	P.2d	456
Blair v. Williams, App.	240	P.2d	1043
Bloch; Goldberg v., App.	239	P.2d	147
Bloch's Estate, In re, App.	239	P.2d	147
Blumenthal v. Liebman, App.	240	P.2d	699
Board of Medical Examiners; Davis v., App.	239	P.2d	78
Board of Medical Examiners; Staley v., App.	240	P.2d	61
Board of Sup'rs of San Mateo County; Handler v., App.	240	P.2d	409
Boggio v. California-Western States Life Ins. Co., App.	239	P.2d	144
Botiller; People v., App.	239	P.2d	914
Bowron; Parker v., App.	239	P.2d	893
Bradley; Baird v., App.	240	P.2d	1016
Bratlie; Mantonya v., App.	240	P.2d	667
Brooks v. Independent Exploration Co., App.	240	P.2d	1037
Brown v. Overshiner, Sup.	240	P.2d	617
Burke; Gerry v., App.	239	P.2d	14
Burke; Scott v., App.	239	P.2d	14
Caffrey v. Tilton, Sup.	240	P.2d	273
California Water Service Co.; Thermalito Irr. Dist. v., App.	239	P.2d	109
California-Western States Life Ins. Co.; Boggio v., App.	239	P.2d	144
Cameron; Spaulding v., Sup.	239	P.2d	625

	Vol.		Page
Carpenter v. Atchison, T. & S. F. Ry. Co., App.	240	P.2d	5
Carpenter v. Laing, App.	239	P.2d	3
Cary v. Wentzel, Sup.	240	P.2d	304
Chula v. Superior Court In and For Orange County, App.	240	P.2d	398
Citizens Title Co.; Davis v., App.	240	P.2d	1037
City and County of San Francisco; Betts v., App.	239	P.2d	456
City and County of San Francisco; Viglione v., App.	240	P.2d	68
City Council of City of San Jose; Morin v., App.	240	P.2d	688
City of Long Beach; Elbert, Limited v., App.	239	P.2d	4
City of Los Angeles v. Ganahl, App.	239	P.2d	1
City of Los Angeles v. Los Angeles Bldg. and Const. Trades Council, App.	240	P.2d	16
City of Los Angeles; Natural Soda Products Co. v., App.	240	P.2d	993
City of Los Angeles; Simpson v., App.	240	P.2d	647
City of Los Angeles; Youngstown Steel Products Co. of Cal. v., Sup.	240	P.2d	977
City of Mill Valley; Stang v., Sup.	240	P.2d	980
City of Oakland; Kader v., App.	240	P.2d	434
City of Santa Ana; Davis v., App.	239	P.2d	656
Civil Service Commission; Terry v., App.	240	P.2d	691
Clark v. Andrews, App.	240	P.2d	330
Clayton; McMillon v., App.	239	P.2d	105
Clayton's Estate, In re, App.	239	P.2d	105
Coachella Val. County Water Dist.; Helvey v., App.	239	P.2d	702
Coachella Val. County Water Dist. v. Taylor, App.	239	P.2d	454
Collie, Ex parte, Sup.	240	P.2d	275
Consolidated Photographic Industries v. Marks, App.	240	P.2d	718
Cook; Glenn v., App.	239	P.2d	680
Cooke v. Ramponi, Sup.	239	P.2d	638
Cooney v. Grower-Shipper Vegetable Ass'n of Central Cal., App.	240	P.2d	999
Corbari; Gambord Meat Co. v., App.	240	P.2d	342
Coverstone v. Davies, Sup.	239	P.2d	876
Cox v. Hollywood Film Enterprises, App.	240	P.2d	713
Curl v. Pacific Home, App.	239	P.2d	481
Curtis Pub. Co.; Gill v., Sup.	239	P.2d	630
Curtiss v. McGowan, App.	240	P.2d	997
Dartt; Law v., App.	240	P.2d	1013
Davies; Coverstone v., Sup.	239	P.2d	876
Davies; Mock v., Sup.	239	P.2d	876
Davis v. Board of Medical Examiners, App.	239	P.2d	78
Davis v. Citizens Title Co., App.	240	P.2d	1037
Davis v. City of Santa Ana, App.	239	P.2d	656
De Armas v. Dickerman, App.	239	P.2d	65
De Burgh v. De Burgh, App.	240	P.2d	625
De Loretto; Haeussler v., App.	240	P.2d	654
Dennis; O'Neill v., App.	240	P.2d	376
DeRosier v. Vierra, App.	240	P.2d	660
Desert Club; Nyman v., App.	240	P.2d	37
Dickerman; De Armas v., App.	239	P.2d	65
Dielissen; Nance v., App.	240	P.2d	70
Dielissen v. Schmidt, App.	240	P.2d	70
Dorsey v. Barba, Sup.	240	P.2d	604
Doyle; People v., App.	240	P.2d	40
Eichler; Hillsdale Builders Supply Co. v., App.	240	P.2d	343
Elbert, Limited v. City of Long Beach, App.	239	P.2d	4
Elliott; San Jose Abstract & Title Ins. Co. v., App.	240	P.2d	41
Estrada v. Alvarez, Sup.	240	P.2d	278
Evans; People v., App.	239	P.2d	666
Fallert v. Hamilton, App.	240	P.2d	1007

	Vol.		Page
Findley v. Garrett, App.	240	P.2d	421
Fleming v. State Bar of Cal., Sup.	239	P.2d	866
Flotho; Toshio Hamasaki v., Sup.	240	P.2d	298
Foreman; Weston v., App.	239	P.2d	513
Forfar; Jermane v., App.	240	P.2d	351
Formosa Corp. v. Rogers, App.	239	P.2d	88
Fountain v. Bank of America Nat. Trust & Sav. Ass'n, App.	240	P.2d	414
Foy's Estate, In re, App.	240	P.2d	685
Frank v. Howich, App.	240	P.2d	66
Frazier v. Moffatt, App.	239	P.2d	123
Freitas v. Peerless Stages, App.	239	P.2d	671
Fry v. Lost Key Mines, two cases, App.	239	P.2d	69
Galbraith v. Thompson, App.	239	P.2d	468
Gall v. Union Ice Co., App.	239	P.2d	48
Gambord Meat Co. v. Corbari, App.	240	P.2d	342
Ganahl; City of Los Angeles v., App.	239	P.2d	1
Ganann v. Ganann, App.	240	P.2d	722
Gardo, Ex parte, App.	239	P.2d	77
Garrett; Findley v., App.	240	P.2d	421
Gear; Taylor v., App.	239	P.2d	11
Gerold; King v., App.	240	P.2d	719
Gerry v. Burke, App.	239	P.2d	14
Giacomazzi v. Rowe, App.	240	P.2d	1020
Gill v. Curtis Pub. Co., Sup.	239	P.2d	630
Gill v. Hearst Pub. Co., Sup.	239	P.2d	636
Glenn v. Cook, App.	239	P.2d	680
Goldberg v. Bloch, App.	239	P.2d	147
Goldenberg v. Merritt, App.	240	P.2d	726
Griffith v. Marks, App.	240	P.2d	718
Grossblatt v. Wright, App.	239	P.2d	19
Grower-Shipper Vegetable Ass'n of Central Cal.; Cooney v., App.	240	P.2d	999
Gudarov v. Hadjieff, Sup.	240	P.2d	621
Guipre v. Kurt Hitke & Co., App.	240	P.2d	312
G. W. Thomas Drayage & Rigging Co.; Meyers v., App.	239	P.2d	118
Haddad; Kester Motors v., App.	240	P.2d	1011
Hadjieff; Gudarov v., Sup.	240	P.2d	621
Haeussler v. De Loretto, App.	240	P.2d	654
Haines v. Wertman, App.	239	P.2d	889
Hamasaki v. Flotho, Sup.	240	P.2d	298
Hamilton; Fallert v., App.	240	P.2d	1007
Hamilton v. Hamilton, App.	240	P.2d	14
Handler v. Board of Sup'rs of San Mateo County, App.	240	P.2d	409
Hastings, In re, App.	239	P.2d	684
Hastings' Estate, In re, App.	239	P.2d	684
Hayes v. Richfield Oil Corp., Sup.	240	P.2d	580
Haywood; Masters v., App.	240	P.2d	1028
Haywood's Estate, In re, App.	240	P.2d	1028
Head; People v., App.	239	P.2d	506
Hearst Pub. Co.; Gill v., Sup.	239	P.2d	636
Heffernan v. Bennett & Armour, App.	239	P.2d	129
Hellman v. Hellman, App.	239	P.2d	458
Helvey v. Coachella Val. County Water Dist., App.	239	P.2d	702
Henderson; Jarvis v., App.	240	P.2d	27
Hewlett; People v., App.	239	P.2d	150
Hiers; Keller v., App.	239	P.2d	6
Hillsdale Builders Supply Co. v. Eichler, App.	240	P.2d	343
Hipp; Alles v., App.	239	P.2d	451
Hixson v. Hixson, Sup.	240	P.2d	586

	Vol.		Page
Hobbs; People v., App.	240	P.2d	411
Hollywood Film Enterprises; Cox v., App.	240	P.2d	713
Honold; Leipert v., Sup.	240	P.2d	288
Horney; Masson v., Sup.	239	P.2d	617
Howich; Frank v., App.	240	P.2d	66
Hucke v. Kader, App.	240	P.2d	434
Hull v. Sheehan, App.	239	P.2d	704
Hurwitz; Rubin v., App.	240	P.2d	990
Hurwitz' Estate, In re, App.	240	P.2d	990
Huyck v. Merritt, App.	240	P.2d	1
Inagaki; Uchida Inv. Co. v., App.	239	P.2d	644
Independent Exploration Co.; Brooks v., App.	240	P.2d	1037
Industrial Acc. Commission; Industrial Indem. Co. v., App.	239	P.2d	477
Industrial Acc. Commission; Kaiser Co. v., App.	240	P.2d	57
Industrial Acc. Commission; Liberty Mut. Ins. Co. v., App.	239	P.2d	485
Industrial Indem. Co. v. Industrial Acc. Commission, App.	239	P.2d	477
Irish; People v., App.	239	P.2d	35
James, Ex parte, Sup.	240	P.2d	596
Jarvis v. Henderson, App.	240	P.2d	27
Jermane v. Forfar, App.	240	P.2d	351
Johnson; People v., App.	239	P.2d	642
Journeymen Barbers, Hairdressers & Cosmetologists' Intern. Union of America, Local No. 148; Riviello v., App.	240	P.2d	361
Kader v. City of Oakland, App.	240	P.2d	434
Kader; Hucke v., App.	240	P.2d	434
Kaiser Co. v. Industrial Acc. Commission, App.	240	P.2d	57
Keller v. Hiers, App.	239	P.2d	6
Keller; Ravenscroft v., App.	239	P.2d	6
Kester Motors v. Haddad, App.	240	P.2d	1011
King v. Gerold, App.	240	P.2d	710
Kirk; People v., App.	240	P.2d	630
Krug v. Meehan, App.	239	P.2d	46
Krug v. Meehan, App.	240	P.2d	732
Kuchel v. Tolhurst, App.	239	P.2d	906
Kuchel; Treu v., App.	240	P.2d	32
Kurt Hitke & Co.; Guipre v., App.	240	P.2d	312
Lacey v. Bertone, App.	240	P.2d	395
Laing; Carpenter v., App.	239	P.2d	3
Lampton; Martin v., App.	240	P.2d	21
Lampton; Redwine v., App.	240	P.2d	21
Lavandera; People v., App.	239	P.2d	30
Law v. Dartt, App.	240	P.2d	1013
Layous v. Monterey County Trust & Sav. Bank, App.	240	P.2d	1001
Lee; People v., App.	239	P.2d	105
LeFiell v. LeFiell, App.	239	P.2d	61
Lefranc's Estate, In re, Sup.	239	P.2d	617
Leipert v. Honold, Sup.	240	P.2d	288
Lekos' Estate, In re, App.	240	P.2d	387
Lenahan v. Poole, Sup.	240	P.2d	276
Leonoff; Rugani v., App.	239	P.2d	500
Levene v. Levene, App.	240	P.2d	730
Libarian v. State Bar, Sup.	239	P.2d	865
Liberty Mut. Ins. Co. v. Industrial Acc. Commission, App.	239	P.2d	485
Lidyoff; Sherrard v., App.	239	P.2d	28
Liebman; Blumenthal v., App.	240	P.2d	699
Los Angeles Bldg. and Const. Trades Council; City of Los Angeles v., App.	240	P.2d	16

	Vol.		Page
Los Angeles, City of, v. Ganahl, App.	239	P.2d	1
Los Angeles, City of, v. Los Angeles Bldg. and Const. Trades Council, App.	240	P.2d	16
Lost Key Mines; Fry v., App.	239	P.2d	69
Lukasik, Ex parte, App.	239	P.2d	492
Lukasik v. Lukasik, App.	239	P.2d	497
Luna v. Ames, App.	239	P.2d	18
Lynn's Estate, In re, App.	240	P.2d	1001
McCord Co. v. Plotnick, App.	239	P.2d	32
McCoy; Nichols v., Sup.	240	P.2d	569
McGowan; Curtiss v., App.	240	P.2d	997
MacIntyre v. Angel, App.	240	P.2d	1047
McKee v. McKee, App.	239	P.2d	37
McKenzie; Sierraville Community Church v., App.	240	P.2d	663
McManus; Owens v., App.	239	P.2d	72
McMillon v. Clayton, App.	239	P.2d	105
Magginetti; Raisin Inv. Co. v., App.	240	P.2d	349
Manning v. Watson, App.	239	P.2d	688
Mantonya v. Bratlie, App.	240	P.2d	667
Marks; Consolidated Photographic Industries v., App.	240	P.2d	718
Marks; Griffith v., App.	240	P.2d	718
Marquez; People v., App.	240	P.2d	1019
Martin v. Lampton, App.	240	P.2d	21
Mason; People v., App.	240	P.2d	64
Massey; Nellis v., App.	239	P.2d	509
Masson v. Horney, Sup.	239	P.2d	617
Masters v. Haywood, App.	240	P.2d	1028
Meade; People v., App.	240	P.2d	680
Meador; Sanal v., App.	239	P.2d	908
Meehan; Krug v., App.	239	P.2d	46
Meehan; Krug v., App.	240	P.2d	732
Meguiar v. Universal Die Casting Co., App.	239	P.2d	699
Melody Lane of Wilshire; Rose v., Sup.	240	P.2d	307
Merritt; Goldenberg v., App.	240	P.2d	726
Merritt; Huyck v., App.	240	P.2d	1
Meyers v. G. W. Thomas Drayage & Rigging Co., App.	239	P.2d	118
Mock v. Davies, two cases, Sup.	239	P.2d	876
Moffatt; Frazier v., App.	239	P.2d	123
Monge; People v., App.	240	P.2d	432
Monterey County Trust & Sav. Bank; Layous v., App.	240	P.2d	1001
Morin v. City Council of City of San Jose, App.	240	P.2d	688
Nance v. Dielissen, App.	240	P.2d	70
Nance's Sanitarium; Bazzoli v., App.	240	P.2d	672
Nanny v. Ruby Lighting Corp., App.	239	P.2d	885
Nation; People v., App.	239	P.2d	891
Natural Soda Products Co. v. City of Los Angeles, App.	240	P.2d	993
Neal; People v., App.	239	P.2d	38
Nellis v. Massey, App.	239	P.2d	509
Newman v. Newman, App.	240	P.2d	682
Nichols v. McCoy, Sup.	240	P.2d	569
Niel v. Barton, App.	239	P.2d	912
Nyman v. Desert Club, App.	240	P.2d	37
Olson v. Standard Marine Ins. Co., App.	240	P.2d	379
O'Neill v. Dennis, App.	240	P.2d	376
One 1947 Cadillac 4-Door Sedan; People v., App.	240	P.2d	1035
Overshiner; Brown v., Sup.	240	P.2d	617
Owens v. McManus, App.	239	P.2d	72
Pacific Fire Extinguisher Co.; Atkinson v., App.	240	P.2d	651

	Vol.		Page
Pacific Home; Curl v., App.	239	P.2d	481
Pan Pac. Sales Corp.; Vickter v., App.	239	P.2d	463
Parker v. Bowron, App.	239	P.2d	893
Peerless Stages; Freitas v., App.	239	P.2d	671
People v. Abrams, App.	239	P.2d	75
People v. Arnold, App.	239	P.2d	449
People v. Beal, App.	239	P.2d	84
People v. Becker, App.	239	P.2d	898
People; Bemis v., App.	240	P.2d	638
People v. Botiller, App.	239	P.2d	914
People v. Doyle, App.	240	P.2d	40
People v. Evans, App.	239	P.2d	666
People v. Head, App.	239	P.2d	506
People v. Hewlett, App.	239	P.2d	150
People v. Hobbs, App.	240	P.2d	411
People v. Irish, App.	239	P.2d	35
People v. Johnson, App.	239	P.2d	642
People v. Kirk, App.	240	P.2d	630
People v. Lavandera, App.	239	P.2d	30
People v. Lee, App.	239	P.2d	105
People v. Marquez, App.	240	P.2d	1019
People v. Mason, App.	240	P.2d	64
People v. Meade, App.	240	P.2d	680
People v. Monge, App.	240	P.2d	432
People v. Nation, App.	239	P.2d	891
People v. Neal, App.	239	P.2d	38
People v. One 1947 Cadillac 4-Door Sedan, App.	240	P.2d	1035
People v. Petree, App.	240	P.2d	327
People v. Proctor, App.	239	P.2d	697
People v. Reed, Sup.	240	P.2d	590
People v. Rodriguez, App.	239	P.2d	883
People v. Schwartz, App.	240	P.2d	1024
People v. Smith, App.	239	P.2d	466
People v. Smith, App.	239	P.2d	903
People v. Stewart, App.	240	P.2d	704
People v. Thomas, App.	239	P.2d	914
People v. Tompkins, App.	240	P.2d	356
People v. White, App.	240	P.2d	728
Petree; People v., App.	240	P.2d	327
Plotnick; McCord Co. v., App.	239	P.2d	32
Poole; Lenahan v., Sup.	240	P.2d	276
Proctor; People v., App.	239	P.2d	697
Raisch v. Sanitary Dist. No. 1 of Marin County, App.	240	P.2d	48
Raisin Inv. Co. v. Magginetti, App.	240	P.2d	349
Ramponi; Cooke v., Sup.	239	P.2d	638
Ravenscroft v. Keller, App.	239	P.2d	6
Rednall v. Thompson, App.	239	P.2d	693
Redwine v. Lampton, App.	240	P.2d	21
Reed; People v., Sup.	240	P.2d	590
Richfield Oil Corp.; Hayes v., Sup.	240	P.2d	580
Riviello v. Journeymen Barbers, Hairdressers & Cosmetologists' Intern. Union of America, Local No. 148, App.	240	P.2d	361
Rodriguez; People v., App.	239	P.2d	883
Rogers; Formosa Corp. v., App.	239	P.2d	88
Rose v. Melody Lane of Wilshire, Sup.	240	P.2d	307
Rowe; Giacomazzi v., App.	240	P.2d	1020
Rubin v. Hurwitz, App.	240	P.2d	990
Ruby Lighting Corp.; Nanny v., App.	239	P.2d	885

	Vol.		Page
Rugani v. Leonoff, App.	239	P.2d	500
Rugani's Estate, In re, App.	239	P.2d	500
Sanal v. Meador, App.	239	P.2d	908
Sanitary Dist. No. 1 of Marin County; Raisch v., App.	240	P.2d	48
San Jose Abstract & Title Ins. Co. v. Elliott, App.	240	P.2d	41
Schaefer; Abbey v., App.	239	P.2d	44
Schanafelt v. Seaboard Finance Co., App.	239	P.2d	42
Schiffman; Sinai v., Super.	240	P.2d	1054
Schmidt; Dielissen v., App.	240	P.2d	70
Schwartz; People v., App.	240	P.2d	1024
Scott v. Burke, App.	239	P.2d	14
Seaboard Finance Co.; Schanafelt v., App.	239	P.2d	42
Sheehan; Hull v., App.	239	P.2d	704
Sherrard v. Lidyoff, App.	239	P.2d	28
Shivers v. Van Lobensels, App.	240	P.2d	635
Shorb v. Barkley, App.	240	P.2d	337
Sierraville Community Church v. McKenzie, App.	240	P.2d	663
Siliznoff; State Rubbish Collectors Ass'n v., Sup.	240	P.2d	282
Simpson v. City of Los Angeles, App.	240	P.2d	647
Sinai v. Schiffman, Super.	240	P.2d	1054
Slavich v. Slavich, App.	239	P.2d	100
Sloss; Benton v., Sup.	240	P.2d	575
Smith; People v., App.	239	P.2d	466
Smith; People v., App.	239	P.2d	903
Spaulding v. Cameron, Sup.	239	P.2d	625
Stainback v. West, App.	240	P.2d	366
Staley v. Board of Medical Examiners, App.	240	P.2d	61
Standard Marine Ins. Co.; Olson v., App.	240	P.2d	379
Stang v. City of Mill Valley, Sup.	240	P.2d	980
State Bar; Libarian v., Sup.	239	P.2d	865
State Bar of Cal.; Alkow v., Sup.	239	P.2d	871
State Bar of Cal.; Fleming v., Sup.	239	P.2d	866
State Bd. of Equalization; Altadena Community Church v., App.	240	P.2d	322
State Bd. of Equalization; Western Los Angeles Citizens' Committee on Liquor Licenses v., App.	240	P.2d	627
State Rubbish Collectors Ass'n v. Siliznoff, Sup.	240	P.2d	282
Stebinger v. Warden, App.	240	P.2d	334
Steele v. Steele, App.	239	P.2d	63
Stewart; People v., App.	240	P.2d	704
Strecker v. Barnard, App.	240	P.2d	345
Strutzel v. Williams, App.	240	P.2d	988
Sullivan; Wedemeyer v., App.	240	P.2d	8
Superior Court In and For Orange County; Chula v., App.	240	P.2d	398
Svistunoff v. Svistunoff, App.	239	P.2d	650
Svistunoff v. Svistunoff, App.	239	P.2d	655
Taylor v. Coachella Val. County Water Dist., App.	239	P.2d	454
Taylor v. Gear, App.	239	P.2d	11
Terry v. Civil Service Commission, App.	240	P.2d	691
Thermalito Irr. Dist. v. California Water Service Co., App.	239	P.2d	109
Thomas; People v., App.	239	P.2d	914
Thompson; Galbraith v., App.	239	P.2d	468
Thompson; Rednall v., App.	239	P.2d	693
Tilton; Caffrey v., Sup.	240	P.2d	273
Tolhurst; Kuchel v., App.	239	P.2d	906
Tompkins; People v., App.	240	P.2d	356
Toshio Hamasaki v. Flotho, Sup.	240	P.2d	298
Treu v. Kuchel, App.	240	P.2d	32
Tuttle v. Tuttle, Sup.	240	P.2d	587

	Vol.		Page
Uchida Inv. Co. v. Inagaki, App.	239	P.2d	644
Union Ice Co.; Gall v., App.	239	P.2d	48
Universal Die Casting Co.; Meguiar v., App.	239	P.2d	699
Vaganas v. Angelonides, App.	240	P.2d	387
Van Lobensels; Shivers v., App.	240	P.2d	635
Vasquez v. Vasquez, App.	240	P.2d	319
Vickter v. Pan Pac. Sales Corp., App.	239	P.2d	463
Vierra; DeRosier v., App.	240	P.2d	660
Viglione v. City and County of San Francisco, App.	240	P.2d	68
Walker v. Walker, App.	239	P.2d	106
Walsh v. Walsh, App.	239	P.2d	472
Warden; Stebinger v., App.	240	P.2d	334
Watson; Manning v., App.	239	P.2d	688
Watson v. Watson, App.	240	P.2d	1005
Wedemeyer v. Sullivan, App.	240	P.2d	8
Wedemeyer's Estate, In re, App.	240	P.2d	8
Wentzel; Cary v., Sup.	240	P.2d	304
Wertman; Haines v., App.	239	P.2d	889
West v. Stainback, App.	240	P.2d	366
Western Los Angeles Citizens' Committee on Liquor Licenses v. State Bd. of Equalization, App.	240	P.2d	627
Western Surgical Supply Co. v. Affleck, App.	240	P.2d	656
Weston v. Foreman, two cases, App.	239	P.2d	513
White; People v., App.	240	P.2d	728
White v. White, App.	240	P.2d	1015
Williams; Blair v., App.	240	P.2d	1043
Williams; Strutzel v., App.	240	P.2d	988
Wright; Grossblatt v., App.	239	P.2d	19
Youngstown Steel Products Co. of Cal. v. City of Los Angeles, Sup.	240	P.2d	977

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SECOND SERIES

108 Cal.App.2d 460

CITY OF LOS ANGELES v. GANAHL et al.

Civ. 18008.

District Court of Appeal, Second District, Division 3, California.

Dec. 28, 1951.

Action by the City of Los Angeles, a municipal corporation, against N. A. Ganahl, and others to quiet title to realty sold to the state in 1934 for delinquent city and county taxes and sold by state to plaintiff city on October 10, 1947. Defendants Wilma E. Schuh and Albert Schuh answered alleging that they were owners of a lien on the realty based on street improvement bonds issued in 1930 and payable in ten annual installments, and they filed a cross-complaint for partition. The Superior Court, Los Angeles County, William S. McKesson, J., entered judgment for plaintiff and cross-complainants appealed. The District Court of Appeal, Vallée, J., held that enforcement of lien of street improvement bonds was barred by conclusive statutory presumption in favor of bona fide purchasers as to extinguishment of lien.

Judgment affirmed.

1. Municipal Corporations ⇐519(5), 575

The lien of street improvement bonds payable in ten annual installments which were issued in 1930 and had been in default from January 2, 1934, was extinguished under 1945 amendment of statute relating to extinction of liens, where no action had been brought upon principle obligation and realty subject to lien had not been sold to satisfy such lien before January 1, 1947, and subsequent sale of the realty by city treasurer to satisfy such lien was void. Streets and Highways Code, §§ 5000–6794; Civ.Code, § 2911.

2. Municipal Corporations ⇐519(5)

Where realty subject to lien of street improvement bonds payable in ten annual installments, which were issued in 1930 and had been in default from January 2, 1934, was sold to state in 1934 for delinquent city and county taxes, deeded to state in 1939, and sold by state to city on October 10, 1947, fact that bonds were issued by city treasurer and payable by him from designated fund did not establish as matter of law that city was not a bona fide purchaser within statute making presumption that lien of such bonds has been extinguished at expiration of four years after due date of bonds or of last installments thereof, or on January 1, 1947, whichever is later, conclusive in favor of bona fide purchaser for value after such dates. Streets and Highways Code, §§ 5000–6794; Civ.Code, § 2911.

3. Municipal Corporations ⇐519(5)

Where realty subject to lien of street improvement bonds payable in ten annual installments, which were issued in 1930 and had been in default from January 2, 1934, was sold to state in 1934 for delinquent city and county taxes, deeded to state in 1939, and sold by state to city on October 10, 1947, the presumption was that city purchased in good faith and for value, and in absence of anything to refute the presumption, subsequent enforcement of lien of bonds was barred by statute making presumption that lien of such bonds has been extinguished at expiration of four years after due date of bonds or of the last installment thereof, or on January 1, 1947, whichever is later, conclusive in favor of bona fide purchaser for value after such dates. Streets and Highways Code, §§ 5000–6794; Civ.Code, § 2911.

Wm. Mackenzie Brown, Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Charles F. Reiche, Asst. City Atty., O. M. Lloyd, John

D. Barrett and John L. Denny, Deputies City Atty., all of Los Angeles, for respondent.

VALLÉE, Justice.

Plaintiff brought this action to quiet its title to two parcels of realty. The defendants Schuh (referred to as defendants) answered, alleging they were the owners of a lien on both parcels, and filed a cross-complaint for partition. The court sustained the demurrer of plaintiff to the cross-complaint without leave to amend and granted plaintiff's motion for judgment on the complaint and the answer. The judgment decreed that plaintiff is the owner of the property and defendants have no interest therein. Defendants appeal.

Defendants own street improvement bonds numbers 204 and 205, issued July 16, 1930, under the Improvement Act of 1911. Stat. 1911, p. 730; now Streets and Highways Code, §§ 5000–6794. Bond 204 was issued in the amount of $315.34, payable in ten annual installments with semi-annual interest. It was in default in the sum of $220.75, together with interest and penalties from January 2, 1934. Bond 205 was issued in the amount of $548.39, payable in ten annual installments with semi-annual interest. It was in default in the sum of $383.87, together with interest and penalties from January 2, 1934.

The property which was subject to the lien of the bonds (the two parcels as to which plaintiff sought to quiet title) became delinquent for city and county taxes for the fiscal year 1933–4. It was sold to the state in 1934 and was deeded to the state in 1939. On October 10, 1947, the state sold the property to plaintiff. Neither the answer nor the cross-complaint alleged that plaintiff was not a bona fide purchaser for value.

On June 18, 1948, the city treasurer of Los Angeles, at the written request of one of the defendants made in writing on November 26, 1947, sold the property to satisfy the lien of the bonds.

As grounds for reversal defendants contend: 1) the lien of the bonds was not extinguished by lapse of time, and 2) defendants were entitled to proceed to trial on their cross-complaint for partition.

[1] The points made for reversal were decided contrary to defendants' contentions in the recent cases of Scheas v. Robertson, 38 Cal.2d 119, 238 P.2d 982, Sipe v. Correa, 38 Cal.2d 131, 238 P.2d 989, and Anger v. Borden, 38 Cal.2d 136, 238 P.2d 976. In those cases it was held that the lien of the bonds was extinguished on January 1, 1947, and that the amendment of Civil Code section 2911 in 1945 when applicable operates to prevent the holder of a street improvement bond issued under the Improvement Act of 1911 from enforcing his lien in any manner, whether the remedy be a suit for partition or foreclosure. At the time of the sale by the city treasurer on June 18, 1948, the lien of the bonds had been extinguished and the sale was therefore void and of no effect. It thus appears from the pleadings that defendants have no right, title or interest in the property.

[2, 3] There is no merit in the contention that plaintiff cannot be cloaked with the robe of a bona fide purchaser for value because the bonds were issued by the city treasurer of plaintiff or because payments of principal and interest on the bonds are paid by the city treasurer from a designated fund made up from sums paid to him for that purpose. Those facts alone are not sufficient to warrant the conclusion, as a matter of law, that plaintiff was not a bona fide purchaser for value. Scheas v. Robertson, supra, 38 Cal.2d 119, 238 P.2d 982; Anger v. Borden, supra, 38 Cal.2d 136, 238 P.2d 976. As we have said, defendants did not in their answer or cross-complaint allege that plaintiff was not a bona fide purchaser for value from the state. The presumption is that plaintiff purhased in good faith and for value. Anger v. Borden, supra, 38 Cal.2d 136, 238 P. 2d 976. Since the record contains nothing to refute the presumption, the court did not err in concluding that section 2911 operated to bar the enforcement of the lien of plaintiff's bonds. See, also, Rombotis v. Fink, 89 Cal.App.2d 378, 201 P.2d 588.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

108 Cal.App.2d 892

CARPENTER v. LAING et al.

Civ. 18123.

District Court of Appeal, Second District, Division 3, California.

Dec. 28, 1951.

Suit for partition and declaratory relief by Charles B. Carpenter, Jr., against Patrick H. Laing, and others. The Superior Court of Los Angeles County, Arnold Praeger, J., entered a judgment of dismissal and plaintiff appealed. The District Court of Appeal, Vallée, J., held that where realty subject to lien of street improvement bonds issued in 1927, which were payable in ten annual installments commencing January 2, 1929, and had been in default from July 2, 1932, was sold to state in 1927 for delinquent city and county taxes and deeded to state in 1933, and state sold the realty to named defendant and another on August 10, 1948, lien of bond, for the foreclosure of which no proceedings had been instituted, could not be enforced against purchasers from state in partition suit commenced on March 31, 1950.

Judgment affirmed.

Partition ⇐44

Where land subject to lien of street improvement bond issued in 1927, which was payable in ten annual installments commencing January 21, 1929 and had been in default from July 2, 1932, was sold to state in 1927 for delinquent city and county taxes and deeded to state in 1933 and state sold the realty to individuals on August 10, 1948, holder of bond, who had instituted no proceedings for its foreclosure, could not enforce lien of bond against individual purchasers from state in partition suit commenced March 31, 1950. Streets and Highways Code, §§ 5000–6794; Civ.Code, § 2911.

Robt. E. Rosskopf, Beverly Hills, for appellant.

Anderson, Burdine & Bowman, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of dismissal entered pursuant to an order sustaining the demurrer of respondents to the complaint without leave to amend in a suit for partition and declaratory relief.

Plaintiff owns a street improvement bond issued November 26, 1927, under the Improvement Act of 1911. Stat.1911, p. 730; now Streets and Highways Code, secs. 5000–6794. The bond was issued in the amount of $138, payable in ten annual installments, commencing January 2, 1929, with semi-annual interest. The bond was in default in the sum of $82.80 principal, together with interest and penalties from July 2, 1932. It had not been foreclosed either by court action or through the city treasurer's office, and no foreclosure proceedings were pending at the time this action was commenced on March 31, 1950.

The property which was subject to the lien of the bond became delinquent for city and county taxes for the fiscal year 1926–7. It was sold to the state in 1927 and was deeded to the state in 1933. On August 10, 1948, the state sold the property to defendants Laing and Smith. The complaint did not allege that Laing and Smith were not bona fide purchasers for value. The prayer was that the lien of the bond be decreed to be on a parity with the title of Laing and Smith, and that the property be sold and the proceeds distributed as the interests of the respective parties appeared.

As grounds for reversal, plaintiff contends: 1) the bond and tax liens were on a parity; 2) the deeds to and from the state did not affect the bond lien; 3) the lien of the bond was not extinguished by Civil Code section 2911; 4) Laing and Smith were not bona fide purchasers; 5) the only remedy of the bondholder against the tax title after 1933 was in partition; 6) the bondholder could not sue for partition until August, 1948; 7) suit was filed 18 months later, and there is no statute of limitations with respect to an action for partition.

Each and all of plaintiff's grounds for reversal were decided contrary to his contentions in the recent cases of Scheas v. Robertson, 38 Cal.2d 119, 238 P.2d 982, and Sipe v. Correa, 38 Cal.2d 131, 238 P.2d 989.

No useful purpose would be served in repeating what is said in those cases. Upon the authority of the Scheas and Sipe cases, the judgment must be affirmed.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



108 Cal.App.2d 463

ELBERT, Ltd. v. CITY OF LONG BEACH.

Civ. 18307.

District Court of Appeal, Second District, Division 3, California.

Dec. 28, 1951.

Suit by Elbert, Ltd., a corporation, against the City of Long Beach, a municipal corporation, to foreclose the lien of a street improvement bond issued in 1923, payable in nine annual installments commencing January 2, 1924, and in default from January 2, 1924. The Superior Court of Los Angeles County, Arnold Praeger, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Vallée, J., held that under statutory amendment of 1945 limiting the time for enforcement of liens to secure payment of public improvement assessments, the right to enforce lien of street improvement bond expired on January 1, 1947, even though the realty subject to lien, which had been sold to state for delinquent state and county taxes, had been deeded to state before issuance of bond and state had held title to the realty until May 21, 1948, when it was sold to defendant.

Judgment reversed with directions.

1. Municipal Corporations ⇐519(5)

The statutory amendment of 1945 limiting the time for enforcement of lien of public improvement bonds applies to all liens to secure payment of a public improvement assessment regardless of whether assessment lien and title of owner of the realty subject to lien are on a parity. Streets and Highways Code, §§ 5000–6794; Civ.Code, § 2911.

2. Municipal Corporations ⇐519(5)

Under statutory amendment of 1945 limiting time for enforcement of liens to secure payment of public improvement assessments, the right to enforce street improvement bond issued in 1923 payable in nine annual installments commencing January 2, 1924, and in default from January 2, 1924, expired on January 1, 1947 and suit commenced thereafter to foreclose lien of street improvement bond was barred by limitations, even though the realty subject to lien, which had been sold to state for delinquent state and county taxes, had been deeded to state before issuance of bond and state had held title to the realty until May 21, 1948, when it was sold to defendants.

Irving M. Smith, City Atty., and Joseph B. Lamb, Asst. City Atty., Long Beach, for appellant.

John F. Bender and Gizella M. Allen, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant from a judgment for plaintiff entered when defendant failed to answer following the overruling of its demurrer to the complaint in a suit to foreclose the lien of a street improvement bond.

Plaintiff owns a street improvement bond issued by the city treasurer of defendant on December 18, 1923, under the Improvement Act of 1911. Stat.1911, p. 730; now Streets and Highways Code, secs. 5000–6794. The bond was issued in the amount of $60.63, payable in nine annual installments commencing January 2, 1924, with semi-annual interest. The bond was in default in the sum of $60.63 principal, together with interest and penalties from January 2, 1924.

The property which became subject to the lien of the bond was delinquent for state and county taxes for the year 1909. It was sold to the state in 1910 and was deeded to the state in 1915. On May 21, 1948, the state sold the property to defendant. The complaint alleged that since May 21, 1948, defendant has been, and is now, the owner of the property, and that its interest is subordinate to the lien of the bond.

It was not alleged that defendant was not a bona fide purchaser for value. The judgment found that all of the allegations of the complaint were true and decreed that the property be sold and that after the time allowed by law for redemption has expired, defendant be barred of all right in the property.

Defendant contends the lien of the bond was extinguished by virtue of the provisions of section 2911 of the Civil Code and, therefore, plaintiff did not exercise his right to foreclose within the time allowed by law.

Plaintiff argues that because the state was the owner of the property from 1915 to May 21, 1948, and the bond was issued in 1923, the lien of the bond was superior to the state's title and, therefore, would not come within the parity rule; that the owner of the property in an indispensable party to a proceeding to foreclose the bond; due to the fact that the state could not be sued in such proceeding, the commencement of the suit to foreclose the lien of the bond was tolled during the period the property was owned by the state; that, therefore, the suit was commenced in time. Plaintiff also claims that if section 2911 of the Civil Code is so construed as to prevent him from foreclosing the lien of his bond, it is unconstitutional.

In the recent case of Scheas v. Robertson, 38 Cal.2d 119, 238 P.2d 982, the Supreme Court held: 1) sale by the state to a purchaser of realty which the state had acquired at a sale for delinquent taxes passes its title to the purchaser and eliminates the right of redemption; 2) the amendment of Civil Code section 2911 in 1945 established an absolute limitation of four years after the due date of the bond or the last installment thereof or the last principal coupon attached thereto or until January 1, 1947, whichever is later, for the enforcement of the lien of bonds issued under the Improvement Act of 1911, and is a valid statute of limitations; 3) notwithstanding the fact that the Improvement Act of 1911 and the contract under which the bond was issued stated that the lien of the bond was to continue until the bond was paid, the amendment of 1945 satisfied the requirements of due process and did not impair the obligation of a contract; 4) the amendment of 1945 when applicable operates to prevent the holder of a street improvement bond issued under the Improvement Act of 1911 from enforcing his lien in any manner, whether the remedy pursued be a suit for partition or foreclosure; 5) the lien of a street improvement bond is presumed to have been extinguished at the expiration of the time stated in Civil Code section 2911, and one who purchases the property after such time has expired need not ascertain whether any lien securing such bond was in fact extinguished but may rely on the presumption.

In Sipe v. Correa, 38 Cal.2d 131, 238 P.2d 989, decided the same day as the Scheas case, the same contention was made as is made here with respect to the constitutionality of Civil Code section 2911. The court held that although the plaintiff could not bring an action for partition during the years the state held title to the property, he could have preserved his right by demanding, after default on the bond and while the state held title to the property, he could have preserved his right by demanding, after default on the bond and while the state held title to the property, that the county treasurer sell the property; that he also could have foreclosed the lien of the bond against the former owner's right of redemption within four years after maturity of the bond; and that section 2911 was not subject to constitutional objection on the ground of lack of due process.

[1] There is no merit in the argument that section 2911 is not applicable because there was no parity between the bond lien and the title held by the state. Assuming, without deciding, that there was no parity, section 2911 applies. The section makes no distinction between a lien when there is parity and when there is not. It applies to all liens to secure payment of a public improvement assessment. Scheas v. Robertson, supra, 38 Cal.2d 119, 238 P.2d 982.

[2] Since plaintiff's right to enforce the lien of the bond sued on expired on January 1, 1947, it follows that the action was not commenced within the time prescribed by

Civil Code section 2911. The demurrer of defendant on that ground should have been sustained without leave to amend.

The judgment is reversed with directions to sustain the demurrer of defendant without leave to amend and to render judgment accordingly.

SHINN, P. J., and WOOD, J., concur.



108 Cal.App.2d 424

KELLER et al. v. HIERS et al.

RAVENSCROFT et al. v. KELLER et al.
Civ. 18528.

District Court of Appeal, Second District, Division 3, California.

Dec. 27, 1951.

Rehearing Denied Jan. 9, 1952.

Hearing Denied Feb. 21, 1952.

A. J. Keller, doing business as Keller Manufacturing Company, sued Harvey Hiers, W. J. Ravenscroft, and others for return of the amount of plaintiff's deposit on the purchase price of soda fountain pumps to be manufactured by defendants for plaintiff, damages for defendants' breach of contract, and an injunction against defendants' use of plaintiff's information and ideas for manufacture of the pumps. Defendants filed a counterclaim and a separate action against A. H. Keller, A. J. Keller, and others for the value of services performed. From a judgment of the Superior Court of Los Angeles County, A. W. Ashburn, J., for defendants in the original action in the amount by which the sum awarded them for work done exceeded the amount of the deposit, plus attorney's fees and cost of collection, awarded plaintiff therein, plaintiff and defendant A. J. Keller appealed. The District Court of Appeal, Shinn, P. J., held that the trial court properly concluded that the parties to the contract intended that return of the deposit should be the buyer's exclusive remedy in event of the sellers' failure to perform the contract and that defendants in the original action were properly allowed offsets for pumps delivered to and accepted by plaintiff and tooling and dies fabricated by defendants on plaintiff's orders.

Judgment affirmed.

1. Contracts ⇐143

Where different constructions of contractual provision are equally proper, construction most favorable to party in whose favor provision was made must be taken. Code Civ.Proc. § 1864.

2. Sales ⇐418(6)

Parties agreeing to manufacture and sell soda fountain pumps under contract providing for return to buyer of amount of his deposit on purchase price, if pumps were not completed and delivered within specified period, were promisors with respect to return of deposit, but buyer was promisor in so far as agreement indicated that he would not ask for more than such return.

3. Sales ⇐54

Any uncertainty as to scope of written agreement to purchase soda fountain pumps, to be manufactured by sellers, for amount on account of which buyer gave sellers a cashier's check for sum to be returned to buyer if pumps were not completed and delivered within specified period, was latent, and agreement having been prepared by buyer should be construed most strongly against him. Civ.Code, § 1654.

4. Sales ⇐418(6)

The meaning of contract to purchase soda fountain pumps, to be manufactured by sellers, for amount on which buyer deposited sum to be returned if pumps were not completed and delivered within specified period, was uncertain as to whether return of deposit to buyer was exclusive measure of damages recoverable by him for sellers' breach of contract, so as to require court to determine sense in which parties understood contract, though there was no uncertainty of language therein.

5. Appeal and Error ⇐1039(13)

Any inconsistency in plaintiff's demands for return of money deposited by him on price of soda fountain pumps, which he contracted to purchase from defendants, and for damages because of defendants' breach of contract, is immaterial on plain-

tiff's appeal from judgment for defendants in sum exceeding amount of deposit, plus attorney's fees and cost of collection, awarded plaintiff, where he was entitled to no more and defendants do not complain.

6. Sales ⇐418(6)

In action for return of amount deposited by plaintiff on purchase price of soda fountain pumps to be manufactured by defendants under contract providing for return of such amount to plaintiff, if pumps were not completed and delivered within specified period, and to recover damages for defendants' breach of contract, trial court properly concluded that parties intended return of deposit to be plaintiff's exclusive remedy in event of defendants' failure to perform contract, so as to preclude recovery of damages. Civ.Code, § 1649.

7. Sales ⇐418(15)

One contracting to purchase soda fountain pumps for $5 each could not recover difference between $10 per unit, which one of defendants testified that it would have cost to complete plaintiff's order, and contract price, as damages for loss of gain or profit because of defendants' breach of contract, in absence of evidence that plaintiff had orders from others for pumps, that they would have been saleable at $10 each or at all, or that they would have had any value.

8. Sales ⇐393

In action for return of amount deposited by plaintiff on price of soda fountain pumps purchased by him from defendants under contract providing for return of such amount if pumps were not completed and delivered within specified period, defendants were properly allowed offset for pumps delivered to and accepted by plaintiff as against plaintiff's contention that statement in writing, increasing price and extending time for performance of contract by defendants, that all terms and conditions of contract should remain in full force and effect, was promise to restore such amount to plaintiff without any deductions or offsets existing at time of execution of such writing, in view of contract provision for payment of balance of purchase price when specified number of pumps were delivered.

9. Sales ⇐183

One ordering tooling and dies, to be used in manufacture of soda fountain pumps for him, under previous separate contract, by parties with whom orders were placed, was not excused from duty to pay for tooling and dies by such parties' default under manufacturing contract.

10. Appeal and Error ⇐197(4)

In action for return of amount deposited by plaintiff on price of soda fountain pumps, purchased by him from defendants under contract requiring return of deposit if pumps were not completed and delivered within specified period, where issue of allowance to defendants for pumps delivered and accepted was tried as if pleaded and was introduced by plaintiff under his claim of defendants' breach of warranty, plaintiff, on appeal from judgment for defendants, cannot complain that such allowance was erroneous because defendants alleged that all pumps delivered were rejected by plaintiff.

11. Account Stated ⇐20(3)

In action for return of amount deposited by plaintiff on purchase price of soda fountain pumps to be manufactured and sold to plaintiff by defendants, who failed to perform contract, plaintiff could not recover amount of credits, given him by book entries and statements, for pump parts received from him by defendants, on theory that such statements amounted to account stated, in view of court's findings, supported by evidence, that defendants did not purchase such parts and that plaintiff owned them.

12. Appeal and Error ⇐760(1)

Where one suing for return of amount deposited on purchase price of soda fountain pumps to be manufactured for plaintiff by defendants, who failed to perform contract, did not plead defendants' conversion of tooling and dies, fabricated by them on plaintiff's orders, by refusal to deliver them to plaintiff except on payment of sum greatly exceeding their value, and plaintiff's brief on appeal from judgment for defendants did not refer to transcript of evidence respecting claimed refusal, appellate

court cannot make independent investigation of reporter's transcript for evidence of such conversion, though defendants alleged damages in amount of payment demanded.

Macbeth & Ford, Norman Macbeth and Patrick H. Ford, all of Los Angeles, for appellant.

Harry J. Gross, Cook & Johnson and Harold E. White, all of Van Nuys, and Clifford A. Rohe, Sherman Oaks, for respondents.

SHINN, Presiding Justice.

On November 13, 1947, plaintiff gave defendants and defendants accepted a written order for the purchase at $4.25 each of 1,000 soda fountain pumps to be manufactured by defendants as per sample furnished by plaintiff. The agreement read in part:

"Also, find enclosed a cashier's check for $2125.00 to be applied on our account, balance to be paid after completion and delivery of 1000 pumps. If said pumps are not completed and delivered within a period 90 days from this date, the sum of $2125.00 is to be returned to the A. J. Keller Sales Co. together with any attorney fees, court costs, etc., which may be incurred in the collection of said monies.

"The acceptance and cashing of the enclosed cashier's check be deemed as full and complete acceptance of this purchase order together with all its stipulations and shall make the same binding just the same as if it were a signed contract."

After plaintiff had granted several extensions of time and defendants had failed to fulfill their agreement it was terminated by plaintiff for nonperformance. He then brought this action seeking: (1) Return of $2,125 plus attorney's fees and costs of collection; (2) $10,000 damages for breach of the agreement; (3) rescission and the return of his deposit, and (4) an injunction against the use of his information and ideas for the manufacture of such pumps. Defendants answered and by a counterclaim and an action separately filed sought recovery for work, labor and services performed for plaintiff of the reasonable value of $19,236.70. After an extended trial the court found that defendants had breached the contract and plaintiff was entitled to the return of $2,125 plus $500 attorney's fees and $96 as costs of collection, or a total of $2,721. Defendants were awarded $2,939.76 for work done for plaintiff and judgment was entered in their favor for the net sum of $218.76. Plaintiff appeals.

[1–6] As the trial court construed the contract return of $2,125 was agreed upon as the exclusive measure of any damages which plaintiff might suffer as a result of defendants' breach. This construction is assailed by plaintiff. He says he was entitled not only to the return of $2,125 but also to damages for the loss of his bargain. The trial court was of the opinion that the parties had anticipated failure of the manufacturing effort and by their agreement had furnished the answer to the principal issue in the case. We do not disagree with this conclusion.

The questioned clause in the agreement established a definite sum as the measure of plaintiff's right and of defendants' liability in case of failure of performance by defendants. This was not merely the amount deposited but also liability for attorney's fees and costs that might become necessary in recovering the deposit. The circumstances under which the agreement was entered into shed light upon the intentions of the parties. The device had been conceived by plaintiff and had not previously been marketed or manufactured. The cost of manufacture had not been established. Time was made of the essence of the agreement. In case of total nonperformance by defendants plaintiff would regain his capital without expense, and have it available for financing another contract. In case of defendants' breach after partial performance plaintiff would be made whole either in money or goods. The problem of the trial court was to determine whether the parties intended that the return of plaintiff's money would satisfy defendants' liability for breach of their agreement. In arriving at a decision certain rules of construction were to be considered. If different constructions are equally proper that is to be taken which is most favorable to

the party in whose favor the provision was made. Code Civ.Proc., sec. 1864. Defendants were the promisors with respect to the return of the deposit, but, insofar as the agreement indicated that plaintiff would not ask for more, he should be regarded as the promisor. Cf. Earl Ranch, Ltd. v. Marchus, 60 Cal.App.2d 379, 140 P.2d 891. If uncertainty existed as to the scope of the agreement it was a latent one, see Pacific Indemnity Co. v. California, etc., Ltd., 29 Cal.App.2d 260, 84 P.2d 313, and since plaintiff prepared the agreement it should be construed most strongly against him. Civ.Code, sec. 1654. Although there was no uncertainty of language there was an uncertainty of meaning which required the court to determine the sense in which the parties understood it. We must presume that the court was of the opinion that plaintiff believed defendants understood that return of the deposit would satisfy plaintiff. If so, the court correctly construed the agreement to accord with defendants' understanding. Civ.Code, sec. 1649. It would have been quite reasonable for defendants to believe that plaintiff had specified in the writing the conditions that were satisfactory to him and had omitted none. Any difficulties with respect to interpretation were caused by plaintiff. He is not in a favorable position to contend that defendants would have accepted his proposal if it had stipulated that upon their default they would be required to return plaintiff's deposit, and in addition, compensate him for any damage he might have suffered. Plaintiff rescinded and sued for the return of his money and he also sued for damages. Any inconsistency in the two demands is immaterial, inasmuch as the judgment awarded plaintiff only what he was entitled to receive and defendants do not complain.

Grant v. Beronio, 97 Cal. 496, 32 P. 556, 557, relied upon by plaintiff is not in point. It held that a provision " 'In case of failure to make deed, money paid to be returned' " did not give the vendor the right to refuse to convey title upon the vendee's offer to pay the purchase price. Such is not the contention of the defendants. They claimed only that plaintiff's claims are in excess of what he had agreed to accept. The right of plaintiff to a return of his deposit was made certain. It was by no means certain at the time the agreement was entered into that under any and all circumstances that might develop plaintiff would have a right to rescind for defendants' default and also the right to have his deposit returned. And except for the agreement, he clearly would not have had a right to recover attorney's fees and costs. His sole remedy might have been in damages. It cannot be said that the agreement gave plaintiff only the rights he would have had without it.

For these reasons we think the court did not commit error in concluding that it was the intention of the parties that return of the deposit to plaintiff would be his exclusive remedy in the event of defendants' failure of performance.

[7] Although we hold that plaintiff's recovery was limited by the purchase agreement to the return of his deposit, the correctness of the judgment is further established by plaintiff's failure to prove any greater damage. He relies upon testimony of one of the defendants that it would have cost defendants $10 per unit to complete the order. From this he argues that he should have been awarded $5 for each of 2,077 pumps, being the difference between the contract price and the cost of manufacture. The weakness of this claim is that there was no evidence that plaintiff had orders for pumps or that they would have been saleable at $10 each, or saleable at all, or that they would have had any value. In the absence of evidence that plaintiff could have realized a profit through sales, or that the pumps would have had a value to him above cost, there was no foundation for an award for a loss of gain or profit. Even if we overlook for the moment the matter of the limitation of plaintiff's recovery under the trial court's interpretation of the agreement, we find in the record no basis for an award of damages in excess of the amount which the court allowed.

[8] On April 16, 1948, following extensions to that date, the price was increased

to $5 per unit and the time for performance was extended by plaintiff until May 13, 1948, by a writing stating "all of the terms and conditions of said contract shall remain in full force and effect." Plaintiff says this was a promise to restore to him $2,125 without any deductions or offsets upon any account whatsoever, inasmuch as certain offsets existed at that time and no mention of them was made. It is correct to say that by the writing of November 13, 1947, plaintiff assumed no obligation other than to pay for pumps delivered at $4.25 each. $2,125 was deposited against the total cost and the balance was to be paid when 1,000 pumps had been delivered. This implied that plaintiff was to be charged for them as they were delivered and accepted. It is immaterial whether the amounts were charged against the deposit or separately. Defendants were properly allowed an offset of $115 for pumps delivered and accepted.

[9, 10] Under separate arrangements defendants fabricated certain tooling and dies upon plaintiff's orders for which the court allowed $2,590.76. In addition, $204 was allowed for pump parts delivered to plaintiff at his request after the contract had been terminated; also $30 for two specially constructed pumps, making the total $2,939.76.

Plaintiff questions these amounts in several particulars. It is claimed that the agreement for manufacture of the pumps and the one for the tooling and dies were so related that default in the manufacturing undertaking should have deprived defendants of a right to be paid for the tooling. Although the tooling was to be used in the manufacture of the pumps, the court found that it belongs to plaintiff. It was the subject of separate written agreements. The court correctly held that plaintiff's duty to pay for tooling would not be excused by defendants' default under the manufacturing agreement. There was no error in charging plaintiff with this item. Plaintiff also contends that the allowance for pumps delivered and accepted was erroneous for the reason that defendants alleged that all pumps delivered had been rejected by plaintiff. The issue was tried as if it had been pleaded and appears to have been introduced by plaintiff under his claim of breach of warranty. He may not complain.

[11] During the course of the work defendants received from plaintiff certain pump parts for which credits were given plaintiff by book entries and statements in the sum of $1,382.63. Plaintiff claims he should have had judgment for this amount. The court found that defendants did not purchase these parts and that plaintiff owns them. Plaintiff does not point out wherein this finding is without support in the evidence. The claim for this amount on the theory that defendants' statements amounted to an account stated was not established.

[12] A final contention of plaintiff is that defendants were guilty of a conversion of the tooling and dies in that they refused to deliver them to him except upon payment of $19,000, which was an exorbitant demand in view of their value of $2,590.76. Conversion of the property was not pleaded by plaintiff in either case; consequently there is no finding, except by implication. Defendants say the point was not raised at the trial. The briefs do not refer to the transcript of the evidence with respect to the claimed refusal by defendants to deliver the tooling unless they were paid the sum of $19,000. Defendants claimed in their pleadings damages of some $19,000. There is no apparent reason for doubting their good faith in making this claim. Certainly this alone would not support the claim of conversion. We cannot make an independent investigation of the reporter's transcript for evidence as to the alleged conversion. Under the circumstances we must hold the claim of conversion to be without merit.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

108 Cal.App.2d 517

TAYLOR et al. v. GEAR et al.

Civ. 7915.

District Court of Appeal, Third District, California.

Jan. 2, 1952.

Action by H. W. Taylor, and others, against Winfield Gear, V. W. Mentick, and another, for damages arising out of a collision between two trucks, wherein defendant Gear cross-claimed against plaintiffs. The Superior Court, Butte County, Dudley G. McGregor, J., rendered judgment for Gear and Mentick on the complaint and for Gear on the cross-complaint as against Taylor, and plaintiffs appealed. The District Court of Appeal, Peek, J., held that the evidence sustained the findings that named plaintiff's negligence was approximate cause of the collision and that defendant Gear was not contributorily negligent in failing to apply brakes immediately upon being approached by blinding headlights of plaintiff's truck.

Affirmed.

1. Appeal and Error ⇐1011(1)

Where there is a substantial conflict in the evidence, the findings of the trial court resolving that conflict will not be disturbed on appeal.

2. Automobiles ⇐244(42, 58)

In action by owner of truck and owners of furniture being transported in truck, for losses sustained in head-on collision with truck owned and operated by defendants at time plaintiff truck owner, with lights on high beam, was allegedly traveling 45 miles per hour on center line of a bridge, evidence was sufficient to sustain finding that accident was due to negligence of plaintiff truck owner.

3. Automobiles ⇐244(42)

In action by owner of truck and owners of furniture being transported in truck for losses sustained in head-on collision with truck owned and operated by defendants, who filed cross-complaint, evidence sustained finding that defendants were not contributorily negligent in failing to apply brakes immediately upon being approached by blinding headlights of plaintiff's truck.

4. Automobiles ⇐247

Where court, in trial of action by owner of truck, and owners of furniture being transported in truck, for losses sustained in head-on collision with truck owned and operated by defendants, found that plaintiff truck owner was negligent, plaintiffs could not complain of court's failure to find what specific acts of truck owner constituted negligence.

5. Appeal and Error ⇐717

The opinion of trial court may not be substituted for or used to modify the findings.

6. Appeal and Error ⇐1071(6)

In action by owner of truck and owners of furniture being transported in truck, for losses sustained in head-on collision with truck owned and operated by defendants, failure of court to make finding on issue of agency between owner of truck and owners of furniture was not prejudicial to owners of furniture in view of fact that court found that defendants were free from negligence and that judgment on defendant truck owner's cross-complaint was not rendered against owners of furniture.

7. Appeal and Error ⇐1071(6)

Neither party can complain of failure to make a finding which would not have benefited either.

8. Automobiles ⇐229

In action by owner of truck and owners of furniture being transported in truck, for losses sustained in head-on collision with truck owned and operated by defendants, where finding that defendants were free from negligence was supported by evidence, owners of furniture had no cause of action against defendants, regardless of whether plaintiff truck owner's negligence was imputed to owners of furniture.

Peters & Peters, Chico, Cresswell & Davis, Oakland, John W. Finley, Chico, for appellants.

Price & Morony, Chico, for respondents.

PEEK, Justice.

The plaintiffs and cross-defendants have appealed from the judgments in favor of

the defendants and cross-complainants in an action for damages arising out of a collision between two trucks. Plaintiff Taylor and plaintiffs O'Brien brought this action against defendant Gear and defendant Mentick as Gear's agent, Taylor claiming damages for personal injuries sustained by him and for damage done to his truck in said collision, and the O'Briens claiming damages for the destruction, loss and damage of certain articles of furniture owned by them which were being transported in Taylor's truck at the time of the collision. Gear cross-complained against both Taylor and the O'Briens for damages on account of the destruction of his truck by reason of the said collision, alleging that Taylor was the agent of the O'Briens at the time of the collision, acting within the scope and course of his employment.

The findings of the trial court pertinent to this appeal were that Taylor operated his truck in a negligent manner and that the collision was a direct and proximate result of his negligence; that Mentick as the agent of Gear operated Gear's truck in a careful and proper manner and that the collision was not in any way due to the fault of Gear or Mentick. Judgments were entered in favor of Gear and Mentick on the complaint and in favor of Gear on the cross-complaint as against Taylor.

While the evidence was in sharp conflict as to how the accident occurred, the testimony favorable to respondents supports the following version of the collision. Around 6 o'clock p. m. on January 21, 1948, Mentick was driving Gear's 1938 Ford V–8 flat-bed truck in a northerly direction on Highway 99–E, accompanied by Gear and a third person. As they reached the Rock Creek Bridge, about six and one-half miles north of Chico, Mentick decreased his speed from 45 miles per hour to about 25 miles per hour. Immediately after his truck was on the bridge a 1947 Chevrolet van type truck owned and driven by Taylor entered the bridge from the opposite direction at a speed of about 45 miles per hour. The lights of Taylor's truck were on high beam, creating a blinding glare, and its left front wheel was on the white line marking the center of the highway. The two vehicles collided south of the center of the bridge. There was some contact between the left front portions of the two trucks, but the greatest impact was when the corner of the bed of Gear's truck connected with the corresponding corner of the van of Taylor's truck. The van of Taylor's truck was torn loose and separated from the chassis. Immediately following the collision Gear's truck traveled diagonally across the road a distance of eight to fourteen feet coming to rest on the west side of the bridge. Taylor's truck traveled about 75 feet after the impact, coming to rest on the east side of the highway off the pavement. Both Taylor and Mentick testified that they were driving in their respective lanes, each as close as possible to the rail of the bridge on his right side. Each testified that the other truck was partly over the center line just before the collision. However, it is not disputed that neither driver applied his brakes prior to the collision, and that Taylor did not take his foot off the accelerator before the accident occurred. The bridge was approximately 132 feet in length and 19 feet in width. Neither truck exceeded 8 feet in width. While considerable damage was done to the west railing of the bridge as the result of Taylor's truck crashing against it, no damage was done either to the east railing or to the right side of Gear's truck.

[1] Insofar as appellants' contentions relate to the insufficiency of the evidence to sustain the findings and judgments, they are at the outset confronted with the well established rule that where there is a substantial conflict in the evidence the findings of the trial court resolving that conflict will not be disturbed on appeal. In order to avoid the application of this rule appellants contend that the evidence tending to show negligence on the part of Taylor is inherently improbable. The argument is thus developed: If respondents' testimony is to be accepted that Gear's truck was at all times prior to the collision as close to the right rail of the bridge as possible, then, in view of the width of the bridge, part of Taylor's truck must have crossed over to the left of the center line in order for the collision to occur; but, argue ap-

pellants, if Taylor's truck thus struck Gear's truck, the latter vehicle would have been impelled to its right, crashing against the bridge on that side, and could not possibly have veered to the left and crossed over to the other side of the road. This, say appellants, is required by the laws of physics.

[2] Assuming for the purposes of argument that the only evidence of negligence on Taylor's part is this inference that he crossed over the center line and thus brought about the collision, such inference is not inherently improbable. In the first place, appellants have failed to demonstrate clearly how the physical laws pertaining to colliding bodies make respondents' version of the accident necessarily improbable. But in any event, while an appellate court must recognize that certain facts are controlled by immutable physical laws, the tests of common sense and common knowledge of physical laws must be applied with great care to a given set of facts. As was stated in Bennett v. Chandler, 52 Cal.App.2d 255, 262, 126 P.2d 173, 177, "Experience and observation teach that strange things sometimes happen in the world of physical phenomena and accidents sometimes appear to happen in a manner unaccountable. For these reasons an appellate court must be careful not to give to dogmatic and undemonstrated conclusions respecting natural laws precedence over the testimony of apparently credible witnesses; and the mere fact that the admitted circumstances make the story of the witnesses seem improbable will not justify a reversal by an appellate tribunal on the ground that the verdict is contrary to the evidence. Austin v. Newton, 46 Cal.App. 493, 189 P. 471."

[3] Appellants next contend that respondents were guilty of contributory negligence as a matter of law by failing to apply the truck's brakes immediately upon being confronted by the blinding headlights of the approaching truck. Appellants rely upon Meads v. Deener, 128 Cal. App. 328, 17 P.2d 198, for the proposition that when a driver is blinded by the glare of the sun or the headlights of approaching cars he is required immediately to bring his vehicle to a stop. As we read that case and the cases therein cited, the driver under such circumstances is required to slacken speed and have his car under such control that he might stop it immediately if necessary. Under the circumstances of the present case, it cannot be said that respondent Mentick was contributorily negligent as a matter of law by reason of his failure to stop, since there was evidence that he had the truck under control, keeping it as close as possible to the right rail of the bridge; and it further appears from his version of the accident that he could not have avoided the collision by stopping. It cannot be said that the finding that the accident was in no way caused or contributed to by the negligence of either Mentick or Gear is not supported by the evidence.

[4, 5] Appellants have quoted a portion of the trial court's opinion wherein it is stated that the trial court was "convinced that the sole and proximate causes of the collision involved in the case were the speed of plaintiff Taylor's truck * * * and the blinding lights on said truck." Appellants then proceeded to argue that the evidence establishes that Taylor's truck was proceeding at a lawful rate of speed, and that Mentick was not blinded by the lights of said truck. We need only point out that the real issue is whether or not the evidence supports the findings, and the opinion of the trial court may not be substituted for or used to modify the findings. Strudthoff v. Yates, 28 Cal.2d 602, 170 P.2d 873. It was sufficient for the trial court to find the ultimate fact of Taylor's negligence, and appellants cannot complain of the court's failure to find what specific acts of Taylor constituted negligence. Pellegrino v. Los Angeles Transit Lines, 79 Cal.App.2d 40, 179 P.2d 39; Williams v. McDowell, 32 Cal.App.2d 49, 89 P.2d 155.

[6–8] Appellants' final contentions relate to the failure of the trial court to make a finding on the issue of an agency relationship between Taylor and the O'Briens. Since judgment on the cross-complaint was not rendered against the O'Briens, they have not been prejudiced by the court's

failure to find that Taylor was not their agent, at least so far as the cross-complaint is concerned. Neither party can complain of the failure to make a finding which would not have benefited either. Ivancovich v. Bertossi, 202 Cal. 770, 777, 262 P. 748. Appellants' contention that a finding as to the absence of agency between Taylor and the O'Briens would have entitled the O'Briens to a judgment against respondents is without merit. Since the trial court found that respondents were free from negligence, and we have concluded that that finding is supported by substantial evidence, the O'Briens had no cause of action against respondents, regardless of whether or not Taylor's negligence is imputed to the O'Briens.

The judgments are affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.



SCOTT v. BURKE.

GERRY v. BURKE.

Civ. 18300, 18302.

District Court of Appeal, Second District, Division 3, California.

Dec. 28, 1951.

Hearing Granted Feb. 25, 1952. *

Daniel Scott and Samuel Gerry brought separate actions against Herman Burke for injuries plaintiff occupants of automobile driven by defendant received when automobile left the highway. The cases were consolidated for trial and for appeal. The Superior Court of Los Angeles County, Allen W. Ashburn, J., rendered judgments adverse to plaintiffs and plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that giving of instructions that if defendant's memory was so impaired as result of shock of accident that defendant was unable to remember and testify as to his conduct, and other facts of accident, a presumption arose that defendant obeyed the law and acted as an ordinarily prudent person would have done in same circumstances, was not error even though res ipsa loquitur instruction was also properly given.

Judgments affirmed.

* Subsequent opinion 247 P.2d 313.

1. Automobiles ⇐246(60)

In action for injuries resulting when plaintiff and all other occupants of automobile, except defendant driver, were asleep, and automobile left highway, giving of instruction that if defendant's memory was so impaired as result of shock of accident that defendant was unable to remember and testify as to his own conduct and other facts of accident, a presumption arose that defendant obeyed law and acted as an ordinarily prudent person would have done in same circumstances, was not error even though res ipsa loquitur instruction was also properly given.

2. Evidence ⇐595

Settled rules of evidence may not be disregarded and a defendant deprived of a statutory right because of difficulty jurors would encounter in determining relative weight of an inference that a thing is black and a presumption that it is white.

3. Negligence ⇐121(1, 2)

Defendant has burden of meeting or overcoming plaintiff's prima facie case of negligence regardless of whether prima facie case is made out by res ipsa loquitur doctrine or by evidence independently of doctrine.

4. Negligence ⇐121(1), 138(2)

If res ipsa loquitur doctrine is not applicable in negligence action, and defendant qualifies for benefit of presumption that defendant exercise ordinary care, defendant is entitled to the presumption and jury must be so instructed.

5. Negligence ⇐121(1)

The presumption that defendant in negligence action exercises due care is evidence.

6. Negligence ⇐121(2)

The inference of negligence under res ipsa loquitur doctrine may be rebutted by that which is evidence, whatever its type or character, including presumption that

defendant exercised due care, if defendant qualifies for benefit of such presumption.

7. Negligence ⇐63

The rule as to unavoidability of accident relates an accidental occurrence to a cause not within control of parties.

8. Automobiles ⇐246(57)

In action for injuries resulting when plaintiff and all other occupants, except the defendant driver, were asleep and automobile left highway, wherein evidence as to movement of automobile suggested occurrence of some emergent condition beyond control of defendant, which caused defendant to immediately take some action defendant would not have otherwise taken, defendant's instruction on unavoidable accident was properly given.

Mark F. Jones, Los Angeles, for appellant Daniel Scott.

Knight, Gitelson & Ashton and Robert R. Ashton, Los Angeles, Samuel A. Rosenthal and Leonard G. Ratner, Los Angeles, of counsel, for appellant Samuel Gerry.

Parker, Stanbury, Reese & McGee, Los Angeles, for respondent.

SHINN, Presiding Justice.

These two cases involve the same defendant and the same accident and were consolidated both for trial and appeal. From a judgment after verdict for defendant, plaintiffs Gerry and Scott appeal.

At an early daylight hour on May 24, 1948, a 1947 Cadillac driven by defendant left the Nogales-Tuscon highway some 21 miles south of Tuscon, Arizona, injuring all the occupants. Defendant was rendered unconscious and there was evidence that he suffered retrograde amnesia and had no recollection of the circumstances of the accident. The other five occupants, including plaintiffs, were asleep at the time of the accident. The party was returning from Guaymas, Mexico. Defendant took over the driving at Nogales and drove until the accident occurred. Officer Keenum of the Arizona Highway Patrol who came on the scene at 6:40 a. m. testified: The north-south highway was paved, two lane, level and straight. There were tire skid marks starting in the northbound lane and moving across the highway and off on the west side; they left the highway at a point where a dirt side road intersected from the west; on the pavement the skid marks were 78 feet long; the car came to rest 38 feet to the west of the highway but approximately 250 feet north of the point where the skid marks started; open flat grazing and farming country bordered the highway on both sides. The related testimony of the officer, reinforced by photographs of the locale, constitutes the sole evidence as to the circumstances surrounding this accident.

We are presented with a case where the jury was required to determine what happened when none of the participants could shed any light on that question. The jury returned verdicts for defendant and the appealing plaintiffs attack the judgment entered on the grounds of erroneous instructions.

[1] At the request of the plaintiff in each case the court gave an instruction on the doctrine of *res ipsa loquitur*. At the request of the defendant the court instructed that if the jury should find that as the result of the shock of the accident the defendant's memory was so impaired that he became and remained unable to remember and testify as to his own conduct and other facts of the accident, a presumption arose that he was obeying the law and acted as an ordinarily prudent person would have in the same circumstances. Neither instruction is criticized as to form. Defendant does not contend that the *res ipsa loquitur* instruction was inapplicable under the evidence and we are not called upon to consider that point. Plaintiffs concede that if this were an ordinary case the evidence of defendant's loss of memory would have justified an instruction that he should be presumed to have been obeying the law and exercising due care. But they say that this presumption is in conflict with the inference of negligence which was to be drawn under the *res ipsa loquitur* instruction, that the presumption of the exercise of due care does not exist in a *res ipsa loquitur* case, and that it was error for the court to give the defendant's instruction.

Their contention finds support in the case of Waite v. Pacific Gas & Electric Co., 56 Cal.App.2d 191, 132 P.2d 311. The Waite case was decided on the authority of Smith v. Hollander, 85 Cal.App. 535, 259 P. 958 and Moeller v. Market St. Ry. Co., 27 Cal.App.2d 562, 81 P.2d 475. In Pezzoni v. City & County of S. F., 101 Cal. App.2d 123, 124, 225 P.2d 14, 15, the court stated: "The courts have held that in a res ipsa case it is not proper to give an instruction on the presumption of care." (Citing the three cases above named.) The Waite case involved injuries claimed to have been suffered by the sudden jerking of a street car. The motorman was not living at the time of the trial. The court gave an instruction which substantially stated the doctrine of *res ipsa loquitur*. On appeal from an adverse judgment the defendant insisted it was prejudicial error not to instruct as to the presumption of the use of ordinary care by the motorman. It was contended that he was the only one who could have explained the cause of the movement of the street car. The court said, 56 Cal.App.2d at pages 201, 202, 132 P.2d at page 317: "We do not agree with defendant's statement that the deceased motorman was the only one who could have explained the cause of the sudden jerking of the street car. The difficulty in obtaining other witnesses does not excuse the absence of such evidence if it could have been procured. However, assuming that the motorman was the only person who could have testified to the cause of the street car's movement, or that he might have accounted for it by some sudden emergency such as the presence of a child on the track, as the appellant argues, the law appears to be well settled that instructions embodying the presumption of due care are improper in a case where the rule of *res ipsa loquitur* applies." The latter statement is found in the Smith v. Hollander, Moeller v. Market St. Ry. Co. and the Pezzoni v. City & County of S. F. cases. In the first two the evidence of the defendant was explanatory of the accident and there was no evidence of inability to produce evidence for the defense. Consequently an instruction on presumed due care would have been improper. Ford v. Chesley Transportation Co., 101 Cal.App.2d 548, 552, 225 P.2d 997. The Pezzoni case was one of injury to a passenger on a street car. It does not appear that the operators of the car had not testified. The verdict was for the defendant; a new trial was granted; defendant appealed and the order was affirmed. The jury had been instructed on *res ipsa loquitur* and the presumption of ordinary care. The ground of the affirmance of the order granting a new trial was alleged error in giving the instruction on the presumption of care, the court saying 101 Cal.App.2d page 124, 225 P.2d at page 15: "The jury was thus faced with the metaphysical responsibility of weighing a presumption of care against an inference of negligence." We fully appreciate the court's reluctance to depart from what had previously been said upon the subject and thus place juries under this "metaphysical responsibility." But we are convinced that in the present state of the law in California situations will occasionally arise when the jury will have that responsibility. We do not believe that it was error in the present case for the court to give both instructions, and this despite our great respect for the wisdom of the judges who have thought otherwise.

[2–6] Settled rules of evidence may not be disregarded and a defendant deprived of a statutory right because of the difficulty jurors would encounter in determining the relative weight of an inference that a thing is black and a presumption that it is white. And where both the inference and the presumption exist we do not see how as a matter of law one can dispel or outweigh the other. In the field of fact we suppose that a jury in order to escape the problem of deciding which of two conflicting forces has the greater weight will find some corroborating circumstance to tip the scales one way or the other. Be this as it may, a defendant who through loss of memory is unable to give an account of his conduct is no less entitled to the benefit of the presumption that he exercised ordinary care than is the plaintiff entitled to the benefit of the inference of defendant's negligence when the *res ipsa loquitur* rule is properly

invoked. After all, the force of the *res ipsa* doctrine is only to make out a prima facie case of negligence. Such a case, of course, can be, and ordinarily is made out by evidence independently of the *res ipsa* rule. In either case the burden is upon the defendant to meet or overcome the plaintiffs' case. If the *res ipsa* rule does not apply, and the defendant qualifies for the benefit of the presumption rule, he is entitled to it and the jury must be so instructed. The presumption must be weighed against the strength of the plaintiffs' evidence. Nothing short of conclusive evidence of negligence which would justify a directed verdict against him can deprive such a defendant of the benefit of the presumption. Why, then, should a mere inference of his negligence be given that effect. It only calls for an explanation by the defendant, which may or may not be deemed sufficient by the jury to meet or overcome the inference. The presumption of the exercise of care is evidence, and it must remain in the case, since the inference of negligence under the *res ipsa* rule may be rebutted by that which is evidence, whatever its type or character. If the presumption is not available to a defendant to rebut a prima facie case of negligence it serves no purpose at all.

It must be remembered that when the presumption of care is properly invoked by a defendant it is purely by way of defense. It is not in the case to interfere with the operation of the *res ipsa* rule to make out a prima facie case for the plaintiff. But in determining the weight of the evidence the trier of facts must weigh it against the inference of negligence just as he must weigh it against the spoken word of the plaintiffs' witnesses.

The present case was a proper one for an instruction on the presumption of the use of care. The verdict in favor of the defendant strongly suggests that the jury believed defendant was confronted with an emergency of some sort. It could be reasoned that there must have been an extraneous cause for the defendant's leaving the northbound lane, applying his brakes so as to cause the car to skid on the pavement for 78 feet, and to travel off the highway for approximately another 175 feet. Since it was impossible to know the nature of the cause, resort to the presumption would have been reasonable and just. It did not explain the cause, but it tended to confirm the supposition that there was a cause, other than the pure negligence of the defendant. We believe it was a typical case for practical application of the presumption.

[7, 8] Appellants also insist that it was error to give defendant's instruction on unavoidable accident. We cannot agree. Properly understood, the rule as to unavoidability relates an accidental occurrence to a cause not within the control of the parties. Were it not so, unavoidability would be involved in every case of claimed negligence. Each party would claim the accident was due to the negligence of the other and therefore unavoidable as to himself in a nonlegal sense, and the rule of unavoidability would be without legal significance. As previously stated, the evidence as to the movement of the car suggested the occurrence of some emergent condition beyond control of the defendant, which caused him to immediately take some action that he would not otherwise have taken. The instruction properly directed attention to this feature of the evidence. If the jury believed that, in a reasonable effort to cope with a condition beyond defendant's control, leaving the highway was unavoidable, it would follow that the accident itself was legally unavoidable. It was not error to give the instruction.

What we have already said is pertinent to the contention that the evidence fails to support the verdicts. While it is true that in a *res ipsa loquitur* case a defendant, in order to prevail, must produce evidence which is found to have weight equal to that of the inference of his negligence, the fact that he is under a disability which renders it impossible for him to give an explanation does not deprive him of a defense against the charge. He may rely upon the presumption as evidence. We need not theorize as to what a court or jury should do when a necessary inference and a disputable presumption come face to face, each without corroborative support in the

circumstances in evidence. In the present case the presumption of due care has some support in the evidence, produced by plaintiffs, that defendant made an effort to bring his car to a stop before it left the highway. Plaintiffs' claim that under the *res ipsa loquitur* rule verdicts should have been directed in their favor because of defendant's failure to give evidence as to his conduct is clearly untenable.

The judgment in each case is affirmed.

WOOD and VALLÉE, JJ., concur.



108 Cal.App.2d 546

LUNA v. AMES.

Civ. 4185.

District Court of Appeal, Fourth District, California.

Jan. 4, 1952.

Raul Luna sued Ray Ames for personal injuries sustained as the result of being struck by defendant's automobile while plaintiff was walking across a highway. From a judgment of the Superior Court of Orange County, Robert Gardner, J., for defendant, plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that defendant's negligence in failing to swerve to right sufficiently to avoid striking plaintiff after he stopped when nearly across the highway was a fact question for the trial court on conflicting evidence, so that plaintiff could not recover, as matter of law, regardless of his own negligence.

Judgment affirmed.

1. Appeal and Error ⇐931(1)

On plaintiff's appeal from judgment for defendant pursuant to trial court's finding that each party was guilty of negligence, evidence must be viewed in light most favorable to defendant, in view of finding in his favor.

2. Appeal and Error ⇐671(4), 1011(1)

On appeal from judgment for defendant pursuant to trial court's finding that each party to action for injuries to pedestrian struck by defendant's automobile while crossing highway outside marked crosswalk, plaintiff appellant's contention that certain exhibits admitted in evidence showed that defendant respondent could have swerved to right sufficiently to avoid collision after plaintiff stopped, cannot be sustained, where evidence on such question was conflicting and appellant failed to produce exhibits as part of record.

3. Automobiles ⇐245(91)

Whether driver of automobile, which struck pedestrian crossing highway outside marked crosswalk, could have swerved to right sufficiently to avoid collision, so as to entitle pedestrian to recover damages for resulting injuries, regardless of his own negligence, under last clear chance doctrine, was fact question for trial court on conflicting evidence.

Marjorie Mize, Santa Ana, for appellant.

No appearance for respondent.

BARNARD, Presiding Justice.

This is an action for damages for personal injuries. The accident happened on Highway 101 in the city of San Clemente, a short distance west of the intersection of that highway with a city street. At 12:30 a. m. on December 12, 1948, the plaintiff was walking across this highway from the south side to the north side when he was hit by defendant's automobile, which was going west in the northerly of the two west-bound lanes. The court found that each of the parties was guilty of negligence and entered a judgment for the defendant, from which the plaintiff has appealed.

The only point raised is that it appears, as a matter of law, that the appellant is entitled to a judgment under the last clear chance doctrine. The appellant cites Gillette v. City and County of San Francisco, 58 Cal.App.2d 434, 136 P.2d 611; Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915; Bragg v. Smith, 87 Cal.App.2d 11, 195 P. 2d 546, and similar cases, in which judgments for the plaintiff were sustained under that doctrine. While this doctrine is

sometimes applied in automobile cases these usually present close questions of fact with respect to the elements of time and distance within which preventive action could have been taken.

[1] The evidence here was conflicting as to a number of matters affecting the situation, including the speed of the car, whether the appellant was crossing this highway at a marked crosswalk, whether or not it was raining, whether a street light and other lights were burning, and whether conditions existed which prevented the respondent from swerving to the right or left. In view of the finding in respondent's favor the evidence must be viewed on this appeal in the light most favorable to him. Gillette v. City and County of San Francisco, 58 Cal.App.2d 434, 136 P.2d 611. It thus appears that the appellant was crossing this highway at an angle some twenty feet westerly from a marked crosswalk; that when the respondent was seventy feet away he saw the appellant running across the street; that the respondent thought the appellant would keep on running and get across, and slowed down to give him a chance to do so; that at the last moment the appellant stopped and stood still when he was nearly across the highway; and that the conditions of time and place were such that the respondent was unable to swerve either way.

[2] The appellant contends that although there was a parked car to respondent's right, certain exhibits which were admitted in evidence showed that he could have swerved a foot or two to the right, which would have been sufficient. Not only does this involve a conflict in the evidence but the appellant has failed to produce these exhibits as a part of the record here.

[3] Under the circumstances of this case, the question presented was, and is, a factual one and it cannot be held, as a matter of law, that the appellant was entitled to recover regardless of any negligence on his part.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.
concur.

108 Cal.App.2d 475

GROSSBLATT et al. v. WRIGHT.

Civ. 18484.

District Court of Appeal, Second District, Division 3, California.

Dec. 28, 1951.

Rehearing Denied Jan. 14, 1952.

Hearing Denied Feb. 25, 1952.

Action by Isedore Grossblatt, and another, against Laurence R. Wright to recover under the Housing and Rent Act of 1947 for alleged overcharges of rent. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., rendered judgment for plaintiffs and defendant appealed. The District Court of Appeal, Vallée, J., held, inter alia, that defendant was entitled to a jury trial of issues raised on the claim for treble damages.

Reversed.

1. Appeal and Error ⇐257

An exception to order denying a jury trial was necessary to make point available to defendant on appeal. Code Civ. Proc. §§ 646, 647.

2. Appeal and Error ⇐248

An objection or opposition to proposed court action indicates a party's dissatisfaction with what is proposed and if, after an objection or opposition to proposed action is overruled, a party takes an exception, he is merely repeating his dissatisfaction.

3. Appeal and Error ⇐273(1)

The functions of an exception are to make a ruling a matter of record so that it may be re-examined by court on motion for new trial or be reviewed by appellate court, and to apprise trial court that its ruling is challenged and thereby enable court to reconsider ruling and correct any error.

4. Appeal and Error ⇐273(1)

An exception does not have any particular form and is sufficient if it points out clearly the error complained of, or if it apprises court in some way that the party does not acquiesce in the ruling or action of the court.

5. Appeal and Error ⇐273(1)

A liberal rule of construction should be applied in determining whether an exception was taken.

6. Appeal and Error ⇐273(3)

Where court granted plaintiff's motion that cause be tried without a jury, statement by defendant's counsel to effect that defendant was again demanding a jury trial was equivalent to an exception and was sufficient to make point available to defendant on appeal. Code Civ.Proc. §§ 646, 647.

7. Jury ⇐13(1)

In determining whether action was one triable by jury at common law, court is not bound by form of action, but rather by nature of rights involved and facts of particular case, and jury trial must be granted where gist of action is legal, where action is in reality cognizable at law.

8. Penalties ⇐16

At common law, debt was appropriate action for recovery of statutory penalties where no other remedy was specified.

9. Landlord and Tenant ⇐200(1½)
War and National Defense ⇐216

The amount recoverable under provision in Housing and Rent Act of 1947 that a person who accepts any payment of rent in excess of maximum rent prescribed shall be liable for three times the amount of the overcharge, is a "penalty." Housing and Rent Act of 1947, § 1 et seq., 50 U.S.C.A.Appendix, § 1881 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Penalty".

10. Jury ⇐14(2)

In action under Housing and Rent Act of 1947 to recover treble damages for alleged rent overcharges, defendant was entitled to jury trial. Housing and Rent Act of 1947, §§ 1 et seq., 205, 50 U.S.C.A. Appendix, §§ 1881 et seq., 1895.

11. Landlord and Tenant ⇐200(1½)
War and National Defense ⇐206

Where action for damages for alleged overcharges of rent under Housing and Rent Act of 1947 had accrued prior to date of decontrol of realty, action could be maintained after decontrol. Housing and Rent Act of 1947, §§ 1 et seq., 205, 50 U.S.C.A.Appendix, §§ 1881 et seq., 1895.

Bernard B. Cohen, Los Angeles, for appellant.

Harry A. Franklin, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by defendant from an adverse judgment in an action to recover treble damages, attorney's fees and costs under the United States Housing and Rent Act of 1947.[1]

At the time involved, June 14, 1948, the Housing and Rent Act of 1947, in pertinent part, provided: "Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed * * * shall be liable to the person from whom he demands, accepts, or receives such payment * * * for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amount of (1) $50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded accepted, or received, whichever in either case may be the greater amount * * *"[2] In the present case the amount found to have been demanded and accepted in excess of the maximum rent which could be lawfully demanded and accepted was $1300.

After the cause was at issue defendant-appellant made timely written demand for a trial by jury, posted the jury fee, and the cause was set to be tried by a jury.

When the cause came on for trial, plaintiffs moved the court for an order "that the jury be dissolved" and the cause be tried by the court without a jury on the ground defendant had no right to a trial by jury. Counsel for defendant vigorously, persistently, and at length, opposed the motion and contended he was entitled to a trial by jury. The motion was taken un-

1. 61 Stat. 193, 50 U.S.C.A.Appendix, § 1881 et seq.

2. 61 Stat. 199, 50 U.S.C.A.Appendix, § 1895.

der submission and a jury impaneled. Prior to the taking of any evidence the motion was granted and the jury discharged. The relevant proceedings which took place with respect to the motion are set out in the margin.[3]

3. "The Court: The objection of the plaintiffs to proceed to trial with a jury in this case was previously submitted for decision by the Court * * *.

"The Court has been researching this subject almost continuously since the matter was argued, and I have about come to the conclusion, gentlemen, that a jury cannot be had as a matter of right in this type of action. * * * I think we must conclude that no such cause of action or form of action existed at common law because of the right to fix prices and fix rents by governmental action did not exist in common law, and it is only through a violation of such a statute that any right of action exists in this present proceeding.

"So regarding the substance of the action rather than the form of it. I think it is one that did not exist at common law and, therefore, under the authorities, a trial by jury is not a matter of right. * * *.

"Mr. Cohen [Attorney for defendant]: * * * If the Court feels disposed to grant the plaintiffs' motion, depriving the defendants of a jury, I will ask the Court to give me an opportunity to prepare a writ of prohibition to submit to the District Court of Appeals so that we can obtain an alternative writ there, if the Court deems it proper and will not require us to go to trial without a jury. Could the Court do that? * * *

"Excuse me, your Honor. I am trying to protect my record, and I don't know whether I should make this request now or after the Court rules. The Court indicated prior to the noon recess that the Court felt that we were not entitled to a jury as a matter of right, and the Court also said it was within the Court's discretion to grant a jury. And at this time I am asking your Honor to exercise that discretion and grant Mr. Wright, the defendant in this case, a trial by jury. * * *

"The Court: * * * I think that the law, as I have attempted to outline it here, requires this Court to hold that in California at least the precedents are to the effect that a jury may not be had as a matter of right in this proceeding, and that is the holding of the Court.

"Mr. Cohen: I will ask your Honor, in the exercise of the Court's discretion, if the Court will grant us the privilege of a jury trial in this case? * * * so at this time I will ask your Honor to give me the opportunity to prepare the necessary papers to submit to the District Court of Appeal and request that a writ of prohibition issue, because I feel that if we should go to trial and your Honor should find against us, that under the law, the authorities, an appeal from this judgment would not be a speedy remedy at law. So I will ask the Court to give us the opportunity to do that. * * * It may be that when we submit the papers to the District Court of Appeal the court may agree that we don't have the right to trial by jury, and then we will proceed to trial. But a writ of prohibition is proper if your Honor is wrong and we are right in the case. * * * I am not at all convinced in my own mind that the ruling is proper, and I feel I owe a duty to my client to pursue the remedy, and I feel it is a proper remedy to seek. * * * and I am simply asking that I be given an opportunity, even until Monday morning. I will work over the week-end, although I was going fishing, and I will prepare a writ and submit it to the Presiding Justice of the District Court of Appeal and, if he sees fit to sign an alternative writ, all right. * * *

"In connection with the case of Grossblatt against Wright, this morning after having spent a total of 24 hours preparing the petition for writ of prohibition that we discussed in your Honor's chambers last Friday, I went to the office of the clerk of the District Court of Appeal and was informed by the clerk this morning at 9:15 that in the ordinary course of events the court will not issue an alternative writ until five days have elapsed, during which time the respondent has the right of filing an answer to the petition.

"I explained to the clerk the circumstances here, that is, that your Honor had continued this matter for trial to 10:00 a.m. this morning, and he said that under such circumstances it is possible, but not at all a certainty, that the District Court of Appeal might waive the five-day period for the answer to be filed and decide that matter today, but that he couldn't guarantee it, so that now we are in a position, your Honor, where because of the exigencies of the situation, if I filed a petition up there, if this trial proceeds today and we conclude it, say, tomorrow afternoon or some time Wednesday, the matter of the petition for writ of prohibition will become moot, and so I have no alternative but to ask your

Defendant first contends the court erred in denying him a trial by jury. Plaintiffs say defendant did not except to the ruling, therefore the point is not available to him on appeal.[4] Defendant answers that his conduct was equivalent to the taking of an exception and that is all the law requires.

[1] Section 646 of the Code of Civil Procedure defines an exception as "an objection upon a matter of law to a decision made," and provides "The exception must be taken at the time the decision is made, except as provided in section six hundred and forty-seven."
Section 647 enumerates various matters which are deemed excepted to. An order denying a trial by jury is not among them, and an exception was required.

The first enactment on the subject of exceptions was the statute of Westminister II,[5] which provided that a litigant might except to the rulings of the court in the progress of the trial, embody his exceptions in a bill of exceptions, and have the bill of exceptions made part of the record for purposes of review. The practice had real merit when its primary purpose was the preparation of a bill of exceptions for an appeal and there were no stenographic reporters or the record in the trial court was sketchy and incomplete. Now that we have a complete record of the proceedings in the trial court, the necessity for an exception in order properly to prepare a record on appeal has disappeared.[6] Its use now makes form a fetish. The necessity of an exception has been dispensed with in the federal courts and in a number of states.[7]

[2] Our statute which lists a great many matters that are deemed excepted to and omits a few to which an exception must be taken is a snare for the unwary. The distinction between those matters deemed excepted to and those not is purely

Honor to continue this case to a time far enough away so as to enable the District Court of Appeal to act on our petition, or to set it off calendar subject to being reset after the District Court of Appeal does act. * * *

"The Court: * * * the cases are numerous to the effect that where money is all that is involved that an appeal is an adequate remedy and, of course, execution would be stayed pending appeal, so that the defendant wouldn't even be out his money during that time. * * I am satisfied by independent research I have made also since our last discussion of the matter that this is not a proper case for the issuance of a writ, and I don't believe it would issue, so the request for continuance is denied.

"Mr. Cohen: Then in that event, your Honor, I shall not file the writ of prohibition because I think we are agreed it would become a moot question because this case will have been determined by that time, that is, by the time the Appellate Court had an opportunity to act on the writ, and I assume by your Honor's statement that we are now required to proceed with the trial; is that true?

"The Court: Yes.

"Mr. Cohen: And may the record show, your Honor, that we are again demanding a jury trial of this matter, and we would ask your Honor to rule on that motion at this time.

"The Court: The motion is denied.

"Mr. Cohen: Thank you, your Honor."

4. In re Estate of Magerl, 201 Cal. 162, 167, 256 P. 204; Snidow v. Hill, 100 Cal. App.2d 31, 36, 222 P.2d 958.

5. 13 Edw. I, c. 31 (1285); 1 Eng.Stat. at L. 99; Holdsworth, History of English Law (1903) 91–92; 23 W.Va.L.Q. 15.

6. In People v. Mitchell, 27 Cal.2d 678, at page 686, 166 P.2d 10, at page 14, the court commented: "The widespread use of the reporter's transcript as the record on appeal and the modernization of the bill of exceptions into a narrative statement of the proceedings (see Rules on Appeal, rule 7), have resulted in the practical disappearance of the formal exception in appellate procedure in this state."

7. Rule 46, Rules of Civ.Proc., for the District Courts of the U. S., 28 U.S.C.A. Ill.Rev.Stat.1937, ch. 110, § 204; Neb. Comp.Stat.1929, § 20–1139; N.M.Stat. Ann.Courtright, 1929, § 105–830; 2 N.D. Comp.Laws Ann.1913, § 7653; Ohio Code Ann.Throckmorton, 1936, § 11560; 1 S. D.Comp.Laws 1929, § 2542; Utah Rev. Stat.Ann.1933, §§ 104–39–2, 104–24–18; Va.Rules of Court, Rule 22, 163 Va. V, XII, 1935; Wis.Stat.1935, § 270.39.

fanciful and arbitrary. Everything accomplished by an exception is achieved by the requirement that the grounds of an objection be stated. An objection or opposition to proposed action indicates a party's dissatisfaction with what is proposed. If, after an objection or opposition to proposed action is overruled, a party takes an exception, he is merely repeating his dissatisfaction.[8]

[3] The courts have stated the functions of an exception as: 1) to make the ruling a matter of record so that it may be re-examined by the court on a motion for a new trial or be reviewed by an appellate court;[9] 2) to apprise the trial court that its ruling is challenged, and thereby enable it to reconsider its ruling and correct the error if it be such.[10]

[4] The purpose of an exception is not ritualistic; it is real.[11] It "is only a formal type of objection".[12] It does not have to be in any particular form.[13] It is sufficient if it points out clearly the error complained of.[14] The test of its sufficiency is whether it fairly directs the attention of the court to the claimed error. It is sufficient if it apprises the court in some way that the party does not acquiesce in the ruling or action of the court.[15]

[5] A liberal rule of construction should be applied in determining whether an exception was taken.[16] Courts exist to do justice. Litigants should be saved from the consequences of an oversight by counsel where it can be done in furtherance of justice and consistent with established rules of law.

In Horstman v. Krumgold, 55 Cal.App. 2d 296, at page 299, 130 P.2d 721, at page 723, the court, referring to the amendment of 1907 to section 647 of the Code of Civil Procedure which provided that certain enumerated rulings were deemed excepted to, said: "The amendment to section 647 of the Code of Civil Procedure has met with much favor and has resulted in improvement in the manner of conducting trials. The old custom of audibly noting exceptions is not generally followed at the

8. Howell, 13 So.Cal.L.Rev. 20; Selvin, Proceedings of 22d (1949) annual meeting of The State Bar of Calif., 32.

9. Smith v. Lawrence, 38 Cal. 24, 27; People v. Mitchell, 27 Cal.2d 678, 685–686, 166 P.2d 10.

10. Story v. Nidiffer, 146 Cal. 549, 552, 80 P. 692.

11. Wilkinson v. Whitworth, 169 Okl. 286, 36 P.2d 932, 933, in which the court said: "Authorities may doubtless be found holding that the failure of a party to note formally his exception to the action of the court at the time the action is taken is a waiver of error on the part of the court. Indeed, some courts guard the record as the Gileadites guarded the passage of Jordan. Judges xii, 5, 6. The stranger who said Sibboleth for Shibboleth was slain. But such formalism is foreign to this jurisdiction."

12. People v. Mitchell, 27 Cal.2d 678, 686, 166 P.2d 10, 14.

13. McCreery v. Everding, 44 Cal. 246, 249; In re Estate of Piper, 147 Cal. 606, 608, 82 P. 246; 4 C.J.S., Appeal and Error, § 324(3)b, p. 664.

14. McCreery v. Everding, 44 Cal. 246, 249; Gerry v. Neugebauer, 83 N.H. 23, 136 A. 751, 752; Gangi v. Fradus, 227 N.Y. 452, 125 N.E. 677, 679, at page 680, in which the court said: "Appellate courts are not diligent in seeking a way to deprive a party of the benefit of an exception pointing out error, where it appears that the trial justice was fully apprised of the nature of the objection."

15. Fitzgerald v. Metropolitan Life Ins. Co., 90 Vt. 291, 98 A. 498, 506; Newton v. City of Worcester, 169 Mass. 516, 48 N. E. 274, 275; Snelling v. Yetter, 25 App. Div. 590, 49 N.Y.S. 917, at page 918, in which the court said: "An exception is but the formula of dissent from a ruling, expressed with sufficient clearness and definiteness to raise some concrete point upon appeal. This dissent, and the intention to question the ruling thereafter, are usually expressed by the phrase, 'I except.' The right of review, however, is not lost merely because this technical phrase does not happen to be employed. Any other clear expression will suffice, provided such expression be adequate to convey the idea which underlies all exceptions. That idea is nonassent and nonsubmission to the ruling. * * *"

16. McMahan v. Walhalla Light & Power Co., 102 S.C. 57, 86 S.E. 194, 195; Levine v. Levine, 144 Va. 330, 132 S.E. 320, 322.

present time. The amendment should be liberally construed in order that the rights of litigants be not lost by the failure of counsel to keep fresh in mind those rulings of the court which are enumerated in the amendment. The record before us discloses that plaintiff vigorously opposed the order requiring her to make an election as to the second count and after the noon recess she requested the court to reconsider its ruling. There is much force in counsel's argument that plaintiff's conduct at the trial was equivalent to the notation of an exception to the court's ruling."

In San Joaquin Light & Power Co. v. Barlow, 43 Cal.App. 241, at page 243, 184 P. 899, at page 900, a witness for the plaintiff, qualified as an expert, testified that charges made for electric current were reasonable. The further proceedings appear in the opinion:

"On cross-examination of Simpson, after some questions had been asked and answered, relating to the conditions under which the service was to be rendered, and for the stated purpose of reaching the question of what was a reasonable rate, counsel for plaintiff objected that defendant could not go into these matters, on the ground that defendant, by entering into the contract, was estopped to question the reasonableness of the rate. After discussion, the court announced that—

" 'The only issue here is of them furnishing the amount for which they are charging.'

"Mr. Doherty: 'You mean no further testimony allowed on the proposition of whether or not the rate fixed by them was a reasonable rate under the issue of their pleadings?'

"The Court: 'I don't see that there is any open question there.'

"On the ruling thus made, defendant's counsel refrained from further cross-examination on the reasonableness of the rate. To the statement made by the court, and without any direct exception, counsel responded, 'Well, on the ruling of the court, then, I will not ask any further questions on cross-examination as to the reasonableness of the rate.'

"Although no question was formally propounded, with a ruling thereon from which under the statute an exception would be implied, the record made, as above stated, was equivalent to such formal ruling and exception. Pastene v. Pardini, 135 Cal. 431, 67 P. 681." [17]

17. In Davis v. Security-First Nat. Bank, 1 Cal.2d 541, 36 P.2d 649, the plaintiff, after issue joined, made demand for a jury, which was successfully resisted by the defendants. The plaintiff refused to proceed to trial without a jury and the court granted a motion for judgment of dismissal. On appeal the defendants contended that the plaintiff's failure to except to the ruling striking the plaintiff's demand for a jury was a waiver of her objection and an acquiescence in such ruling. The District Court of Appeal held that the plaintiff was entitled to a trial by jury, reversed the judgment, and with respect to the contention that the ruling could not be reviewed because no exception had been taken, said, 23 P.2d 1036, 1041:

"The motion to strike was based solely on the ground that the case is in equity and not triable by a jury, and on plaintiff's refusal to proceed without a jury the judgment of dismissal was entered. All of such facts are shown in the judgment and appear in the judgment roll, and consequently so appear in the record before us. Sichler v. Look, 93 Cal. 600, 29 P. 220. The only purpose of a bill of exceptions is to enable appellate courts to review errors in law which do not appear on the face of the record, and 'that which is a record already, cannot receive any higher degree of sanction by being made record a second time.' Parsons v. Davis, 3 Cal. 421, 425.

"Trial by jury in civil actions, unless waived as prescribed by law, is a constitutional right. Section 7, art. 1, Const. of California. If, as we think, the instant case is a civil action, appellant's constitutional right was denied and finally determined by the order which the court made. Such order was an 'interlocutory order * * * finally determining the rights' of appellant, and under section 647 of the Code of Civil Procedure is deemed to have been excepted to. Being a constitutional right, it is to be presumed that prejudice resulted from the denial." The Supreme Court granted a hearing and held, 1 Cal.2d 541, 36 P.2d 649, that the plaintiff was entitled to a trial by jury and reversed the

[6] Regardless of the theory upon which an exception is required, defendant's conduct was the equivalent of an exception. After the court had granted plaintiffs' motion "that the jury be dissolved," defendant's counsel said: "And may the record show, your Honor, that we are again demanding a jury trial of this matter, and we would ask your Honor to rule on that motion at this time." The motion was denied.

Defendant made it perfectly clear to the trial court that he did not assent to or acquiesce in the ruling, but, on the contrary, that he considered it erroneous; with the court's knowledge he made what attempt he could in the time allowed him to obtain a writ of prohibition; the court had ample opportunity to reconsider and correct the ruling if it deemed it erroneous; defendant unequivocally indicated, and it appears clear that the court fully understood, he intended to make the ruling the subject of appellate review if judgment went against him. There is no mode by which defendant could have more distinctly manifested his dissent from the ruling than the one he followed. It would have been an idle and useless formality to have said "note an exception" or "I except." It would be a reproach to any legal system to hold that defendant did not except to the ruling sought to be reviewed.

We must, therefore, consider the merits of defendant's assignment that the court erred in denying him a trial by jury.

[7] The principles governing the right of trial by jury have been stated recently by the Supreme Court in People v. One 1941 Chevrolet Coupe, 37 Cal.2d 283, 231 P.2d 832, and need not be repeated at length. The test which determines the right to a trial by jury is whether the gist of the action is legal. It is not, as plaintiffs argue, and as the trial judge mistakenly assumed, whether there existed a right of action at common law identical with that given by the Housing and Rent Act of 1947. As stated in People v. One 1941 Chevrolet Coupe, supra, 37 Cal.2d at page 299, 231 P.2d at page 843: "If the action has to deal with ordinary common-law rights cognizable in courts of law, it is to that extent an action at law. In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the gist of the action. A jury trial must be granted where the gist of the action is legal, where the action is in reality cognizable at law."

Defendant argues that although the action involves recovery of a penalty under a statute, it is, in reality, one for debt, which at common law was triable by jury.

[8] The action (writ) of debt was the general remedy at common law for the recovery of all sums certain, or sums readily reducible to a certainty, whether the legal liability arose from contract or was created by statute.[18] Statutory penal-

judgment without mentioning the point that no exception had been taken, evidently thinking, although the point was argued extensively in the briefs and in the petition for hearing and the answer thereto, that it was not of sufficient importance to warrant mention.

18. (a) Andrews Stephen's Pleading, 2d ed. 122, § 76: "The [action] writ of debt lies where a party claims the recovery of a debt, i. e. a liquidated or certain sum *of money* alleged to be due to him. * * *The cause of action* which is made the basis of the form of action designated debt *is a sum of money due according to the terms of some obligation to pay money*, which may be an oral, a written, an implied contract, or an express obligation imposed by a public law, be it custom, statute, or a city ordinance."

(b) 1 Chitty on Pleading (1872) 108, 111: "Debt is, in some respects, a more extensive remedy for the recovery of money than assumpsit, or covenant; * * * debt lies to recover money due upon legal liabilities, or upon simple contracts, express or implied, whether verbal or written, and upon contracts under seal; or of record; and on statutes by a party grieved, or by common informer, whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty. * * * [p. 111] Debt is frequently the remedy on statutes either at the suit of a party grieved, or of a common informer. In some cases

ties existed at common law, and debt was the appropriate action for the recovery thereof where no other remedy was specified, because the money due under such statute gave rise to a debt, the underlying theory being an implied promise which the law annexed to the liability.[19]

[9] Obviously, a statute such as the Housing and Rent Act of 1947, placing a ceiling on rents and permitting the recovery of treble the amount of any rental overcharges, did not exist at common law. While such a statute was unknown to the common law, the liability is one created by statute. The treble damages recoverable under the act are in the nature of penalties.[20] The issues involved in the claim for treble damages are legal; they grow out of a claim for moneys due and owing—in the nature of a suit at common law—and the court which determines this issue sits as a court of law.[21]

[10] A jury trial was a matter of right in the common-law action of debt, and consequently it exists in all civil actions under modern practice which formerly would have fallen within this form of action. 31 Am.Jur. 566, § 17. Although the claim for damages arises out of and is based upon statute, it is a claim grounded in debt. "* * * [W]hen a federal statute embraces a common-law form of action, that

it is given to the party grieved at the express words of a statute, as * * * *against a tenant for double value for not quitting in pursuance of a notice to quit given by his landlord.* And if a statute prohibit the doing an act under penalty or forfeiture to be paid by a party grieved, and do not prescribe any mode of recovery, it may be recovered in this form of action, as *treble the value of tithes* not duly set forth, or *treble the amount of damages* incurred by extortion." (Italics added.)

(c) Archbold, Plead. & Evid. (Civ. Actions) (1837) p. 17: "If an act of parliament inflict a certain penalty for a particular act, *an action of debt will lie for the penalty*, if no other remedy be specified in the statute; for the law implies that by the fundamental contract of society, the offending party is bound and hath virtually agreed to obey the directions of the legislature, and pay the forfeiture incurred, to such persons as the law requires."

(d) 3 Bl.Comm. (London ed. 1857) 162, 167–169: "From these *express* contracts the transition is easy to those that are only *implied* in law. Which are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform; and upon this presumption makes him answerable to such persons as suffer by his nonperformance. Of this nature are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound and has virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by interpretation of the law. For it is a part of the original contract, entered into by all mankind who partake of the benefits of society, to submit in all points to the municipal constitutions and local ordinances of the state, of which each individual is a member. Whatever therefore the laws order anyone to pay, that becomes instantly a debt, which he has beforehand contracted to discharge."

(e) Shipman, Common-Law Pleading 137: "Debt is also a proper remedy * * * to recover a specific sum of money due by virtue of a statute, where the statute prescribed no particular form of action."

19. State of California v. Poulterer, 16 Cal. 514, 525; U. S. v. Lyman, 26 Fed.Cas. No.15,647, 1 Mason 482; Hepner v. United States, 213 U.S. 103, 29 S.Ct. 474, 53 L.Ed. 720, 721; United States v. Jepson, D.C., 90 F.Supp. 983, 984–985; United States v. Mesna, D.C., 11 F.R.D. 86, 87; Miami Copper Co. v. State, 17 Ariz. 179, 149 P. 758, 760–763.

20. United States v. Hart, D.C., 86 F.Supp. 787, 789; Porter v. Warner Holding Co., 328 U.S. 395, 66 S.Ct. 1086, 1091, 90 L.Ed. 1332, 1339; United States v. Friedland, 94 F.Supp. 721, 723. Cf. Heesy v. Vaughn, 31 Cal.2d 701, 709, 192 P.2d 753; Miller v. Municipal Court, 22 Cal.2d 818, 837, 142 P.2d 297; Garcia v. Ebeling Motor Co., 89 Cal.App.2d 688, 692, 201 P.2d 854.

21. Porter v. Warner Holding Co., 328 U.S. 395, 66 S.Ct. 1086, 1091, 90 L.Ed. 1332, 1339; United States v. Hart, D.C., 86 F.Supp. 787, 789; United States v. Strymish, D.C., 86 F.Supp. 999, 1000; United States v. Mesna, D.C., 11 F.R.D. 86–87; United States v. Jepson, D.C., 90 F.Supp. 983, 985; United States v. Friedland, D.C., 94 F.Supp. 721, 723.

action does not lose its identity merely because it finds itself enmeshed in a statute. The right of trial by jury in an action for debt still prevails whatever modern name may be applied to the action. To hold otherwise would be to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactments. It is by such methods that courts lose their power to enforce the Bill of Rights." United States v. Jepson, D.C., 90 F.Supp. 983, 986. A trial by jury of the issues raised by a claim for treble damages under the act is a matter of right.[22]

The cause was tried on an amended complaint and the answer thereto. Defendant contends that the amended complaint does not state facts sufficient to constitute a cause of action. We have considered the point, and although the amended complaint is not a model pleading, we think the point is without merit. However, in view of the necessity of a retrial, plaintiffs should be permitted to amend if they be so advised.

[11] The judgment was entered on October 5, 1950. On December 20, 1950, the Housing Expediter, acting under the authority of section 204(j)(3) of the Housing and Rent Act of 1947, as amended,[23] decontrolled rents in the city of Los Angeles where the property involved is located.[24] Defendant contends that decontrol "voids the judgment." He relies on the principle that repeal of a statute creating a penalty at any time before final judgment extinguishes the right to recover the penalty.[25] He argues: section 204(j)(3) authorizing the Housing Expeditor to decontrol contained no savings clause; section 204(f), providing for termination of rent control 1) on automatic expiration of the act, 2) by proclamation of the President, or 3) by resolution of both houses of Congress, contained a savings clause that as to rights and liabilities incurred prior to the termination date the act would remain in force for the purpose of sustaining any proper action with respect to any such right or liability; therefore, Congress intended that when a city is decontrolled by the Expediter under section 204(j)(3), existing causes of action fall with the decontrol order. The argument is unfounded. The Supreme Court of the United States has held that the savings clause contained in section 204(f) is applicable to section 204(j)(3) and that an action of this character may be maintained after decontrol by the Expediter.[26]

Other errors assigned by defendant are not likely to occur on a retrial and need not be discussed.

Reversed.

SHINN, P. J., and WOOD, J., concur.

22. United States v. Friedland, D.C., 94 F.Supp. 721, 723–724; United States v. Mesna, D.C., 11 F.R.D. 86, 87; United States v. Jepson, D.C., 90 F.Supp. 983, 984–985; United States v. Hart, D.C., 86 F.Supp. 787, 789; United States v. Strymish, D.C., 86 F.Supp. 999, 1000; 35 Minn.L.Rev. 304.

23. 50 U.S.C.A.Appendix, § 1894.

24. 15 F.Reg. 9238.

25. Lemon v. Los Angeles T. Ry. Co., 38 Cal.App.2d 659, 671, 102 P.2d 387.

26. United States v. Moore, 340 U.S. 616, 71 S.Ct. 524, 95 L.Ed. 582, 585; United States v. Valenzuela, D.C., 95 F.Supp. 363, 365, in which it was held that an action for treble damages could be maintained after decontrol of the city of Los Angeles by the Expediter. See, also, Woods v. Wayne, 4 Cir., 177 F.2d 559, 560; Woods v. Richman, 9 Cir., 174 F.2d 614, 615.

108 Cal.App.2d 325

SHERRARD v. LIDYOFF.

Civ. 18548.

District Court of Appeal, Second District, Division 1, California.

Dec. 26, 1951.

Rehearing Denied Jan. 14, 1952.

Hearing Denied Feb. 21, 1952.

Action by Lillie Sherrard, tenant, against Mary E. Lidyoff, landlord, for personal injuries occasioned by a defect in stairway leading to plaintiff's apartment. The Superior Court, Los Angeles County, Jesse J. Frampton, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Hanson, J., held that in view of the fact that plaintiff knew of defective step in stairway and had notified defendant to make repairs without result, plaintiff could not recover for injuries sustained in fall on step since she had assumed risk of a dangerous condition fully known to her.

Affirmed.

1. Landlord and Tenant ⇐164(1)

In absence of contract, landlord is not liable to tenant for personal injuries caused by defects in demised premises at time of the letting or which thereafter arise when there is no concealment savoring of fraud.

2. Landlord and Tenant ⇐164(3)

Landlord who undertakes for a consideration or gratuitously to repair a defect in leased premises and does so in a negligent manner and thereby creates a new defect, or fails to eliminate existing defect, is not liable to tenant for any injuries resulting therefrom if defect is patent and not latent.

3. Landlord and Tenant ⇐164(2)

Mere failure to make repairs after notice or a promise to do so imposes no tort liability on a landlord to an injured tenant.

4. Landlord and Tenant ⇐168(1)

A tenant, who knew of defective step in stairway leading to her apartment and had notified landlord to make repairs without result, could not recover from landlord for injuries sustained in fall on step since tenant had assumed risk of a dangerous condition fully known to her.

5. Landlord and Tenant ⇐168(1)

Tenant, who failed to exercise statutory right to compel landlord to fix defective step or upon landlord's refusal, to repair step and deduct costs thereof from rent, assumed all risks of personal injury resulting from such defect.

6. Landlord and Tenant ⇐164(3)

General rule that landlord, who gratuitously undertakes to repair a defect in leased premises, is liable for negligence in repairing defect, is limited to cases where landlord has concealed defective condition or has misrepresented the condition to tenant.

7. Landlord and Tenant ⇐168(1)

Where tenant knew of defective step in stairway leading to her apartment and assumed risk of injury inherent therein, question of negligence on part of landlord, in failing to make repairs on demand by tenant, was immaterial in tenant's personal injury action.

E. A. Oppenheim and Ward Sullivan, Los Angeles, for appellant.

Moss, Lyon & Dunn, Sidney A. Moss, and Henry F. Walker, Los Angeles, for respondent.

HANSON, Justice pro tem.

This is an appeal by a tenant from an order granting a non-suit in favor of the landlord in an action for personal injuries occasioned by a defect in the bottom step of a backyard stairway which led to the tenant's apartment and to no other. The tenant occupied the premises with her family upon a month-to-month rental basis. There was no written lease between the tenant and the landlord.

In 1947 a car backed into the lower step of the stairway and broke off a part of the tread-board. Early in 1948 a carpenter employed by the landlord removed the board and substituted another which was cracked its entire length. This fact was observed at the time by the tenant who immediately notified the landlord thereof and demanded that it be repaired. Numer-

ous like demands were made thereafter, but the board was never repaired.

About a year after the split board had been installed the tenant had occasion to hurry down the steps and momentarily forgot the condition of the board. As a consequence she stepped on the center portion of it and not at either end as had been her custom owing to the defect in the board. The board sagged or sprung and as a result the tenant found herself in a sitting position and injured. Prior to this mishap and during the space of a year prior thereto four of her friends who had come to call on her had likewise been thrown "off-balance" by the action of the board, but had sustained no injuries. These incidents were known to the tenant long prior to her own injury.

Upon the facts as stated the initial question is whether the landlord was under a duty to repair the step or to maintain it so as to make it safe or reasonably safe for use by the tenant. In the absence of any such duty it is evident that the forgetfulness of the tenant is not a factor for consideration. Colburn v. Shuravlev, 24 Cal. App.2d 298, 74 P.2d 1060.

[1, 2] In this state it is a well-established principle of law that in the absence of contract a landlord is not liable to the tenant for personal injuries caused by defects in the demised premises at the time of the letting or which thereafter arise when there is no concealment savoring of fraud. Accordingly, if the landlord undertakes for a consideration or gratuitously to repair a defect in the premises and does so in a negligent manner and thereby creates a new defect or fails to eliminate the existing defect he is not liable to the tenant for any injuries resulting therefrom if the defect is patent and not latent. Dorswitt v. Wilson, 51 Cal.App.2d 623, 125 P.2d 626; Daulton v. Williams, 81 Cal. App.2d 70, 183 P.2d 325, 627.

[3, 4] As was said in Dorswitt v. Wilson, 51 Cal.App.2d 623, 125 P.2d 626, 627, the "mere failure to make repairs after notice or a promise to do so imposes no tort liability". Moreover as the case states: "It is not the dangerous condition which renders the landlord liable but its concealment, and the concealment is no longer a factor in the injury to the tenant once the dangerous condition is discovered by him. The conversation of August 29 above quoted makes it clear that plaintiff was as fully aware of the danger as defendant. Passing the question of her contributory negligence, which might possibly be a question of fact, the plaintiff was injured by a condition of which she was as cognizant as the defendant and concealment was no part of its proximate cause. In the language of some of the cases she must be held to have assumed the risk of a dangerous condition fully known to her. Colburn v. Shuravlev, 24 Cal.App.2d 298, 74 P.2d 1060; Priver v. Young, 62 Cal.App. 405, 216 P. 966."

So too in Daulton v. Williams, 81 Cal. App.2d 70, 183 P.2d 325, 327, it is said: "Not having concealed any defective condition from his tenants or positively misrepresented the condition of his tenement, a landlord is not liable to his tenant for injuries due to a defective condition or faulty construction."

[5, 6] In this case it is plain from our recital of the facts that the dangerous defect in the board of which the tenant complains was known to her at the time the new board was installed. If, as appellant contends, the board was unsafe for her use, she was given a statutory right to make a demand upon the landlord to further repair it and if the landlord failed to do so within a reasonable time she was vested with a right to have it repaired and to deduct the cost thereof from her ensuing monthly rental payment. Having failed to avail herself of this statutory right she thereafter assumed all of the risks of personal injury which might thereafter result to her from its negligent reconstruction. The general rule that a landlord who gratuitously undertakes to repair a defect in the leased premises, is liable for negligence in repairing the defect, is restricted in its sweep in this state by the statute mentioned.

[7] Even if we were to hold the statute inapplicable, we would yet be compelled to

hold under well-established precedents in this state that the plaintiff assumed the risk of the defect which was at all times known to her and for that reason it is immaterial whether the defendant was or was not negligent. In short, negligence is a false quantity in a case such as we have here.

The order and judgment are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; CARTER, J., dissenting.



108 Cal.App.2d 431

PEOPLE v. LAVANDERA.

Cr. 4708.

District Court of Appeal, Second District, Division 3, California.

Dec. 27, 1951.

George Breceda Lavandera was convicted in the Superior Court of Los Angeles County, William B. Neeley, J., of escape, and he appealed. The District Court of Appeal, Shinn, P. J., held that the confinement from which defendant escaped had been legally imposed.

Affirmed.

1. Infants ⇐68

The Welfare and Institutions Code section restricting jurisdiction of courts over juveniles must be read together with following section, relating to referral to juvenile court, as entire enactment, and, thus read, enactment does not invalidate trials of defendants under eighteen at time of alleged offense, even in absence of referral to juvenile court, where trial court has determined from evidence in preliminary investigation that defendant is over eighteen. Welfare and Institutions Code, §§ 825, 826; Pen.Code, § 1368.

2. Judgment ⇐498

Where jurisdiction depends upon a factual condition, the existence of which must be found by court before further proceedings are had, and in regular manner it is found that the condition does exist, court has authority to proceed, and an erroneous determination, if reversible on appeal, is not subject to collateral attack.

3. Infants ⇐68

Where defendant, in justice court prosecution for petty larceny, represented that he was nineteen years old but was in fact only eighteen years of age and court took his statement to be true, referral of the case to the juvenile court was not required. Welfare and Institutions Code, §§ 825, 826.

4. Escape ⇐4
Infants ⇐68

Where justice court tried and convicted an eighteen year old defendant of petty larceny, after defendant represented to court that he was nineteen years old, confinement for the crime was legal and escape therefrom constituted a felony. Welfare and Institutions Code, §§ 825, 826.

Gloria Farquar, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

George Lavandera was convicted of petty theft in the Justice Court of San Jose Township, Los Angeles County, and sentenced to the County Jail. On his eighteenth birthday, he escaped from the Los Angeles County Wayside Honor Rancho, a facility of the County Jail. He was later apprehended, tried, convicted and sentenced to San Quentin for the felony of escape. He appeals from the judgment and an order denying his motion for a new trial. There is no dispute as to the facts, the sole issue being the legality of the confinement from which defendant liberated himself. It is not questioned by the People that defendant was under eighteen years at the time the offense of petty theft occurred. Since the justice court did not refer his case to the juvenile court, defendant contends that his conviction and confinement

were void and the escape lawful. No appeal was taken from the conviction of petty theft. The fact the defendant was under eighteen at the time of the offense was first brought out in his trial for escape.

[1] In a brief which evidences great industry and extensive research upon the part of his counsel, defendant relies on what he claims to be a clear and absolute legislative command that no court has jurisdiction to try a person under eighteen without first referring the matter to the juvenile court. This contention is based on section 825 of the Welfare and Institutions Code which reads: "No court shall have jurisdiction to try the case of any person under the age of eighteen years at the time of the alleged commission of a public offense or crime unless the matter has first been submitted to the juvenile court by petition as provided in Article 7 of this chapter, or by certificate of any other court as provided in this article, and said juvenile court has made an order therein directing that such person be prosecuted under the general law." A reading of this section alone might lead to a conclusion that even though the trial court after taking evidence had determined a defendant to be eighteen or over there could be no valid trial without a referral to the juvenile court if defendant was actually under eighteen. It is necessary, however, to look beyond section 825 and read it with the following section as an entire enactment. Section 826 provides that whenever it is suggested or appears to the trial judge that the defendant was under eighteen, "he shall examine into the age of such person, and if, from such examination, it appears to his satisfaction that such person was at the date the offense is alleged to have been committed under the age of eighteen years, he shall forthwith certify [the matter] to the juvenile court * *." Section 826 governs in the matter of referral to the juvenile court; section 825 to cases that are or should have been referred. The court having jurisdiction over the crime and person may proceed unless after the court's investigation it appears to the satisfaction of the trial judge that the defendant was under eighteen at the date of the offense. The fact as to age must at this preliminary stage of the proceeding be determined in order that the case may proceed in accordance with the finding of the trial judge. If the finding is in error jurisdiction is not for that reason defeated.

[2] Where jurisdiction depends upon a factual condition, the existence of which must be found by the court before further proceedings are had, and in regular manner it is found that the condition does exist, the court has authority to proceed, and an erroneous determination, even if reversible on appeal, is not subject to collateral attack. Matter of Maginnis, 162 Cal. 200, 206, 121 P. 723; Ex parte Williams, 87 Cal. 78, 24 P. 602, 25 P. 248; 49 C.J.S., Judgments, § 427, page 849. If an accused minor has been accorded his procedural rights under section 826 and is tried, convicted and committed without certification to the juvenile court, the fact that he may have been under the age of eighteen years at the time his offense was committed does not render his confinement unlawful. Cf. People v. Oxnam, 170 Cal. 211, 149 P. 165; In re Bastiani, 81 Cal.App. 294, 253 P. 951. The preliminary inquiry as to the age of a minor is not unlike an inquiry as to the present sanity of an accused. Although section 1368 of the Penal Code gives an accused a right to a trial of his present sanity it is conditioned upon the existence in the mind of the trial judge of a doubt as to the sanity of the defendant. People v. Perry, 14 Cal.2d 387, 399, 94 P.2d 559, 124 A.L.R. 1123; People v. Lindley, 26 Cal.2d 780, 789, 161 P.2d 227. In the case of a minor referral is not required unless it appears to the satisfaction of the judge that the accused is under eighteen years of age.

[3,4] Here it is shown that in the Justice Court defendant represented to the court that he was nineteen years of age. His statement was taken as true and therefore the judge was not satisfied that he was under eighteen. Reference to the juvenile court under section 826 would have been unjustified. Defendant was

properly tried in the Justice Court. His confinement was legal and his escape from custody constituted the offense of which he was convicted.

The judgment and order are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



108 Cal.App.2d 392

McCORD CO. v. PLOTNICK et al.

Civ. 18390.

District Court of Appeal, Second District, Division 2, California.

Dec. 27, 1951.

Rehearing Denied Jan. 16, 1952.

Hearing Denied Feb. 21, 1952.

Action by McCord Co., a California corporation, against Ben Locker and West Coast Textile Association, and others, to restrain defendants from copying items from plaintiff's newspaper for publication and for damages for the alleged diversion of plaintiff's customers. The Superior Court, Los Angeles County, R. R. Sischo, J., rendered judgment for plaintiff and named defendant appealed. The District Court of Appeal, Per Curiam, held, inter alia, that the evidence sustained finding that defendants were competitors of plaintiff.

Affirmed.

1. Trade-Marks and Trade-Names and Unfair Competition ⇐93(3)

In action by newspaper publisher to restrain defendants from copying items from publisher's newspaper for publication, evidence sustained finding that defendants were competitors of publisher.

2. Trade-Marks and Trade-Names and Unfair Competition ⇐68(7)

Fact that newspaper publisher could have copyrighted its material, but had failed to do so, did not give defendants right to copy items from publisher's newspaper for publication.

3. Trade-Marks and Trade-Names and Unfair Competition ⇐68(7)

Fact that there was no fraud or deception on part of defendant in copying items from plaintiff's newspaper, did not give defendant right to copy such items for publication.

4. Trade-Marks and Trade-Names and Unfair Competition ⇐68(1)

In equity, if that which complainant has acquired fairly at substantial cost may be sold fairly at substantial profit, it has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience.

5. Trade-Marks and Trade-Names and Unfair Competition ⇐93(1)

In action for injunctive relief against unfair competition it is unnecessary to prove that defendant's conduct was fraudulent. Civ.Code, § 3369.

6. Trade-Marks and Trade-Names and Unfair Competition ⇐93(3), 100

In action by newspaper publisher to restrain defendant from copying items from publisher's newspaper for publication, trial court's finding of non-existence of laches was supported by evidence and would not be disturbed on appeal.

Jacob Chaitkin, Pasadena, and Rose Hemperly, Los Angeles, for appellants.

Irving M. Walker, John L. Martin and Mark Mullin, all of Los Angeles, for respondent.

PER CURIAM.

From a judgment in favor of plaintiff in an action for unfair competition, defendants appeal.

Plaintiff publishes, five times a week at three points on the Pacific Coast, a newspaper known as McCord's Daily Notification Sheet containing credit items of interest to banks, collection agencies, mercantile firms and other businesses. The information is collected by employees and correspondents. Plaintiff also publishes five times a week a textile edition of its news-

paper containing those items from its general edition which are of interest to the textile trade in Southern California. The cost of these publications averages $10,000 monthly.

Defendant Ben Locker is the president of defendant West Coast Textile Corporation which publishes three times weekly to its subscribers a paper called "Credit Briefs." The instant action was instituted to restrain defendants from copying or pirating items from plaintiff's newspaper for publication in Credit Briefs, and for damages for the alleged diversion of plaintiff's customers.

The only question raised by the appeal is whether the decision of the United States Supreme Court in International News Service v. Associated Press, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211, is determinative of the issues in the instant action or whether, as contended by defendant, there are basic factual differences in the two cases which render that decision inapplicable.

In the cited case the parties were competitors in the gathering and distributing of news to newspapers throughout the United States. The International News Service took news from bulletins and early editions of eastern newspapers serviced by Associated Press and telegraphed it for publication in western papers served by the former, with the result that because of the time differential and other factors the pirated news was in the hands of International News Service readers simultaneously with the service of its competitor, and occasionally even earlier. In holding such practice to be unfair competition the court said: "In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself and a court of equity ought not to hesitate long in characterizing it as unfair competition in business." 248 U.S. at page 239, 39 S.Ct. at page 72.

Defendants maintain that (1) they are not competitors of plaintiff; (2) plaintiff could have copyrighted its material; (3) there is no element of fraud and deception and that these factual differences in the instant case make the principles of the International News Service case inapplicable.

[1] Defendants admit that both parties publish credit information of interest to the textile trade but assert they could not be competitors because plaintiff's textile edition carries ten times the number of items appearing in Credit Briefs and defendants offer other services not furnished by plaintiff such as checking credits, collecting accounts and publishing a Buyers Directory. Such contention is untenable. A salesman employed by plaintiff testified that he called upon 400 to 500 firms soliciting subscriptions to plaintiff's textile edition; that he was informed "they did not need our service because they had a similar service to ours" which was Credit Briefs of the West Coast Textile Association. This evidence sustains the finding that plaintiff and defendants are competitors.

It is undisputed that defendants copied items from plaintiff's publication which they published in their Credit Briefs. Defendant Ben Locker testified they did not have any representatives or agents working in Los Angeles collecting credit information on their behalf and that they had no correspondents outside the County of Los Ange-

les who examined court records. Defendants took material acquired by plaintiff as the result of organization and the expenditure of labor, skill and money and appropriating it without expense on their part, offered it to their subscribers as their own, diverting customers from plaintiff to themselves.

[2–5] Also without merit is defendant's contention that because plaintiff could have copyrighted its material and because there is no evidence of fraud or deception there is a fundamental distinction between the instant case and that of the International News Service. In the latter decision the court stated it was not a question of property in news matter at common law or the application of the Copyright Act upon which the case turned but upon the question of unfair competition in business. In a court of equity "if that which complainant has acquired fairly at substantial cost may be sold fairly at substantial profit, a competitor who is misappropriating it for the purpose of disposing of it to his own profit and to the disadvantage of complainant cannot be heard to say that it is too fugitive or evanescent to be regarded as property. It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience." 248 U.S. at page 240, 39 S.Ct. at page 73. The court further pointed out that in addition to the misappropriation there were elements of false pretense and false representation but those elements, although they accentuate the wrong, are not the essence of it. Defendant Locker admitted they had been copying items from plaintiff's publication for the past fifteen years; that they had not subscribed to it because he had been informed that plaintiff would not sell its publications to West Coast Textile Association. Moreover, in an action for injunctive relief against unfair competition it is unnecessary to prove that defendant's conduct was fraudulent since Civil Code section 3369 declares that unfair competition shall "include unfair *or* fraudulent business practice". Wood v. Peffer, 55 Cal.App.2d 116, 124, 130 P.2d 220, 225.

[6] Defendants also assert that the award of damages was barred by plaintiff's laches since it had knowledge and proof that defendants were copying items appearing in the McCord publication as early as 1944, but at no time did plaintiff object or notify defendants to desist; the first intimation they had of any objection on the part of plaintiff was the filing of the suit whereupon defendants immediately discontinued their practice and subscribed to other agencies. Plaintiff's witnesses testified that because of the similarity in style of the credit items appearing in their publication and in defendants' Credit Briefs it had reason to suspect for some time that defendants were pirating these items. However, there is no evidence that plaintiff had legal proof of defendants' piracies until after the lapse of a period of time during which fictitious items were inserted in its publication which thereafter appeared in Credit Briefs. Approximately two months later plaintiff filed this action. The finding of the existence or nonexistence of laches by the trial court from substantial evidence will not be disturbed. Austin v. Hallmark Oil Co., 21 Cal.2d 718, 734, 134 P.2d 777.

Finally defendants contend that the damages are unfair and inequitable. Plaintiff and defendants are the only publishers in this area of a publication containing credit information of interest to the textile trade. Plaintiff's witness testified he had a definite recollection of having contacted 105 firms which informed him they were not interested in subscribing to the McCord publication because they were subscribers to Credit Briefs; that he had called upon 300 or 400 other firms, of which he had no specific or independent recollection, which told him they did not need plaintiff's service because they had a similar service which they stated was Credit Briefs. Such evidence supports the finding of the court as to the amount in which plaintiff was damaged.

Judgment affirmed.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

108 Cal.App.2d 447

PEOPLE v. IRISH.

Cr. 2301.

District Court of Appeal, Third District, California.

Dec. 27, 1951.

Gail Irish was convicted in Superior Court of Humboldt County, C. L. Christensen, Jr., J., of offense of kidnapping and of offense of sex perversion and defendant appealed. The District Court of Appeal, Schottky, J. pro tem., held that the evidence was sufficient to sustain the convictions.

Judgment affirmed.

1. Kidnapping ⇐5
Sodomy ⇐6

Convictions for kidnapping and sex perversion were sustained by evidence. Pen.Code, §§ 207, 288a.

2. Criminal Law ⇐730(3)

Prosecuting attorney's repeating of a proper question to complaining witness as to identity of defendant was not prejudicial misconduct where jury was instructed to disregard last question along that line.

3. Criminal Law ⇐1171(3)

Prosecuting attorney's argument to jury as to what a man of 33 was doing with high school kids and why he should be giving a party in which drinks were served was not prejudicial misconduct in view of evidence.

Chester Monette, Eureka, for appellant.

Doris H. Maier, Wallace Colthurst, Deputies Atty. Gen., for respondent.

SCHOTTKY, Justice pro tem.

The appellant was charged with a violation of sections 288a and 207 of the Penal Code. Following his plea of not guilty a jury returned a verdict of guilty on both charges. Judgment was entered, the sentences to run concurrently. This appeal is from the verdict, the judgment, an order denying a motion for a new trial and an order denying probation.

Appellant makes two main contentions: (1) That the evidence is insufficient to sustain the verdicts and judgment; and (2) that the district attorney was guilty of prejudicial misconduct.

A brief summary of the evidence as shown by the record is as follows:

The complaining witness is a girl, 16 years of age, who resides in Samoa, Humboldt County. The alleged assault upon her occurred on February 11, 1951. On that day, a Sunday, she and her two brothers and a neighbor boy came to Eureka on the afternoon boat to attend a movie. After the movie it was necessary to wait for approximately one hour for the boat on the return trip home. During this interval the complaining witness had some coffee at Hinch's restaurant, met some girl friends, and circulated around the town. During the course of her travels a girl friend introduced her to appellant Irish. She missed the five o'clock boat, and returned to Hinch's restaurant. The appellant and some boys joined her there. Her brothers returned home on the five o'clock boat.

As to events following, the complaining witness testified that she left Hinch's, unaccompanied, for the boat dock some five blocks away; that as she arrived at the dock the boatman hollered "All aboard;" that appellant came up behind her and hollered "No," stating to her that he had a knife and if she knew what was good for her she would keep walking and keep her mouth shut; that he walked behind her and alongside her to Mom's Cafe; that she did not see the knife but felt something in her back; that appellant unlocked the door of the cafe, and at this point she tried to scream, but appellant clamped his hand over her mouth and pushed her inside; that she told appellant her mother was expecting her, and the appellant had her call home and inform her mother that she was going to a party; that her mother refused to give permission; that appellant then had her call and inform her mother that she had missed the boat, and on this call the mother consented to her going to the party, but told her to be home by nine o'clock; that appellant then informed her that it was all a joke, and some of the kids would arrive in a few minutes for a

party; that appellant offered her cigarettes and liquor; that she refused them and appellant spilled a drink on her suit; that appellant went around the counter and got a long gun, placed it against her stomach, turned off the light, and ordered her to stand up; that he forced her behind a partition and shoved her on a bed; that at this point she was crying and screaming, and appellant slapped her; that thereafter appellant committed the acts prohibited by section 288a.

The testimony of the complaining witness was corroborated in certain particulars. After the alleged assault upon her at Mom's Cafe she returned to Hinch's restaurant. Witnesses Dolly and Shirley Seigrest found her in the rest room of the restaurant around eight o'clock. These witnesses testified that she was crying, nervous and shaken up. She informed them of her encounter with appellant, and witness Walkow took her home in his automobile. This witness testified that she was "roughed up, shaken and scared." She arrived home around ten o'clock and immediately complained to her parents. The boatman, witness Crowell, testified that he saw the girl approach the boat landing around six o'clock, and that he was waved on by a man standing near her.

The appellant testified that he met the complaining witness and her girl friend on the street around six o'clock; that he again met her around seven-thirty and she accompanied him to Hinch's restaurant for a cup of coffee; that upon arriving at the restaurant she went to the rest room and did not return; that he waited for some twenty minutes and then departed for the theater; that he did not see her again that night. Defense witness Welcome Guest testified that appellant came into the Lucky Barrel, a tavern, "somewhere between six and eight o'clock. Aside from that it would be hard to remember." Witness Womack testified that he saw appellant "about twenty to seven or a quarter to seven, somewhere in there to about seven-fifteen." Witness Sherrill testified that he saw appellant at Hinch's restaurant about a quarter after six o'clock.

[1] It is apparent from the foregoing summary of the evidence that there is little merit in appellant's argument that it is insufficient to support the verdicts and judgment. Appellant's argument only emphasizes the conflicts in the testimony, and it was for the jury to decide which witnesses were telling the truth or what testimony was to be believed. Our function as an appellate tribunal is only to decide if there is sufficient testimony to support the judgment. Because of the seriousness of the offenses charged we have read the record carefully and have concluded that there was ample evidence to support the judgment of conviction.

[2] Appellant contends that the prosecuting attorney was guilty of prejudicial misconduct in asking the complaining witness numerous times if appellant was the person she saw at the boat dock. Appellant's counsel objected on the ground that the questions were repetitious. The objection was sustained and the jury instructed to disregard the last question along that line. The appellant argues that despite the instruction by the court, "the damage was done, and the passion of the jury incited." We are unable to understand how appellant could have suffered prejudice from the repeating of a proper question which had been asked before.

[3] It is also contended that the prosecuting attorney was guilty of misconduct by stating the following in his argument to the jury: "All I can ask you is * * * what would a man thirty-three years old, as is testified to, be doing with high school kids and associating with high school kids. Why would he be giving a party in which drinks been given?" Appellant's counsel objected to the argument upon the ground that it misquoted the evidence. The court instructed the jury that the arguments of counsel were not evidence in the case.

The record shows that appellant's age was 33; that many of the persons involved, including the complaining witness, were high school students and minors; the complaining witness testified that she was informed by appellant that the kids would

come to Mom's Cafe for a party and she also testified that he spilled a drink on her; and the witness Kenny Sherrill, aged 16, called by appellant, testified that on New Year's eve there was a party at appellant's cafe at which other kids were present and at which drinks were served. We are therefore unable to agree with appellant's contention that the district attorney was guilty of prejudicial misconduct.

In view of the foregoing we conclude that appellant was accorded a fair and impartial trial, that the record fully supports the verdicts of the jury, that no prejudicial error was committed, and that the judgment and orders appealed from should be and the same are hereby affirmed.

PEEK and VAN DYKE, JJ., concur.



108 Cal.App.2d 488

McKEE v. McKEE.

Civ. 18582.

District Court of Appeal, Second District, Division 3, California.

Dec. 28, 1951.

Action by Geraldine D. McKee against Raymond W. McKee. From an order of the Superior Court of Los Angeles County, Harold W. Schweitzer, J., assigned, reducing plaintiff's allowance for support from $165 to $90 per month, she appealed. The District Court of Appeal, Shinn, P. J., held that where defendant had estimated monthly income of $786.38 and monthly expenditures of $874.82, including a monthly payment of $315.25 on an avocado grove belonging to his second wife, and plaintiff had a monthly income of $204.30 after deductions, reduction of wife's allowance for support from $165 to $90 was not an abuse of discretion.

Affirmed.

1. Divorce ⇐245(3), 286

Whether husband was entitled to reduction of wife's monthly allowance for support was within discretion of trial judge and not for reviewing court.

2. Divorce ⇐245(3)

Where husband had estimated monthly income of $786.38 and monthly expenditures of $874.82, including a monthly payment of $315.25 on an avocado grove belonging to his second wife, and his divorced wife had a monthly income of $204.30 after deductions, reduction of divorced wife's allowance for support from $165 to $90 was not an abuse of discretion.

Hill, Farrer & Burrill, William S. Scully and John E. Anderson, Los Angeles, for appellant.

Edwin C. Boehler and Francis R. Dwyer, Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an appeal by plaintiff wife from an order reducing her allowance for support from $165 per month to $90 per month. The parties were divorced in 1947; the decree incorporated a property settlement agreement under which plaintiff received certain property and defendant agreed to pay her $165 per month; in 1949 the allowance was voluntarily reduced to $150 per month. It is not contended that the court had no power to reduce the allowance—only that it was an abuse of discretion to reduce it.

The briefs are but a repetition of arguments which, presumably, were made to the trial court. They deal at length and in detail with the finances of the parties, their necessities and their personal habits. Plaintiff contends that defendant's finances, as compared with his necessities, are in better shape than they were in 1947, or 1950, while defendant argues that the reverse is true. Defendant has taken a new wife; they have one child and at the time of the hearing were expecting another.

Plaintiff summarizes defendant's income and expenses, as defendant computes them, as follows: Salary $10,000, estimated bonus $750; deductions for income tax, etc. $1,314.40, leaving $9,436.60, or a monthly income of $786.38; monthly expenses claim-

ed by defendant $874.82, leaving a monthly deficit of $88.44. But, plaintiff says, $315.25 of defendant's monthly expenses consist of principal and interest payments on an avocado grove that is in the name of the present Mrs. McKee, and other expenses of the grove, and should not be deducted in computing defendant's net income. Therefore, under plaintiff's theory, the court should have concluded that defendant has available for plaintiff's support the sum of $162.81 per month. The grove is claimed by plaintiff to have an equity value of $19,000.

According to defendant's calculations his "take home" pay is but $693.70 per month and his necessary expenses $739.57. The estimated bonus is problematical, he says, and is applicable to an indebtedness of $3,000 which he owes his employer. The equity in the grove is computed at $12,000 instead of $19,000, and it is heavily encumbered. Defendant and his present wife own household furniture and appliances not fully paid for, and defendant owns an old automobile. He testified that his finances went behind some $5,800 during 1947–50.

Plaintiff is employed as a typist and receives, after deductions, $204.30 per month. Her mother lives with her in an apartment and pays $40 per month toward the rent of $100 and living expenses. Plaintiff has no dependent. She has on hand $6,501.84.

It is clear from the evidence that each of the parties experiences difficulty in making ends meet from current income. Their gross salaries, which are not meager, appear in a different aspect after income taxes, social security taxes, unemployment insurance taxes and hospitalization and group life insurance charges are deducted. Other factors, including innumerable and varied taxes, which contribute to the high cost of living, have materially impaired the finances of both parties and brought hardships to them which are common to all those who live as best they can on fixed salaries.

[1, 2] Adjustment of support money in such circumstances as meet the parties before us is one of the most difficult and baffling problems which confront a trial judge. But it is his problem. Time and again it has been emphasized that a reviewing court does not have the discretion in such matters that is vested in the trial judge. The court here was not required to maintain plaintiff's allowance at an amount that would impair defendant's ability to maintain his second wife and children. Lamborn v. Lamborn, 80 Cal. App. 494, 251 P. 943. The major complaint is that defendant is spending money on the avocado ranch which belongs to his present wife. They were not shown to be unnecessary expenditures; upon the contrary, defendant is making an effort to place the ranch on a paying basis and thus increase the family income. It does not appear that it was an abuse of discretion, nor even unwise, for the trial court to give tacit approval to this effort. An allowance of $90 per month is not unreasonable in view of the present circumstances of the parties. The reduction to that amount was not an abuse of discretion.

The order is affirmed.

VALLÉE and PARKER WOOD, JJ., concur.



108 Cal.App.2d 491

PEOPLE v. NEAL.

Cr. 4684.

District Court of Appeal, Second District, Division 3, California.

Dec. 28, 1951.

Hearing Denied Jan. 24, 1952.

Peter Neal was convicted in the Superior Court of Los Angeles County, Barnes, J., of violating statute prohibiting the committing of a lewd or lascivious act upon a child under age of fourteen years, and was sentenced to a term in prison by Thomas J. Cunningham, J., after defendant's return from hospital to which defendant had been committed as a sexual psychopath, and defendant appealed. The District Court of Appeal, Wood,

J., held that order sentencing defendant to prison was an order made after judgment affecting substantial rights of defendant and was an appealable order.

Order in accordance with opinion.

1. Criminal Law ⇐1023(11)

Judgments requiring imprisonment of a defendant for violating statute prohibiting committing of a lewd or lascivious act upon a child under age of fourteen years were appealable although execution of sentences was suspended. Pen.Code, § 288.

2. Criminal Law ⇐982

Under statute relating to probation, the granting of probation is within sound discretion of trial court, but it is mandatory that court hear and determine application for probation. Pen.Code, § 1203.

3. Criminal Law ⇐1023(12)

Where judgment requiring defendant to be imprisoned for violation of statute prohibiting committing of lewd or lascivious act upon a child under age of fourteen years was entered and became final, and defendant applied for probation, and defendant was subsequently adjudged a sexual psychopath, and after defendant's return from hospital to which defendant was committed defendant's counsel argued that defendant was rehabilitated and that probation should be granted, and trial judge failed to rule upon application for probation although defendant was entitled to ruling, a second judgment sentencing defendant to prison was an order made after judgment affecting substantial rights of defendant and was an appealable order. Pen. Code §§ 288, 1203, 1237.

4. Criminal Law ⇐981(1)

Where defendant convicted of violating statute prohibiting committing of a lewd or lascivious act on a child under age of fourteen years was committed to state hospital as being a sexual psychopath, and defendant was returned from hospital to Superior Court, and certificate made by hospital superintendent and approved by Director of Department of Mental Hygiene recited that defendant would not benefit by further treatment in hospital and was not a menace to health and safety of others, action of trial court in sentencing defendant to prison rather than returning defendant to jurisdiction of Department of Mental Hygiene was not error under statute. Pen.Code, § 288; Welfare and Institutions Code, §§ 5517(b, c), 5518.

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged in two counts with violation of section 288 of the Penal Code. It was alleged in the information that he had been convicted previously of violating said section. Trial by jury was waived. On June 10, 1949, he was convicted on both counts, and his request for permission to file an application for probation was granted. The date set for pronouncing judgment, for a hearing on the application for probation, and for "the determination of the prior conviction," was July 7, 1949.

On said July 7th, the defendant appeared and filed his affidavit of sexual psychopathy; the court found that the allegation of a prior conviction was untrue, then pronounced judgment that the defendant be imprisoned in the state prison for the term prescribed by law as to each count, and suspended execution of the sentences. Trial by jury was waived as to the issue of sexual psychopathy. On said July 7th the hearing as to sexual psychopathy was had, and the court found the defendant to be a sexual psychopath. Proceedings were suspended and defendant was committed to the Director of Institutions for confinement in Norwalk State Hospital. No determination of defendant's application for probation was made, but the judge who was then presiding (Judge Barnes), signed a statement on the probation report that he had read and considered the report. Defendant was placed in Norwalk State Hospital on July 16, 1949.

On March 21, 1951, defendant was returned to the superior court for further

proceedings, under subdivision (b) of section 5517 of the Welfare and Institutions Code. A certificate, made by the hospital superintendent and approved by the director of the Department of Mental Hygiene, recited that the defendant had been treated to such an extent that, in their opinions he "will not benefit by further care and treatment in the hospital, and is not a menace to the health and safety of others." In the letter, in which said certificate was sent to the court, the said director stated that he approved the recommendation of the hospital staff "that probation appears to be appropriate for this man." On that date defendant appeared without counsel, and the cause was continued to March 23, 1951. On said date defendant appeared with counsel (not his counsel on appeal), and the further proceedings were had before Judge Cunningham (who was not the judge who presided at the trial on the criminal charges and at the hearing on the issue of sexual psychopathy). Defendant's counsel presented arguments to the effect that defendant should be released from custody. His counsel also stated that the record indicated that defendant had been rehabilitated, and he requested that the defendant be granted probation instead of being sent to the penitentiary. The judge stated, in effect, that he did not like to send the defendant to the penitentiary (he was 73 years of age) but, under the circumstances, it was his duty to do so. The minutes of the court recite that the court "pronounces judgment and sentence," and that the defendant is sentenced to the state prison for the term prescribed by law on each count, and is remanded to the custody of the sheriff to be delivered into the custody of the director of corrections. Thereafter on said March 23, 1951, a document entitled "Judgment" was signed by the judge which recited that the defendant had been found guilty, as charged in each count; and that it was ordered that defendant be imprisoned in the state prison for the term prescribed by law as to each count; and that he be remanded to the custody of the sheriff to be delivered to the custody of the director of corrections at San Quentin. No order was made granting or denying probation, and no order at all was made with respect to defendant's application for probation.

The notice of appeal states that defendant appeals "from the judgment rendered on March 23, 1951, from the denial of motion for new trial made on March 23, 1951, and from all proceedings had herein up to and including March 23, 1951."

[1] It is to be noted that judgment was rendered on July 7, 1949, as to each of the two counts. The defendant did not appeal from those judgments and they became final in July, 1949. Even though the execution of the sentences was suspended, the judgments were appealable. See In re Phillips, 17 Cal.2d 55, 58, 109 P.2d 344, 132 A.L.R. 644.

The People assert that the purported appeal from the purported judgment of March 23, 1951, should be dismissed upon the ground that the purported judgment is merely a commitment and is not appealable.

It seems that appellant also regards the purported judgment of March 23, 1951, as an order of commitment and does not consider it to be a judgment of conviction. Appellant contends, however, that said order (committing him to the penitentiary, after his return from the hospital) is appealable for the reason that it "was an order made after judgment" affecting the substantial rights of appellant.

[2, 3] In support of that contention appellant argues that his application for probation, made on June 10, 1949, was not denied; that therefore it was still pending at the time sentences were pronounced on March 23, 1951; and that appellant was entitled to a full hearing on, and a determination of, such application. Section 1203 of the Penal Code provides, in part, that "[i]f probation is not denied, and in every felony case in which the defendant is eligible for probation, before any judgment is pronounced, and whether or not an application for probation has been made, the court must immediately refer the matter to the probation officer to investigate and to report to the court, at a specified time * * *. At the time * * * fixed by the court, the court *must hear and determine*

such application * * * and in connection therewith must consider any report of the probation officer, and *must make a statement that it has considered such report which must be filed with the clerk of the court* as a record in the case. If the court shall determine that there are circumstances in mitigation of punishment * * * or that the ends of justice would be subserved by granting probation * * * the court shall have power in its discretion to place the defendant on probation * * *." (Italics added.) It therefore appears that while the granting of probation is a matter within the sound discretion of the trial court, it is mandatory that the court hear and determine the application for probation. As above shown, on the date set by Judge Barnes for hearing defendant's application for probation, namely, July 7, 1949, appellant was adjudged a sexual psychopath and was committed to the hospital, but no determination of his application for probation was made. Thereafter (March 23, 1951), during the proceedings before another judge (Judge Cunningham), after appellant's return from the hospital, appellant's counsel argued that defendant had been rehabilitated and that probation should be granted. Although the judge indicated that he would deny probation, he made no order denying probation. It does not appear that the judge made a statement that he had considered the report of the probation officer. Under the provisions of section 1203 of the Penal Code, such a statement must be made and filed with the clerk of the court. Defendant was entitled to have his application for probation heard and determined according to the provisions of said section 1203. As above shown, the allegation in the information regarding a prior conviction of a felony was found to be untrue. It does not appear that appellant is ineligible for probation. By reason of the failure of the judge to rule upon appellant's application for probation, the appellant was deprived of a substantial right. The purported judgment rendered on March 23, 1951, is, in effect, an order of commitment under the circumstances herein where judgment had been pronounced previously and had become final. An order of commitment issued, under the circumstances herein, where the appellant's application for probation had not been ruled upon, is an order made after judgment affecting the substantial rights of appellant. Such a commitment is an appealable order within the contemplation of subdivision 3 of section 1237 of the Penal Code which provides that an appeal may be taken from "any order made after judgment, affecting the substantial rights of the party."

[4] Appellant contends further that the court erred in not returning him to the jurisdiction of the Department of Mental Hygiene. He argues that the court was of the opinion that defendant still was a menace to the health and safety of others, and that under the provisions of section 5518 of the Welfare and Institutions Code the court had no alternative but to return him to the state hospital for further treatment. That contention is not sustainable. As above shown, defendant was returned from the state hospital to the superior court under subdivision (b) of section 5517 of the Welfare and Institutions Code. Section 5517 provides that when the superintendent of the hospital and the director of mental hygiene certify to the committing court their opinion, under subdivision (b) of said section 5517 (that the person committed will not benefit by further treatment and is not a menace to the health and safety of others), the said person shall be returned to the court "to await the further action of the court with reference to the criminal charge against him.

"The court shall resume the proceedings * * * and after considering all the evidence before it may place the person on probation * * *." Said sections 5517 and 5518 were construed in the case of People v. Thompson, 102 Cal.App.2d 183, 227 P.2d 272. When a defendant is returned to the court under subdivision (c) of section 5517 (for the reason that he has not recovered from sexual psychopathy and is still a menace to society), the provisions of section 5518 become applicable.

Since there was no motion for a new trial, the purported appeal from an order denying said motion is dismissed. The purported appeal from all other proceedings is dismissed.

The purported judgment or order of commitment of March 23, 1951, is vacated, and the cause is remanded to the superior court with instructions that the court consider and determine appellant's application for probation.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.



108 Cal.App.2d 420

SCHANAFELT v. SEABOARD FINANCE CO.

Civ. 18481.

District Court of Appeal, Second District, Division 3, California.

Dec. 27, 1951.

Hearing Denied Feb. 21, 1952.

Mary Ann Schanafelt brought action against the Seaboard Finance Company, a corporation, for false imprisonment by defendant's agent when he was repossessing furniture. The Superior Court, Los Angeles County, Samuel R. Blake, J., entered judgment for plaintiff and entered order denying defendant's motion for judgment notwithstanding the verdict, and defendant appealed. The District Court of Appeal, Shinn, P. J., held, inter alia, that evidence that defendant's agent had parked his automobile across plaintiff's driveway so as to block exit therefrom and had told plaintiff, who was pregnant, that she must stay in the house until truck arrived to carry away the repossessed furniture established false imprisonment for the period plaintiff remained against her will, though agent had not physically restrained plaintiff.

Affirmed.

1. False Imprisonment ⇐5

A person is falsely imprisoned if he is wrongfully deprived of his freedom to leave a particular place by the conduct of another.

2. False Imprisonment ⇐5

Evidence that finance company's agent, when repossessing furniture, had parked his automobile across delinquent loanee's driveway so as to block exit therefrom and had told loanee, who was pregnant, that she must stay in the house until truck arrived to carry away the repossessed furniture, established false imprisonment for period loanee remained against her will, though agent had not physically restrained loanee.

3. False Imprisonment ⇐5

Words or conduct furnishing a reasonable apprehension on part of one restrained that he will not be allowed to depart is sufficient to support finding of false imprisonment.

4. False Imprisonment ⇐34

Extreme anxiety or emotional distress is a proper element of damage for false imprisonment.

5. False Imprisonment ⇐36

In action by delinquent loanee against finance company for false imprisonment at time of repossession of furniture, evidence sustained award of $500 for compensatory damage.

6. False Imprisonment ⇐31

In action by delinquent loanee against finance company for false imprisonment by defendant's agent when repossessing furniture, evidence was sufficient to support finding that conduct of agent was oppressive so as to justify award of punitive damages. Civ.Code, § 3294.

7. Principal and Agent ⇐123(1)

In action by delinquent loanee against finance company for false imprisonment by defendant's agent when repossessing furniture, evidence was sufficient to show that agent's conduct was authorized by defendant so that finance company was responsible for such conduct.

8. False Imprisonment ⇐36

Where compensatory damages for false imprisonment were assessed at $500,

award of $2,000 exemplary damages was not excessive. Civ.Code, § 3294.

Bromley, Ritter & Lindersmith, A. G. Ritter, H. E. Lindersmith, Los Angeles, for appellant.

Victor C. Rose, Alfred M. Klein, Los Angeles, for respondent.

SHINN, Presiding Justice.

From a judgment after verdict awarding plaintiff $500 compensatory and $2,000 punitive damages for false imprisonment, and from an order denying a motion for judgment notwithstanding the verdict, defendant Seaboard Finance Company appeals. The only ground urged for reversal as to liability and also as to damages, is insufficiency of the evidence.

The evidence which tends to support the verdict may be summarized as follows: Plaintiff was delinquent on a furniture loan made by the main Los Angeles office of defendant Seaboard. Mr. Alexander, assistant manager of the Burbank office of defendant, undertook the task of either collecting the deficiency or repossessing the furniture. After unsuccessful efforts to contact plaintiff Alexander made arrangements with a neighbor to call him when anyone arrived at plaintiff's unoccupied house. In response to a telephone call from the neighbor, Alexander arrived at the home of plaintiff at 11:00 a. m. on June 2, 1949. He parked his automobile so as to block exit from plaintiff's driveway, was admitted to the house by plaintiff's mother and stated his business. Mrs. Schanafelt requested time in which to make the delinquent payments, and Alexander went with her next door where they telephoned the Los Angeles office of Seaboard. Mrs. Schanafelt talked with Alexander's superior officer and the extension of time was refused. Alexander then took the phone and was instructed to call a truck and repossess the furniture. On returning to the Schanafelt home, Alexander informed plaintiff that she must stay there until the truck arrived. His manner was abrupt and gruff. Plaintiff asked if she could leave and Alexander said she could not. Fearing the consequence of contrary action, Mrs. Schanafelt remained. There was no food in the house and although Mrs. Schanafelt complained of hunger Alexander made no offer to procure any for her, although he did get some next door for himself. She asked if she could leave to obtain food and Alexander told her she could not. The truck arrived, backed over plaintiff's lawn and took the furniture about 2:15 p. m. Alexander then left and Mrs. Schanafelt was free to leave the house.

[1–3] Defendant contends that there was no evidence to show that Mrs. Schanafelt had her freedom of movement restrained in any way. This contention appears to be founded on the theory that there must be a restraint of liberty by active force in order to constitute false imprisonment. A person is falsely imprisoned if he is wrongfully deprived of his freedom to leave a particular place by the conduct of another. Although Alexander did not physically restrain plaintiff his conduct effectively prevented her from leaving the house as she desired to do. The house was at the time unoccupied and Mrs. Schanafelt and her mother, who were there only to collect some personal belongings, had completed their work and were ready to leave shortly after Alexander arrived. Their only means of transportation was by automobile and Alexander had parked his car across the driveway for the obvious purpose of blocking exit. Plaintiff concluded from Alexander's attitude that he would not move the car if requested to do so. Plaintiff was pregnant at the time and especially fearful because of her condition, which was known to Alexander. Alexander's conduct, in the light of his motives, was clearly sufficient to support a finding of false imprisonment. Words or conduct furnishing a reasonable apprehension on the part of the one restrained that he will not be allowed to depart is sufficient. 35 C.J.S., False Imprisonment, § 11, p. 511; Vandiveer v. Charters, 110 Cal.App. 347, 294 P. 440.

[4, 5] Defendant further contends that no pecuniary damage was shown and thus the $500 award of compensatory damage was unwarranted. Plaintiff testified she was made nervous and upset by the experience. She had previously lost a child prematurely and experienced great anxiety over possible loss of another as a result of the imprisonment. Such extreme anxiety or emotional distress is recognized in false imprisonment cases as one of the elements of the damage caused by the tortious act. Emden v. Vitz, 88 Cal.App.2d 313, 198 P.2d 696; Rest., Damages, sec. 905, comment (b), p. 543. The award of compensatory damages was reasonable and is amply supported by the evidence.

[6–8] The award of $2,000 punitive damages is challenged upon the ground that no malice was shown and it was not shown that Alexander's conduct was either authorized or ratified by defendant corporation. Section 3294 of the Civil Code provides for punitive damages where defendant has been guilty of oppression. The jury was properly instructed on this subject. The evidence was sufficient to prove that the conduct of Mr. Alexander was oppressive and would have sustained an award of punitive damages against him. It was also sufficient as against the corporation. Alexander was authorized to take necessary means to repossess the furniture. He testified that all that he did was in the usual performance of his duties and was expressly authorized by his employer. He admitted having told plaintiff to remain in the house until the truck came, his explanation being that he wished her to check the articles as they were taken out. Her restraint was deliberate and to serve his purpose and convenience. If this was his customary practice it must have been known to and authorized by those who dictated the collection policies of the corporation. Moreover, it could have been inferred that Alexander was acting under express instructions received over the telephone when he called his superiors. The award of $2,000 exemplary damages was not excessive. Farvour v. Geltis, 91 Cal.App.2d 603, 205 P.2d 424.

The judgment and order denying defendant's motion for judgment notwithstanding the verdict are affirmed.

WOOD, J., concurs.

VALLÉE, J., being disqualified, did not participate.



108 Cal.App.2d 554

ABBEY v. SCHAEFER.

Civ. 4426.

District Court of Appeal, Fourth District, California.

Jan. 4, 1952.

E. R. Abbey, as administrator with the will annexed of the estate of Mortimer F. Babcock, deceased, brought action against Clara T. Schaefer, as executrix of the last will and testament of Cora Cline Babcock, deceased, to recover money in bank account. The Superior Court of Orange County, Franklin G. West, J., entered an order denying defendant's motion for change of venue, and the defendant appealed. The District Court of Appeal, Mussell, J., held that proper place for trial of action was county in which bank account was located and not county of defendant's residence.

Order affirmed.

1. Venue ⇐21

Generally, defendant has right to have certain actions tried in county of his residence, and right of plaintiff to have action tried in another county than that of defendant's residence is exceptional, and if plaintiff claims such right, he must bring himself within the terms of the exception.

2. Executors and Administrators ⇐430

An action cannot be maintained against the personal representative of an estate in his representative capacity for a tort committed by him.

3. Executors and Administrators ⇐436

Where action by administrator against executrix to recover money in bank account was against the executrix in her official capacity and not in her personal capacity, proper place for trial of action was in county where money was located, and not in county of residence of executrix, and executrix' motion for change of place of trial to county of her residence was properly denied. Code Civ.Proc. § 395.1.

4. Venue ⇐72

The right of the moving party to a change of venue depends upon the conditions existing at time demand is made.

5. Venue ⇐72

The parties defendant, as revealed by pleadings existing at time demand for change of venue is made and demurrer is filed are the only parties to be considered on a motion for change of place of trial.

Irl D. Brett, Los Angeles, for appellant.

Ridley C. Smith, Santa Ana, for respondent.

MUSSELL, Justice.

Plaintiff, E. R. Abbey, as administrator with the will annexed of the estate of Mortimer F. Babcock, deceased, commenced this action in Orange county against Clara T. Schaefer, as executrix of the last will and testament of Cora Cline Babcock, deceased, to quiet title to personal property and to recover the sum of $31,433 alleged to be in the possession of the defendant and listed by her as an asset of the estate of Cora Cline Babcock, deceased, in probate proceedings filed in said estate. The funds so listed are the proceeds of bank accounts which were formerly in the joint names of Cora Cline Babcock and Mortimer F. Babcock, and held by them as joint tenants.

Cora Cline Babcock died on April 10, 1950, and Mortimer F. Babcock died on June 4th of the same year. Plaintiff claims all of said money as the sole and separate estate of Mortimer F. Babcock, deceased.

Defendant, Clara T. Schaefer, resides in the county of Los Angeles and appeals from an order denying her motion for change of venue to the county of her residence.

It is alleged in the first cause of action of the complaint, among other matters:

"That the defendant Clara T. Schaefer as Executrix of the estate of Cora Cline Babcock has taken, or is in constructive possession of, the said money in the sum of $31,443.00, and claims the same as a part of the estate of Cora Cline Babcock, deceased, and further claims that plaintiff has no right of possession thereof, and that the estate of Mortimer F. Babcock, deceased, has no right, title or interest therein."

And in the second cause of action:

"That the defendant is indebted to the plaintiff, at and within the County of Orange, State of California, in the sum of $31,443.00 for money had and received by the defendant to and for the use of the plaintiff.

"That no part of said sum of $31,443.00 has been paid though the plaintiff has demanded the same from the defendant."

The prayer is that the defendants be required to set forth the nature of their claims to said money and that they be restrained and enjoined from claiming or asserting any right, title or interest thereto; that it be decreed by the court that said funds were the separate property of Mortimer F. Babcock; that the defendant, as executrix, be ordered to deliver to plaintiff the said funds, and for such other and further relief as to the court may seem meet and proper.

Defendant claims that both causes of action are statements of claims against her personally; that the reference to her as executrix is descriptive and surplusage; that the causes of action are transitory and defendant is entitled to a change of place of trial to Los Angeles county.

[1, 2] The general rule is that a defendant has the right to have certain actions tried in the county of his residence; that the right of a plaintiff to have an action tried in another county than that in which the defendant has his residence is exceptional, and if the plaintiff would claim such right, he must bring himself within the

terms of the exception. Lyons v. Brunswick-Balke, Etc., Co., 20 Cal.2d 579, 584, 127 P.2d 924, 141 A.L.R. 1173; Bybee v. Fairchild, 75 Cal.App.2d 35, 37, 170 P.2d 54. It is also well settled that an action cannot be maintained against the personal representative of an estate in his representative capacity for a tort committed by him. Monahan v. Blossom, 88 Cal.App.2d 951, 952, 199 P.2d 738; Luscomb v. Fintzelberg, 162 Cal. 433, 443, 123 P. 801.

[3] We conclude that the proper place for trial of the instant action is in Orange county by reason of the provisions of Section 395.1 of the Code of Civil Procedure, which reads as follows: "When a defendant is sued in his official capacity as executor, administrator, guardian or trustee, on a claim for the payment of money or for the recovery of personal property, the county which has jurisdiction of the estate which he represents shall be the proper county for the trial of the action."

Unquestionably the action is brought in accordance with the provisions of this section. It is against the defendant in her official capacity as executrix. It is for the payment of money and for the recovery of personal property. The complaint alleges that the defendant, "as executrix" has the possession of the funds in question and claims the same as a part of the estate of Cora Cline Babcock, deceased. There is no allegation that the defendant, individually or personally, misappropriated said funds or converted the property to her own use. It does not appear from the record before us that the defendant was served with process as an individual. She appears by demurrer in her official capacity as executrix and not individually.

[4, 5] The right of the moving party to a change of venue depends upon the conditions existing at the time the demand is made. The parties defendant, as revealed by the pleadings existing at the time the demand is made and the demurrer is filed are the only parties to be considered on a motion for change of place of trial. Kallen v. Serretto, 126 Cal.App. 548, 549, 14 P.2d 917.

The order denying defendant's motion for a change of place of trial is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



108 Cal.App.2d 416

KRUG v. MEEHAN et al.

Civ. 18248.

District Court of Appeal, Second District, Division 3, California.

Dec. 27, 1951.

Action by Milton A. Krug, as special administrator of the estate of James Cleary, deceased, against Rose A. Meehan and others to set aside a conveyance of realty, wherein the named defendant filed a cross-complaint to quiet title to the realty in her. From an order of the Supreme Court, Los Angeles County, Arnold Praeger, J., dismissing the complaint, the plaintiff appealed. The District Court of Appeal, Vallee, J., 235 P.2d 410, dismissed the appeal as premature. Subsequently, after proceedings on an order to show cause why the judgment of dismissal should not be vacated, the District Court of Appeal, Per Curiam, held that since the court's prior dismissal had been based on the false and mistaken assumption that the cross-action involving title to the same property and the same issues as the appealed action had not been dismissed, the court had the inherent power and duty to vacate the former judgment of dismissal.

Vacated.

Appeal and Error ⇐807

Where an appeal was dismissed as being premature because of mistaken assumption that a cross-complaint, involving the same property and the same issues as the appealed action, was still pending, and it later appeared that the cross-complaint had been dismissed prior to appeal, District Court of Appeal had inherent power and duty to vacate its judgment dismissing the

appeal, it appearing that responsibility for mistake rested solely upon respondents' counsel.

Gilford & Mendelson, Los Angeles, for plaintiff-appellant.

Arthur G. Baker, Los Angeles, for defendant-respondent.

PER CURIAM.

The appeal taken by plaintiff in this action was dismissed upon the ground that it was premature, Krug v. Meehan, Cal.App., 235 P.2d 410. As stated in the opinion, the ground of the dismissal was that the record on appeal disclosed that there was on file in the action a cross-complaint to quiet title and answer thereto involving title to the same property and the same issues as the complaint and answer. We held that although the action had been dismissed on motion, for plaintiff's failure to amend his complaint, there had been no final judgment determining the question of title. It was subsequently made to appear to the court that the cross-complaint had been dismissed in July, 1950, upon the written request of the attorney for defendant, respondent herein. Thereupon, issuance of remittitur was stayed and an order was issued to show cause why our judgment should not be vacated, and after due notice the same was heard on affidavits of counsel for the parties. It was known to the court that upon argument of the appeal the court raised the point that by reason of the undetermined issues raised by the cross-complaint and answer thereto as shown by the record on appeal, there had been no final judgment, and it was also known to the court that the attorney for respondent, in the argument, or in his points and authorities subsequently filed as to the suggested premature appeal, did not advise the court or counsel for appellant that the cross-complaint had been dismissed. It was made to appear by affidavit of one of the attorneys for plaintiff that plaintiff's present counsel were substituted for counsel who had tried the case and were unaware of the fact of such dismissal until after our judgment dismissing the appeal. It was made to appear by affidavit of the attorney for respondent that he had forgotten he had caused the cross-complaint to be dismissed, and that the fact was not recalled to his mind until after our judgment dismissing the appeal. Upon the hearing of the order to show cause the attorney for respondent stated that he would not oppose an order vacating our judgment upon the ground of mutual mistake. We need not, however, give heed to this concession in formulating our judgment in the premises.

The appeal was dismissed upon the assumption of a fact by reason of which it was held that the appeal had been taken prematurely. It was a false and mistaken assumption, and, in the view we are presently taking, the mistake was that of the parties, and consequently of the court. Present counsel for appellant were not negligent in the matter. Responsibility for the regrettable mistake rests upon counsel for respondent. The court has not only the inherent power but the duty to vacate its former judgment. Wiggin v. Superior Court, 68 Cal. 398, 9 P. 646; Bastajian v. Brown, 19 Cal.2d 209, 120 P.2d 9; Isenberg v. Sherman, 214 Cal. 722, 725, 7 P.2d 1006; In re Rothrock, 14 Cal.2d 34, 92 P. 2d 634; 5 C.J.S., Appeal and Error, § 1957, p. 1483; 49 C.J.S., Judgments, §§ 265, 275, pp. 478, 495.

The judgment dismissing the appeal is vacated.

108 Cal.App.2d 303

GALL et al. v. UNION ICE CO. et al.

No. 14781.

District Court of Appeal, First District, Division 1, California.

Dec. 21, 1951.

Hearing Denied Feb. 18, 1952.

Lucille E. Gall and Judith Gall, a minor, by and through her guardian ad litem, Lucille E. Gall, sued the Union Ice Company, the Stauffer Chemical Company, the Braun-Knecht-Heimann Chemical Company, corporations, and others, for the death of plaintiffs' husband and father, William T. Gall, Jr., as the result of injuries received when hit by the head of a bursting sulphuric acid drum at defendant ice company's plant. From a judgment of the Superior Court, Santa Clara County, John D. Foley, J., for plaintiffs on a jury's verdict, defendants chemical companies appealed. The District Court of Appeal, Bray, J., held that the questions of defendants chemical companies' negligence in failing to place proper warning labels on sulphuric acid drums were for the jury and that the negligence of defendant ice company's engineer in failing to act after seeing the bulged condition of the drums at such company's plant was not the sole cause of the accident.

Judgment affirmed.

1. Appeal and Error ⇐989, 996, 1001(1)

On appeal from judgment for plaintiffs on jury's verdict, duty of District Court of Appeal as to facts is to determine whether there is substantial evidence, with reasonable inferences therefrom, to support jury's implied findings for plaintiffs.

2. Negligence ⇐134(4, 7)

In action for death of one hit by head of bursting sulphuric acid drum at defendant ice company's plant, evidence substantially supported jury's implied finding that there were no warning labels on drums containing such acid when delivered to ice company by codefendant seller thereof and that such company had neither warning nor knowledge of danger of drums bursting.

3. Negligence ⇐24

One supplying chattel for another's use, directly or through third person, is liable for injury to one whom supplier should expect to use chattel, with consent of person supplied therewith, or to be in vicinity of its probable use by such person, as result of use of chattel in manner intended, if supplier knew or should have realized from facts known to him that chattel was dangerous or likely to be dangerous for such use, had no reason to believe that person for whose use it was supplied would realize its dangerous condition, and failed to exercise reasonable care to inform him of its dangerous condition or of facts making it likely to be dangerous.

4. Negligence ⇐27

A supplier of chattel for another's use owes duty to exercise reasonable care to give users thereof information which supplier possesses and should realize to be necessary to make its use safe for them and those in whose vicinity it is to be used.

5. Negligence ⇐27

When chattel, which is unsafe for any use or for particular use for which it is supplied by one person to another, unless its properties and capabilities are known to user, is supplied to person whom supplier should realize is unlikely to know such properties and capabilities, supplier must exercise reasonable care to give such person information which supplier possesses concerning such matters.

6. Negligence ⇐24

One supplying article for others' use owes duty to exercise reasonable care to inform them of dangers peculiarly within supplier's knowledge in using article, and if he does so, is not liable for injuries caused by their use thereof, though such information never reached them.

7. Negligence ⇐24

A manufacturer must give appropriate warning of any known dangers which user of his product would not ordinarily discover.

8. Negligence ⇐27

The likelihood of accident because of absence of sufficient warning label on dangerous article, supplied by manufacturer thereof for others' use, and seriousness of consequences, are pertinent matters to be

considered in determining whether manufacturer owed duty to provide sufficient label.

9. Negligence ⇐136(18)

Whether producer of sulphuric acid negligently failed to place on, or attach securely to, drums containing acid, labels warning of danger of bursting thereof, when delivered to retailer about ten days before retailer's delivery thereof to corporate purchaser at plant where one of drums burst, causing death of by-stander, was question for jury on conflicting evidence.

10. Negligence ⇐27

The fact that sulphuric acid producer kept retailer, purchasing acid from producer, supplied with extra labels, warning of danger of acid drums bursting, to replace any missing or damaged labels, did not relieve producer of duty to label drums properly.

11. Negligence ⇐24

A producer and seller of sulphuric acid in drums, with knowledge of danger of bursting thereof, unless handled with more than ordinary care, which fact is not generally known, owes duty to give reasonable warning of such danger to those who may reasonably be expected to come into contact with drums.

12. Negligence ⇐24

A producer or seller of sulphuric acid, which he knows to be dangerous if not properly handled, is not relieved from charge of negligence in permitting acid to leave his premises in drums without proper warning labels thereon, merely because of his custom to place such labels on drums.

13. Negligence ⇐24

One supplying others a dangerous chattel to use for any purpose owes duty to exercise reasonable care to inform them of its dangerous character in so far as he knows of such danger or of facts which to his knowledge make chattel likely to be dangerous, if he has no reason to expect that such others will discover its condition and realize danger.

14. Negligence ⇐136(18)

Whether chemical company, selling sulphuric acid in drums to ice company, had no reason to expect that ice company's employees would discover and realize danger of drums bursting, if not kept cool and vented, so as to impose duty on seller to exercise reasonable care to inform them of danger, was question for jury in action for death of by-stander struck by head of bursting drum at ice company's plant.

15. Negligence ⇐61(2)

An ice company's engineer's failure to act to prevent bursting of sulphuric acid drums after seeing bulged condition thereof, which he knew was caused by internal pressure, was not sole proximate cause of fatal injuries to by-stander, struck by head of bursting drum at company's plant, but delivery of drums to ice company by chemical company, which knew they would be likely to burst if not kept cool and vented, without warning ice company of such fact, together with engineer's failure to act, caused accident.

16. Negligence ⇐62(3)

A third person's intervening negligent act is not a superseding cause of injury which another's previous negligent conduct was substantial factor in bringing about, if first actor should have realized that third person might so act or reasonably prudent man, knowing situation when third person's act was done, would not have regarded such act as highly extraordinary.

17. Negligence ⇐136(16, 18, 24)

Whether producer and retailer of sulphuric acid, sold and delivered by retailer to ice company, should have realized that such company's employees would not know of danger of drums containing acid bursting because of internal pressure, if not properly warned thereof, and whether reasonably prudent person, knowing what ice company's engineer knew when he saw bulges in drum which subsequently burst, would not have regarded them as highly extraordinary and done nothing about them, were questions for jury in action for resulting death of by-stander.

18. Negligence ⇐136(18, 24)

Whether producer and retailer of sulphuric acid, sold and delivered by retailer to ice company, should reasonably have expected that drums containing acid would burst, unless they were kept cool and vented, so as to render producer and retailer liable for death of one struck by head of bursting drum at ice company's plant because of their failure to place on or securely attach to drums labels warning users of such danger, was question for jury.

19. Negligence ⇐27

The fact that buyer of sulphuric acid agreed to assume responsibility for damage to persons and property because of handling, storage or use of acid by buyer or third persons, as between buyer and seller, did not justify corporate seller's failure to perform, or assumption that it did not have to perform, its duty to protect third persons from injuries caused by improper handling of acid drums, on which there were no proper warning labels.

20. Negligence ⇐27

The fact that seller of commodity, which he knows is dangerous to handle, obtains from buyer assumption of liability for injuries to others, does not relieve seller of duty to warn buyer who seller does not know to have knowledge of danger.

21. Evidence ⇐378(1)

In action for death of one struck by head of bursting sulphuric acid drum at defendant ice company's plant, trial court did not abuse its discretion, as matter of law, in excluding from evidence a copy of letter which sales manager of codefendant chemical company, from which ice company purchased acid, testified that chemical company sent to all its sulphuric acid customers, calling attention to hazards of such acid, and attached list of such customers, including ice company, in view of statutory provision that record of act, condition or event shall be competent evidence, so far as relevant, if sources of information of witness testifying concerning it and method and time of preparation thereof were such as to justify its admission. Code Civ.Proc. § 1953f.

22. Negligence ⇐126(2)

In action for death of one struck by head of bursting sulphuric acid drum at defendant ice company's plant, testimony of sales manager of codefendant chemical company, from which ice company purchased acid, that ice company's purchasing agent stated that drum burst after being exposed to elements for several months without venting, was properly excluded as irrelevant for intended purpose of showing that ice company knew of necessity for venting and hence was solely responsible for accident notwithstanding absence of warning labels, stating such necessity, on drums.

23. Negligence ⇐125, 126(1)

In action for death of one struck by head of bursting sulphuric acid drum, left in sun and never vented, at plant of defendant ice company, which purchased acid, produced by codefendant, from third defendant, evidence that another drum of sulphuric acid, produced by same defendant and delivered by third defendant to another company in same city, burst on same day after being stored in open, but not vented, was admissible to show propensity of such drums to burst and as bearing on cause of bursting of drum at ice company's plant and question whether seller and producer exercised ordinary care in placing on drums paper warning labels which did not remain thereon with use.

24. Trial ⇐267(1)

The trial court need not give jury instructions in particular language requested by party, but instructions properly covering subject-matter and stating law applicable to case fairly and fully are sufficient.

25. Negligence ⇐138(2)

In action for death of one struck by head of bursting sulphuric acid drum at plant of defendant ice company, which purchased acid, produced by co-defendant, from third defendant, trial court's refusal of producer's and third defendant's offered instruction that law presumes that labels, advising users as to how to care for drums of such acid, were attached thereto if jury found that drums, in ordinary course of business, did not leave producer's and third defendant's plants without such

labels, was error, in view of instructions given and evidence. Code Civ.Proc. § 1963, subds. 1, 20.

26. Appeal and Error ⇐1170(9)

In action for death of one struck by head of bursting sulphuric acid drum at plant of defendant ice company, which purchased acid, produced by one of two defendant chemical companies, from other such company, error in trial court's refusal of chemical companies' offered instruction that if jury found that drums of such acid, in ordinary course of business, did not leave such companies' plants without labels advising users as to how to care therefor, law presumed that such labels were attached to drums, was not prejudicial to chemical companies, in view of evidence of their custom and practice of thus labeling drums. Code Civ.Proc. §§ 1959, 1963, subds. 1, 20; Const. art. 6, § 4½.

27. Death ⇐95(1)

In determining amount of damages for wrongful death, trier of facts should consider fact, of which judicial knowledge may be taken, that purchasing power of the dollar has decreased.

28. Death ⇐85, 88

Though damages recoverable for death of member of plaintiffs' family must be measured by pecuniary loss to plaintiffs, trier of facts, in fixing such loss, is not limited to proof thereof in dollars and cents, but may properly consider pecuniary value of loss of such noneconomic interests of family as comfort, society and protection.

29. Appeal and Error ⇐1004(3)

To upset jury's award of damages for wrongful death by verdict which trial judge, on motion for new trial, found not excessive, District Court of Appeal must find that award was so high as to suggest passion or prejudice.

30. Appeal and Error ⇐1004(3)

A jury's verdict, awarding 35 year old widow and 7½ year old daughter of 35 year old army sergeant, earning $330 per month while on temporary duty as army meat inspector, $100,000 damages for his wrongful death, was not so high as to suggest passion or prejudice, as required for District Court of Appeal to upset award as excessive after trial court's contrary finding on motion for new trial.

Edward J. Niland, Santa Clara, for appellant, Braun-Knecht-Heimann Chemical Co.

Campbell, Hayes & Custer and Robert E. Hayes all of San Jose, Cal. (Frederick W. Mielke, Jr., San Francisco, of counsel), for appellant, Stauffer Chemical Co.

Keith, Creede & Sedgwick, San Francisco, for respondents.

BRAY, Justice.

From a judgment in the sum of $100,000 in favor of plaintiffs based on a jury verdict, all three defendants appealed. Apparently, however, defendant Union Ice Company [1] has abandoned its appeal. Our consideration, therefore, is solely of the appeals of defendants Stauffer Chemical Company [2] and Braun-Knecht-Heimann Chemical Company.[3]

Questions Presented.

In addition to the sufficiency of the evidence as to liability and damages, the main questions are: (1) What is the degree of care required of the producers and sellers of sulphuric acid as regards giving warning to users? (2) What was the proximate cause of the accident?

General Facts.

There is no dispute as to the cause of the accident upon which this action is based. On February 28, 1947, two drums of sulphuric acid were delivered to the San Jose plant of Union. They were purchased by Union from Braun, who, in turn, bought them from Stauffer, the producer. From date of delivery until August 4 the drums were left out in the sun and weather at Union's plant, on which date one of them burst. No one was assigned by Union to care for these drums. They were never

1. Herein referred to as "Union."
2. Herein referred to as "Stauffer."
3. Herein referred to as "Braun."

opened or vented in any way to relieve pressure. When sulphuric acid comes in contact with the steel interior of the drum, it gradually corrodes the metal, producing hydrogen gas and iron sulphate in the process. The gas causes an increase of pressure inside the drum and sooner or later the drum will burst. Heat hastens the process. It is necessary that these drums be kept out of the sun and that about once a week the bungs be opened, thereby releasing the pressure. The drum that burst was badly bulged before it burst. The other drum was also bulging.

Plaintiffs are the widow and daughter of William T. Gall, Jr., deceased. At the time of the accident he was a sergeant in the United States Army on temporary duty at Union, supervising the purchase of meats for the Army, some of which meats were in storage there. He was standing several feet from the drums when the one burst. He was hit by the head of the drum, receiving injuries from which he died two days later. The main factual dispute is whether when delivered these drums were warning-labeled and whether Union had been warned and knew of the dangerous propensities of sulphuric acid in steel drums and how they should be handled.

Were There Warning Labels, and did Union Know of the Danger?

None of the Braun or Stauffer employees testified to the condition of these drums as to warning labels at the time of delivery. It is the custom among manufacturers and sellers of sulphuric acid to place labels on the drums, instructing users not to store them in the sun or near heat and to vent them at least weekly. The Stauffer plant superintendent testified that he personally inspected every drum in the shipping pile to make certain it had the warning label; that no drum of sulphuric acid ever went out of the plant without having a label pasted to it, stating, "Keep the plug up to prevent leakage, do not drop, keep drum out of sun, and away from heat; relieve internal pressure when received and at least weekly thereafter by slowly loosening plug." It was Stauffer's custom and practice to place warning paper labels on the drums with "tin paste." However, concentrated sulphuric acid falling on paper will quickly decompose and disintegrate it, as well as the glue or paste used. One of the experts for Braun and Stauffer testified that in his opinion the burst drum had been bathed in sulphuric acid. Stauffer's shipping department had been instructed that every drum before being sent out was to have the warning label on it. All drums were shipped out by the Clark Drayage Company whose drivers also checked the labels on the drums and called to Stauffer's attention any labels which were torn or mutilated in loading. One of Stauffer's salesmen said he had seen many drums ready for shipment, but had never seen one that was not labeled. Stauffer advises its customers to vent drums at least once a week. It passes on to its customers circulars and instructions received from the Maunfacturing Chemist's Association. Before the war, the district sales manager had prepared a mimeographed sheet condensing the pertinent directions given by the association. This sheet was sent to all Stauffer's customers and is still given to new customers. This stated that drums should be vented weekly by loosening the bung to prevent possibility of explosion. While he was sure one was sent to Braun he could not swear to it. The same applied to a copy of Manufacturing Chemist's Association Manual Sheet D 31 which called attention to the danger of the drum bursting unless internal pressure is periodically vented, and that drums should not be stored in the sun.

The custom and practice of Braun was confined to checking for the labels put on by Stauffer and to replace any which were missing or defaced. The drums are checked for labels when received by the foreman of the warehouse and by the order clerk, and double checked when shipped out. Seldom did a drum come in from Stauffer with the label missing. In checking for labels Braun operated under a number of different regulations and requirements, including those of the Bureau of Explosives, the Federal Caustic Poison Act, 15 U.S. C.A. § 401 et seq., requirements of the State of California on the sale of economic

poisons, the Industrial Accident Commission, and the recommendations of the Manufacturing Chemist's Association. The warehouse personnel is given lists of commodities requiring markings, and a part of their duties is to inspect the packages to be sure that the required markings are shown. Braun's customary procedure was to store sulphuric acid drums in a cool place and vent at least once a week. In 1943 the sales manager had sent to all purchasers of sulphuric acid a letter warning them about the proper methods of handling and storing these drums. Braun's salesman kept instruction warning sheets and handed some of these out to his customers. He did not recall whether he had given any to Union.

Stauffer has been selling these drums of sulphuric acid to Braun for over 30 years. Union has purchased 260 drums from Braun since 1931. Thirty-three were bought in the year of the accident and 48 the year before. Union has 50 to 60 plants in California. At its San Jose plant it used about three drums a year.

The chief engineer of that plant was a member of the safety committee of the plant. About a week before the accident he noticed that the ends of both drums were bulged out. He did not report this although he had noticed that the ends were flat when the drums were received and he assumed that the bulging was caused by some sort of internal pressure. After the accident, the ends of the non-bursted drum were found to be very obviously bulged. Its bung could not be loosened because it had become too corroded with iron sulphate. After the accident no warning labels could be found on either drum. Two labels that were not warning labels were found on the drums. They were badly weathered, mutilated and difficult to read. A metallurgical engineer with extensive experience in the handling of sulphuric acid testified that there was an area on the exploded drum which had the "common appearance of an area bearing a label which has been spattered with sulphuric acid in the glue." It was an area where Stauffer had customarily attached its warning label.

The Union plant engineer to whom the drums were originally delivered testified that while he saw labels on the drums to the effect that when empty they should be returned, he saw no warning labels, nor did he see any during the entire time the drums were there. He looked the drums over to see if they had any stickers giving their weight and was sure there were no warning labels there. Union's chief engineer, who was then working at the San Jose plant, was present at the delivery of the drums and helped roll them off the truck, testified that there were no warning labels on them, just a label having to do with their return when empty. He examined the drums after the accident and found no warning labels. A licensed private investigator and two testing laboratory engineers, examining the drums for warning labels the day after the accident, found none, nor any indication that there had been any. A salesman for Stauffer examined the burst drum and was unable to find trace of any warning label. The words "sulphuric acid" were stencilled in large letters across the end of each drum.

There was no evidence that the Union employees knew of the danger of leaving the drums in the sun and unvented. Chief Engineer Graves, chairman of the plant's safety committee, the assistant foreman, and the assistant chief engineer, all testified that they had never received instructions concerning the danger from nor the method of handling the drums, and did not know of such danger.

[1, 2] Our duty on the factual end of the case is to determine whether there is substantial evidence, together with the reasonable inferences therefrom, to support the implied findings of the jury. The testimony of the two Union employees who were present at the delivery of the drums, together with that of a number of the witnesses who examined the drums after the accident, substantially supports the jury's implied finding that there were no warning labels on the drums at the time of delivery to Union, in spite of the testimony of defendants' witnesses as to the customs of Stauffer, Braun and the delivery company

concerning labeling. Likewise the testimony of the Union employees that they neither knew nor were told about the danger of the drums, constituted substantial support for the implied finding that Union had neither warning nor knowledge of the danger, in spite of the evidence concerning custom of Braun and Stauffer to warn their customers. This brings us to the questions of law.

Duty of Manufacturer and Dealer.

[3-8] The negligence charged against Braun and Stauffer is that they violated the duty of the manufacturer and seller of a dangerous commodity to warn the purchaser of the danger. The rule is stated in Restatement, Torts, p. 1039, § 388: "One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied; (b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so." Comment (c) includes "vendors" as "suppliers." p. 1041. "g. The duty, which the rule stated in this Section imposes upon the supplier of a chattel for another's use, is to exercise reasonable care to give to those who are to use the chattel the information which the supplier possesses and which he should realize to be necessary to make its use safe for them and those in whose vicinity it is to be used. * * * There are many chattels which, even though perfect, are unsafe for any use or for the particular use for which they are supplied unless their properties and capabilities are known to those who use them. If such a chattel is supplied to another whom the supplier should realize to be unlikely to know its properties and capabilities, the supplier is required to exercise reasonable care to give to the other such information thereof as he himself possesses." pp. 1043, 1044. "j. The supplier's duty is to exercise reasonable care to inform those for whose use the article is supplied of dangers which are peculiarly within his knowledge. If he has done so, he is not subject to liability, even though the information never reaches those for whose use the chattel is supplied. The factors which determine whether the supplier exercises reasonable care by giving this information to third persons through whom the chattel is supplied for the use of others, are stated in Comment 1." p. 1048. Comment 1 indicates the necessity of a warning label where practical. "The courts have frequently ruled that a manufacturer must give an appropriate warning of any known dangers which the user of his product would not ordinarily discover. * * * The likelihood of an accident taking place and the seriousness of the consequences are always pertinent matters to be considered with respect to the duty to provide a sufficient label. See Rest., Torts, §§ 291, 388, comment 1, pp. 1051–1052; § 397, comments (b–d). Defendant knew of all the perils involved, and it was for the jury to determine whether defendant should have foreseen that workers in the tool company's shop might fail to take all necessary precautions to avoid contamination in the absence of a warning. On the other hand, the jury could properly conclude that without such a warning label neither Tingey nor any other tool company employee was bound to anticipate that there would be a violent chemical reaction or explosion upon the mixing and heating of the two sales * * *." Tingey v. E. F. Houghton & Co., 30 Cal.2d 97, 102, 103, 179 P.2d 807.

Stauffer's Negligence.

[9, 10] Stauffer contends, in addition to the contentions also made by Braun, that there was no evidence of negligence on its part, pointing out that there is no direct evidence of the condition of the drums as to labeling when delivered to Braun about ten days prior to their delivery by Braun to Union. As hereinbefore set forth, there

was positive evidence that there were no warning labels on the drums when received at Union nor any indication that there ever had been any. True, one witness testified that after the explosion he saw indications on one of the drums that it had been warning-labeled. That, however, merely created a conflict in the evidence which it was the duty of the jury to resolve. The fact that ten days later there were no warning labels or indications of them on the drums, particularly in view of the fact that the labels requiring return of the drums were still on, raises the reasonable inference that the drums were not warning-labeled, or if they were, the labeling was of such a flimsy type as not to meet the requirement of ordinary care. The fact that Stauffer kept Braun supplied with extra warning labels to replace any missing or damaged would not relieve Stauffer of its duty to label properly. Actually, this fact raises the reasonable inference that Stauffer knew or believed that some drums would be delivered to Braun unlabeled, or at least that the labels were not attached securely.

[11, 12] Stauffer takes the position that because its custom was to warning-label its drums, it had met the duty imposed upon it, even though it should appear that in spite of that custom drums left the plant unlabeled. That this is not the law is shown by the first case cited by Stauffer as support for its contention, Tingey v. E. F. Houghton & Co., supra, 30 Cal.2d 97, 179 P. 2d 807. There the court said, 30 Cal.2d at page 101, 179 P.2d at page 810: "Although the testimony of the plant manager, if believed by the jury, would indicate that defendant exercised great care to prevent contamination, it is not sufficient as a matter of law, under all of the facts of this case, to compel a finding that the product was pure when shipped. It does not necessarily follow from the fact that defendant ordinarily exercised great care that departures from the usual practice were never made." In Means v. Southern California Ry. Co., 144 Cal. 473, 77 P. 1001, the court stated that there was nothing in the evidence to show that sulphuric acid in drums was essentially and inherently a dangerous agency. However, there the court was talking about the peculiar facts of that case. A drum burst while in the possession of a carrier. The evidence failed to disclose what caused it. The court even stated that it did not require more than ordinary care in handling it. The evidence in our case, however, shows just the contrary—that unless handled with more than ordinary care sulphuric acid in drums is dangerous. However, this fact, as held in the Means case, is not generally known. Hence arises the duty of the producer and seller, who know this dangerous characteristic, to give reasonable warning to those who may reasonably be expected to come in contact with it. Of course, there is no absolute liability for harm done by sulphuric acid, but if the producer or vendor, knowing that if not properly handled it will be dangerous, permits it to leave his premises without being properly labeled as to warning, the mere fact that it was his custom to label it will not relieve him from a charge of negligence.

Negligence of Braun.

[13, 14] Braun contends that, assuming the drums were not labeled at the time of delivery, Braun as a distributor is not liable, as sulphuric acid is not explosive and that Braun had the right to assume that Union as a user of that acid for many years was aware of the danger of not keeping the drums cool and vented. The rule stated in the Restatement requires a situation where the vendor realizes or should realize that that commodity is dangerous. "i. *When warning of defects unnecessary.* One who supplies a chattel to others to use for any purpose is under a duty to exercise reasonable care to inform them of its dangerous character in so far as it is known to him or of facts which to his knowledge make it likely to be dangerous, if, but only if, he has no reason to expect that those for whose use the chattel is supplied will discover its condition and realize the danger involved therein." Rest., Torts, p. 1047. Whether such a situation existed here was for the jury to determine. Tingey v. E. F. Houghton & Co., supra, 30 Cal.2d 97, 179 P. 2d 807. The fact that Union had used 260 drums of sulphuric acid in its various

plants over a ten year period (however, the evidence fails to disclose any bursting of drums during that period), the possibility that labels may have been on many of them, and the training of the Union personnel in refrigeration and safety, do not compel a finding that Union must have known of the danger or that Braun was not negligent in failing to appreciate that the danger which Braun knew to exist would not be know to its customers.

Was Union's Negligence the Sole Proximate Cause of the Accident?

[15] Both Braun and Stauffer contend that it was. They contend that the fact that Union's assistant engineer saw the bulged condition of the drums and knew that it was caused by some sort of internal pressure, and did nothing about it, makes such failure to act the sole proximate cause of the accident. This fact undoubtedly constituted negligence on the part of the engineer, but it was not the sole cause of the accident. The delivery to Union of the drums which the vendor knew would be likely to burst if not kept cool and vented, without any warning to the purchaser of that fact, combined with the engineer's failure to act, caused the accident. Had there been a warning on the drums, the engineer most likely would have done something about the bulging and thereby prevented the accident. In that event, whether he did or not, Braun would have met its duty.

[16–18] In North Western National Ins. Co. v. Rogers, etc., Foundry, 73 Cal. App.2d 442, 166 P.2d 401, defendant shipped to the purchaser five sacks of magnesium castings which were negligently included in an order of aluminum castings, knowing they were to be immersed in a molten salt bath at over 925 degrees temperature. When so immersed a violent explosion took place causing the damages for the recovery of which the action was brought. The manager of the purchaser before immersing the castings noticed that the color of the castings and the weight differed slightly with that of the other castings in the same shipment. Defendants contended that their concurrent negligence was the remote cause of the accident and that the proximate cause was the manager's negligence by which he became the independent intervening cause. The court held the contention untenable and said, 73 Cal.App.2d at page 444, 166 P.2d at page 402, "This proposition is untenable since the law is settled in California that an intervening act of a third person, negligent in itself, is not a superseding cause of injury to another which the actor's negligent conduct is a substantial factor in bringing about, if (1) the actor at the time of his negligent conduct should have realized that a third person might so act, or (2) a reasonably prudent man knowing the existing situation when the act of the third person was done would not regard it as highly extraordinary that the third person should so act. [Citing cases.]" Applying this principle to the facts of our case, it was for the jury to determine whether (1) the suppliers of sulphuric acid should have realized that Union employees, if not properly warned, would not have known of the danger of the drum bursting, and (2) whether a reasonably prudent person, knowing what the Union engineer knew when he saw the bulges in the drum, would not regard it as highly extraordinary and would do nothing about that bulging. We cannot say that, under the evidence, the jury's determination was not a reasonable one, nor unsupported. Stasulat v. Pacific Gas & Elec. Co., 8 Cal.2d 631, 67 P.2d 678, is not in point here for the reason that under the facts of the case, the court held that although it is not necessary to preserve the chain of causation from the original negligence, "the precise nature of the second negligent act should reasonably have been anticipated, it is necessary that some such negligence should have been anticipated as reasonably likely to follow as a natural and ordinary consequence of the situation created by the original negligent act" 8 Cal.2d at pages 637–638, 67 P.2d at page 681, and that the negligence of appellant as a matter of law was not of the type as reasonably likely to cause the accident which took place. We certainly cannot say as a matter of law that suppliers of this acid should not reasonably have expected the consequences which occurred. On the

contrary, the evidence shows that the fear of occurrences such as the bursting of the drum here was the reason for Braun and Stauffer attaching warning notices to their drums. Waterman v. Liederman, 16 Cal. App.2d 483, 60 P.2d 881, 62 P.2d 142, held that the maker of automobile tires is not bound to anticipate the gross carelessness of automobile drivers. Obviously there is a vast difference between a tire and a drum of sulphuric acid. Nor is Catlin v. Union Oil Co., 31 Cal.App. 597, 161 P. 29, in point. There, by mistake, the appellant delivered to a grocer mixed kerosene and gasoline. However, the error was discovered, the grocer was notified of it and that the defendant would take it back. The grocer, claiming to be an expert, without the knowledge of the company attempted to test and segregate the oils. He then sold as kerosene to a purchaser a container which he had determined contained kerosene only, but which actually contained gasoline. The purchaser using it as kerosene caused an explosion in which he received fatal injuries. The court refused to hold appellant liable for the reason that "there should be no difference of opinion in the mind of any reasonable man, but that the appellant was shown to have exercised reasonable caution, when its driver informed Riley, the dealer, that he would take the oil back upon being informed by Riley that the fluid was mixed. No assurances were made to Riley designed to dissuade him from his conviction that the oil had been mixed, but the transaction or sale to him was agreed in effect to be rescinded. Riley himself had had abundant proof that the fluid delivered was not unmixed kerosene." 31 Cal.App. at page 609, 161 P. at page 34. No analogy exists there to the facts in our case.

Alleged Errors.

(1) The Contract.

[19, 20] The contract between Braun and Union covering the sale and delivery of the two drums was offered in evidence by Braun and Stauffer, and admitted except as to paragraph 9, which was refused admission on the objection of both plaintiffs and Union. Defendants contend that the court erred in not admitting that portion of the contract which read: "Buyer assumes complete responsibility for any and all results, including damage to persons and property, obtained from handling, storage or use of said materials by Buyer or third persons, whether same are handled, stored or used singly or in combination with other products." Defendants concede that this clause could not affect their liability as to plaintiffs, but contend it was admissible on the issue of negligence as tending to establish a right of defendants to assume that Union would take reasonable care of the drums. The fact that the buyer had agreed to assume responsibility as between it and the supplier in no wise would justify the supplier in failing to perform its duty towards third persons or in assuming that it did not have to perform such duty. Moreover, Braun knew the danger from improper handling of the drums. The fact that the seller of a commodity which he knows is dangerous to handle obtains an assumption of liability from the purchaser could not relieve the seller of the duty to warn a buyer whom he does not know to have knowledge of the danger.

(2) Warning Letter.

[21] Mr. Harris, the sales manager of Braun's chemical division, testified that in 1943 the company sent to all sulphuric acid customers a letter calling attention to the hazards of that acid. He then produced from the company's files a copy of a letter dated August 16, 1943, to which was pinned a list of sulphuric acid customers as of that date, made up by the witness at the time, and which included Union. He was unable to testify whether such letter was actually sent to Union. He testified in detail as to the procedure followed in preparing and mailing these letters, basing his testimony upon his knowledge of the custom and practice of the office. Braun offered the letter and the list on the theory that they were admissible under the Uniform Business Records Act. An objection to the admission of the letter and the list was sustained. Assuming that section 1953f of the Code of Civil Procedure applies to situations of this kind, see Hughes

v. Pacific Wharf Co., 188 Cal. 210, 205 P. 105; Oakland California Towel Co. v. Zanes, 81 Cal.App.2d 343, 184 P.2d 21, we cannot hold as a matter of law that the court abused the discretion given it by the section. The section states: "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, *and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.*" (Emphasis added.) The court for the reasons hereafter set forth might very well have been of the opinion that the sources of information, method and time of preparation were not such as to justify admission of the documents.

The jury had the benefit of the testimony of the sales manager to the effect that the company sent out the letter to all of their customers, of which Union was one. The source of the witness' information as to the sending of the letter to Union, was his knowledge of the custom of sending out such letters to the trade and his finding of a four-year old copy of a warning letter attached to a list of customers. There was no testimony by anyone that the letters to Union had actually been sent out. The letters were sent out approximately four years before the accident. It is reasonable to conclude that the sending of such a letter to Union that far in the past would not have changed the jury's conclusion of negligence in view of their implied finding that the drums were not labeled when delivered. Obviously, Braun should have known that in view of the danger a four-year old notice would not relieve it of the obligation of labeling.

(3) Statement of Union Agent.

[22] After bringing out the fact that the day after the accident, Mitchell, Union's purchasing agent, talked to Harris, Braun's sales manager, concerning it, Braun asked for the conversation. Upon objection of plaintiffs the court refused to admit it. Braun contends that this constituted error. Braun offered to prove by Harris that Mitchell stated that the drum burst after having been exposed to the elements for several months without any venting. It is contended that from such statement it could be concluded that Union knew of the necessity for venting and hence was solely responsible for the accident. How such conclusion could be drawn does not appear. Mitchell's statement as to the cause of the accident agrees with the conclusions of the other witnesses and of the parties. It was not claimed that Mitchell stated that prior to the accident he had any knowledge of the necessity for venting the drum or its condition, but merely that after the accident, at which he was not present, he stated its cause. Assuming that Union would be bound by the statement of its purchasing agent on this subject (see Breland v. Traylor Eng., etc., Co., 52 Cal.App.2d 415, 126 P.2d 455, indicating that Union was not so bound), there was no error in denying the admission of the statement as it was irrelevant to the purpose for which it was offered.

(4) Bursting of Drum at Other Plant.

[23] Over objections of Braun and Stauffer, evidence was admitted that on the same day as the accident here, a drum of sulphuric acid produced by Stauffer and delivered by Braun to the Crown By-Products Co. in San Jose, had burst. There were four to six drums on these premises and only the ruptured drum had a warning label on it (a somewhat mutilated one), although there was testimony that on the others there were places indicating that there had been labels of the same size. There was no evidence as to the condition of the drums as to labels on delivery, how they had been handled, nor how long they had been on the premises, other than the plant manager's statement that he did not believe they had been there a year. They had been stored in the open but not vented. The evidence of the explosion was admissible for the purpose of showing the propensity of these drums to burst and hence their dangerousness, and also as bearing on the cause of the bursting of the Union

drum. That Braun and Stauffer admitted these conclusions did not make the evidence inadmissible. Both Braun and Stauffer contended that invariably the drums were labeled when they were delivered. While the evidence was somewhat remote due to the fact that a considerable time had elapsed since delivery, that fact affected its weight rather than its admissibility. To some extent the evidence was favorable to Braun and Stauffer—it showed a label on one drum and indications that at some time there had been labels on the other. However, the jury was entitled to the evidence in determining whether Braun and Stauffer in labeling dangerous articles with paper labels which apparently did not remain on the drums with use, had exercised ordinary care. The paper label which was introduced in evidence and which certainly was admissible to show the type of label used, was rather flimsy for the purpose of warning concerning a product which the sellers knew to be dangerous if not properly handled.

Instructions.

(a) Proximate Cause.

[24] The court gave instructions on proximate cause which are substantially Nos. 104, 104A and 104B of B.A.J.I. Braun and Stauffer offered a series of instructions adapted from the Restatement, Torts, sections 431 and 432, which have been cited with approval in, among other cases, Mosley v. Arden Farms, 26 Cal.2d 213, 157 P.2d 372, 158 A.L.R. 872. In spite of the criticism in Prosser, Proximate Cause, in 38 Cal. Law Review 369, 424, we find no error. The offered extracts from the Restatement are hardly less abstruse than defendants claim those given were. An instruction the same as B.A.J.I. No. 104 was approved in Chutuk v. Southern Counties Gas Co., 21 Cal.2d 372, 380, 132 P.2d 193. Substantially the same instructions as 104A and 104B were found sufficient in Dieterle v. Yellow Cab Co., 53 Cal.App.2d 691, 128 P.2d 132. After commending the use generally of B.A.J.I. instructions, the court in Dodge v. San Diego Electric Ry. Co., 92 Cal.App.2d 759, said at page 763, 208 P.2d 37, 40: "There is abundant authority to the effect that it is not necessary for the court to give instructions in the particular language requested. If the subject-matter is properly covered and the law applicable to the case is fairly and fully given, that is sufficient."

(b) Superseding Cause.

Offering an instruction on this subject, part of which is taken from section 447, Restatement, Torts, Braun and Stauffer concede that the instructions given by the trial court on the subject were "not incorrect" but claim they were inadequate. Actually the instructions on this subject given by the court were clearer and less abstruse on superseding cause than the proposed ones. We find the instructions adequate.

(c) Presumption.

[25, 26] Braun and Stauffer offered an instruction to the effect that "there is a legal presumption that the course of business has been followed and that a person, including a corporation, has not been guilty of an unlawful act. If you find that in the ordinary course of business, drums of sulphuric acid did not leave the plants of the two chemical companies without labels advising users as to how to care for the same, the law presumes that the labels were attached to the drums." The court refused the instruction. Braun and Stauffer contend that this was error in view of the fact that the court instructed on the general subject of presumptions and that it was defendants' duty to give appropriate warning of any known dangers which the user of their product would not ordinarily discover. The proposed instructions were based on section 1963, Code of Civil Procedure "That a person is innocent of crime or wrong" subd. 1; "That the ordinary course of business has been followed" subd. 20. This instruction was offered because of the testimony concerning the practice and custom of the chemical companies to attach warning labels to the drums, and the fact that no one of their employees was able to state that labels were actually on the drums in question when delivered by the respective companies. This instruction should have been given. They are disputable presumptions which, as stated by the

court in its charge, should be weighed against the other presumptions, if any, and evidence in the case. In People v. Layman, 117 Cal.App. 476, at page 478, 4 P.2d 244, 245, the court said: "Appellant complains that it was error, in violation of the hearsay rule, to permit the train dispatchers to testify that they had received no report of an accident. It was not hearsay, but direct proof, of course, of a fact; the fact being that no report had been turned in. This fact was material because of the presumption that the ordinary course of business had been followed (subd. 20, of section 1963, Code Civ.Proc.); that is, that if there had been an accident it would have been reported to the dispatchers. 'The corroborating evidence may be slight.'" However, in view of section 4½, article VI of the Constitution, we cannot say that the error was prejudicial. As a presumption is "a deduction which the law expressly directs to be made from particular facts" Code Civ.Proc. § 1959, for the presumption to come into being the jury must first find the facts upon which it is based. Here, the jury had the evidence of the custom and practice before it. If it believed them to be as testified to by defendants, then the necessary inference was that these drums were labeled. The jury, either with or without the presumption, had to weigh this against the positive testimony that when delivered the drums were not labeled. It is not realistic to assume that in view of that fact the mere fact that the situation raised a presumption rather than the inference which the jury must have considered, would have made any difference in their verdict.

Damages.

[27, 28] The jury awarded plaintiffs $100,000 as damages. Defendants contend this is excessive. Deceased at the time of his death was 35 years old. His life expectancy as shown by the U. S. life tables was 34.36 years. Plaintiff Lucille was also 35 years of age and her expectancy was 37.71 years. They had a daughter 7½ years old. He was a sergeant in the United States Army. His base pay was $100 per month. An allotment of $80 per month was made his wife, and while on temporary duty he received $5 per diem. Altogether this totaled $330 per month. The evidence justifies the conclusion that as a meat and dairy inspector he would indefinitely receive this income plus later additions in pay due to length of service. According to the testimony of an actuary it would take $89,655 to return $300 a month income at 2 per cent; $77,583 at 3 per cent; $67,821 at 4 per cent, and $59,859 at 5 per cent. To return $400 a month it would take $119,540 at 2 per cent; $103,444 at 3 per cent, $90,428 at 4 per cent, and $79,812 at 5 per cent. Defendants cite other cases on death awards as a criterion here. While they are of some value in determining the adequacy of the award it must be pointed out that the circumstances are not the same. Thus in Holder v. Key System, 88 Cal.App.2d 925, 200 P.2d 98, where this court upheld an award of $45,000, deceased was 56 years of age with a life expectancy of only 16.7 years and was earning but $180 per month at the time of his death. At the time of the trial the job paid only $240 a month. His children were adults and his widow was 51 years of age. Moreover, we are in a period of inflation and the dollar is of less value than it was even only three years ago when that case was decided. As there pointed out, "Analysis of awards made in other similar cases, while of assistance, is by no means conclusive * * *" 88 Cal.App.2d at page 940, 200 P.2d at page 106, and the trier of fact should take into consideration in determining the amount of damages the fact of which judicial knowledge may be taken, that the purchasing power of the dollar has decreased (actually is still decreasing) and further 88 Cal.App.2d at page 940, 200 P.2d at page 106: "Another factor to be considered in cases involving damages for loss of a member of a family is that, although damages must be measured by the pecuniary loss to the plaintiffs, in fixing such loss the trier of the fact is not limited to proof of loss in dollars and cents, but may properly consider the pecuniary value of the loss of such non-economic interests of a family as loss of comfort, society and protection." In Jennings v. McCowan, 215 S.C. 404, 55 S.E.2d 522, the court up-

held an award of $85,000 given a widow and two children. Seventy thousand was for actual damages, $15,000 punitive damages. There the deceased was 56 years of age with an expectancy of only 16.2 years and his income was only $2475 per year.

[29, 30] Another circumstance to be considered by this court is the fact that the trial judge, sitting as the thirteenth juror, has weighed the evidence, judged the credibility of the witnesses, and on motion for new trial determined that the verdict is not excessive. For us to upset this award we must find that it is so high as to suggest passion or prejudice. Holder v. Key System, supra, 88 Cal.App.2d at page 940, 200 P.2d 98. We cannot do so.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.



108 Cal.App.2d 321

LE FIELL v. LE FIELL

Civ. 18437.

District Court of Appeal, Second District, Division 1, California.

Dec. 21, 1951.

Divorce action by Hilda L. LeFiell against Cecil K. LeFiell. From a judgment and order of the Superior Court of Los Angeles County, Kurtz Kauffman, J., that the defendant was entitled to a divorce on ground of cruelty and, among other things, dividing a manufacturing company, owned by the couple as community property, in the proportions of 55 per cent. to defendant and 45 per cent. to plaintiff, plaintiff appealed and defendant cross-appealed. The District Court of Appeal, Doran, J., held that the granting of the divorce was supported by substantial evidence and that the division of the community property was in the discretion of the trial court.

Affirmed.

1. Appeal and Error ⇐989, 996

A reviewing court must disregard conflicts and give to the evidence and proper inferences therefrom the fullest effect in support of findings and judgments, rather than attempt to weigh the evidence anew.

2. Divorce ⇐184(6, 10)

In divorce action, matters of cruelty and its effect on aggrieved party are questions of fact to be decided by trial court and findings in respect thereto will not be interfered by appellate court where substantial supporting evidence is disclosed by the record.

3. Divorce ⇐130

Evidence justified divorce decree for husband on ground of extreme cruelty.

4. Divorce ⇐184(10)

In determining whether finding of trial court that husband was entitled to divorce on ground of cruelty was supported by substantial supporting evidence, it is immaterial whether such evidence came from testimony of one of the parties or from other witnesses.

5. Divorce ⇐184(7)

The question of credibility of witnesses is for the trial judge in divorce action.

6. Divorce ⇐252

Statute providing that where divorce is granted on ground of extreme cruelty the community property shall be divided in such proportions as court may deem just gives rise to inference that the nonoffending party is entitled to more than one-half of the community property where divorce is granted on the ground of extreme cruelty. Civ.Code, § 146, subd. 1.

7. Divorce ⇐252, 286

Where divorce is granted upon ground of extreme cruelty, question of the amount of the award in excess of 50 per cent. of the community property is a matter largely in the discretion of the trial court, and reviewing court will be slow to interfere with that discretion. Civ.Code, §§ 146, subd. 1, 148.

8. Divorce ⇐252

Award giving husband, who obtained divorce for cruelty, 55 per cent. and wife

45 per cent. of a manufacturing concern owned as community property was not an abuse of discretion. Civ.Code, §§ 146, subd. 1, 148.

9. Divorce ⇐223, 252, 286

In action for divorce in which the husband was granted a divorce on grounds of extreme cruelty, all matters pertaining to various items of property owned by the parties and award of attorney's fees in connection with trial and appellate litigation involved questions of fact and judicial discretion.

Beloud & Bowman, Robert G. Beloud, Ontario, for appellant.

Roland Maxwell, Paul H. Marston, Pasadena, for respondent.

DORAN, Justice.

It is the contention of the plaintiff-appellant wife that the evidence fails to "support the trial court's judgment that the defendant (husband) was entitled to a divorce"; that the trial court erred "in dividing the community property business, known as LeFiell Manufacturing Company, in proportions of 55% to the defendant and 45% to the plaintiff"; and that the evidence did not support the "judgment that the defendant is entitled to a $10,000.00 separate interest in the business * * * by reason of a gift from defendant's father. The defendant cross-appealed from certain portions of the judgment and from an order awarding plaintiff attorney fees and costs on appeal.

The parties hereto were married in 1924 and lived together approximately 25 years. Plaintiff wife complained of some twenty specific acts of cruelty, and by cross-complaint the defendant husband charged the wife with nine acts of cruelty. After finding that certain household effects and other items were community property, the trial court found that the LeFiell Mfg. Co. was likewise community property but that the wife had a separate interest therein of $10,000 as the result of an advancement to such business, and that the husband had a like separate interest of the value of $10,000 "as the result of the gift to him by his father on or about October 1, 1931 of the equipment of said business". Certain other property including the family home was held in joint tenancy. The wife was found to have income of more than $200 per month from certain separate property inherited from relatives.

It was found by the trial court that the wife's allegations of cruelty were untrue except that the husband had, "in a joking and facetious manner" stated that the wife's hair "looked as though it had been combed with a mixmaster"; that for five years neither party had remembered the other with an anniversary present; that the husband had, in the course of discipline, unintentionally broken a tooth of the minor child; and that the husband had had dinner with a woman friend whom the husband had not seen for 27 years, etc.

The husband's allegations that the wife had been unaffectionate, faultfinding and of a nagging disposition, etc., were found to be true. There was evidence to the effect that the wife refused to accompany defendant to various places, criticized business policies, would not wait dinner for defendant, and failed to visit Mr. LeFiell who was hospitalized with an eye injury. In appellant's brief this evidence is contradicted or explained, appellant's position being that "When broken down and examined defendant's charges indicate there was no cruelty on plaintiff's part towards him entitling him to a divorce. On the contrary, the admitted acts of cruelty of the defendant * * * unquestionably indicate that the plaintiff was the one wronged."

It is also argued that even if there had been cruelty on the part of Mrs. LeFiell, grievous mental suffering on the husband's part was not shown; also, that if both parties were at fault, divorce should be denied. In this connection, appellant concedes that "The general rule of law is to the effect that ordinarily the trial court's finding in matters of this kind is binding if supported by sufficient evidence. However, it is contended that this case falls within the exception of the general rule which states that the conclusion reached by the trial court will be reversed on appeal if the

evidence is so slight as to indicate an abuse of discretion".

[1–5] The fundamental principle that a reviewing court must disregard conflicts and give to the evidence and proper inferences therefrom, the fullest effect in support of findings and judgment, rather than attempting to weigh the evidence anew, is clearly applicable to the present appeal. The matter of cruelty and its effect on the aggrieved party are questions of fact to be decided by the trial court, and the findings in respect thereto will not be interfered with by an appellate tribunal where, as in the instant case, substantial supporting evidence is disclosed by the record. In this respect it is immaterial whether such evidence comes from testimony of one of the parties or from other witnesses; in any event the question of credibility was one for the trial judge to determine.

[6] In reference to the division of community property and appellant's complaint that the trial court erred in assigning 55% of the LeFiell Manufacturing Company to the husband, it is only necessary to point out that Section 146(1) of the Civil Code expressly provides that where a divorce is granted on the ground of extreme cruelty the community property shall be assigned "in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just". As said in Harrold v. Harrold, 100 Cal.App.2d 601, 224 P.2d 66, 70, and elsewhere, "The inference derived from this code section is that the non-offending party is entitled to more than one-half of the community property where the divorce is granted on the ground of extreme cruelty".

[7, 8] The question of the amount of the award in excess of 50% of the community property is a matter resting largely in the discretion of the trial court. Although Section 148 of the Civil Code empowers an appellate court to revise the award made by the trial court, as stated in Gonsalves v. Gonsalves, 92 Cal.App.2d 334, 341, 206 P.2d 1127, 1132, the reviewing court "will be slow to interfere with that discretion". In the instant case the record affords no ground for relief that the trial judge was guilty of any abuse of discretion or that the division made depended upon "a mere whimsy" of the judge, as suggested in appellant's brief.

[9] In like manner it may be said that all matters pertaining to the various items of property owned by the parties, and the award of attorney fees in connection with the trial and appellate litigation, involved questions of fact and judicial discretion. No reversible error has been pointed out, and the findings made derive support from evidence disclosed by the record. Assignments of error on the original appeal by the plaintiff wife, and on the cross-appeal by the husband, are without merit.

The judgment and order appealed from are affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



108 Cal.App.2d 595

STEELE v. STEELE.

Civ. 18598.

District Court of Appeal, Second District, Division 3, California.

Jan. 9, 1952.

Suit by Anita Steele against John A. Steele for divorce. The wife was granted an interlocutory judgment of divorce and awarded support. The plaintiff obtained, upon an ex parte application, a writ of execution as to unpaid installments of the support award. The defendant moved for a modification of the support payments and for recall of the writ of execution. The Superior Court, Los Angeles County, Elmer D. Doyle, J., entered an order recalling the writ of execution and requiring defendant to pay accrued installments of support award at rate of $10 per month, and the wife appealed. The District Court of Appeal, Vallée, J., held that a party to a divorce action is entitled to execution as to unpaid installments of a support award that have accrued within five years of the date of an ex parte application al-

though application be made more than five years after entry of the decree or order making the award.

Order reversed in part.

1. Divorce ⇐263

Wife, who was awarded support in judgment of divorce, had right to have writ of execution issued and levied for unpaid installments of support award that accrued within five years of date of ex parte application although application was made more than five years after entry of judgment making award.

2. Divorce ⇐245(1)

Judgment for alimony is final and cannot be modified as to accrued installments.

3. Divorce ⇐263

Party to divorce action is entitled to execution as to unpaid installments of support award that have accrued within five years of date of ex parte application although application be made more than five years after entry of decree or order making award.

William E. Empey, North Hollywood, for appellant.

No appearance for respondent.

VALLÉE, Justice.

Appeal by plaintiff from an order recalling a writ of execution and ordering defendant to pay an arrearage of $949.39 accumulated under an order for support at the rate of $10 a month.

On February 17, 1938, plaintiff was granted an interlocutory judgment of divorce from defendant by which he was ordered to pay plaintiff $75 a month for her support and that of minor children. On January 5, 1942, an order was made reducing the amount to be paid to $65 a month. On October 24, 1950, plaintiff filed an affidavit in which she averred that defendant was $909.39 in arrears. On November 6, 1950, without notice to defendant, a writ of execution issued. All the installments for which execution issued accrued within five years of the date of the ex parte application. On November 13, 1950, defendant filed a notice of motion that the order of January 5, 1942, "be modified to require the payment of only $50 per month commencing August 15, 1943, and ending September 30, 1950," and the writ of execution be recalled.

On November 13, 1950, want of notice of defendant's motion having been waived, the court found that defendant owed plaintiff $949.39, and made an order which in pertinent part reads: "defendant is ordered to pay the same at $10.00 per month to plaintiff on the same dates as heretofore ordered; the writ of execution is recalled." The trial judge acted on the erroneous view that a writ of execution could not issue except on notice "where the order was made over five years ago." Plaintiff appeals from the quoted portions of the order of November 13, 1950.

[1–3] Plaintiff had an absolute right to have the writ of execution issued and levied. A judgment for alimony is final and cannot be modified as to accrued installments. Keck v. Keck, 219 Cal. 316, 320, 26 P.2d 300. A party to a divorce action is entitled to execution as to unpaid installments of a support award that have accrued within five years of the date of the application on an ex parte application although it be made more than five years after entry of the decree or order making the award. Wolfe v. Wolfe, 30 Cal.2d 1, 4, 180 P.2d 345; Di Corpo v. Di Corpo, 33 Cal.2d 195, 201, 200 P.2d 529; Millard v. Millard, 102 Cal.App.2d 249, 250, 227 P.2d 477.

The part of the order of November 13, 1950, which reads "defendant is ordered to pay the same at $10.00 per month to plaintiff on the same dates as heretofore ordered; the writ of execution is recalled" is reversed.

SHINN, P. J., and WOOD, J., concur.

108 Cal.App.2d 548

DE ARMAS v. DICKERMAN.

Civ. 4421.

District Court of Appeal,
Fourth District, California.

Jan. 4, 1952.

Luz De Los Angeles De Armas sued Neva S. Dickerman for treble damages under the Federal Housing and Rent Act for rental overcharges. From an order of the Superior Court of Orange County, Robert Gardner, J., denying defendant's motion for judgment notwithstanding a jury's verdict for plaintiff, and from a judgment of such Court on the verdict, defendant appealed. The District Court of Appeal, Mussell, J., held that whether the parties' written agreement was a bona fide option to purchase agreement or a lease in the form of such an option agreement was a fact question properly submitted to the jury, and that parol evidence was properly admitted to show that the agreement was illegal or part of an illegal transaction.

Judgment and order affirmed.

1. Landlord and Tenant ⇐200(1½)
War and National Defense ⇐221

Whether a written agreement between owner and occupant of house was bona fide option to purchase agreement or a lease in form of such an option was fact question properly submitted to jury in occupant's action against owner for treble damages for rental overcharges. Housing and Rent Act of 1947, § 205, as amended, 50 U.S.C.A.Appendix, § 1895.

2. Evidence ⇐429

Oral evidence is competent to prove that written contract was executed as mere artifice affecting parties' relationship or conduct, without intention that it should become binding on them, as such evidence does not vary terms of written instrument, but tends to prove invalidity thereof. Civ. Code, § 3097.

3. Evidence ⇐437

In action for treble damages for rental overcharges, parol evidence was properly admitted to show that parties' written agreement in form of option to purchase defendant's house was illegal or part of illegal transaction as a lease for more than maximum legal rent. Code Civ.Proc. § 1865; Housing and Rent Act of 1947, § 205, as amended, 50 U.S.C.A.Appendix, § 1895.

4. Evidence ⇐426, 461(4)

In action to recover treble damages for rental overcharges under written agreement in form of option to purchase defendant's house parol evidence was properly admitted to show that parties considered their relationship to be that of landlord and tenant before controversy arose, and evidence of their subsequent conduct was admissible to show their intentions. Housing and Rent Act of 1947, § 205, as amended, 50 U.S.C.A. Appendix, § 1895.

5. Evidence ⇐426

In action to recover treble damages for rental overcharges under written agreement in form of option to purchase defendant's house, evidence of parties' intention was admissible to show that agreement was in fact a lease. Housing and Rent Act of 1947, § 205, as amended, 50 U. S.C.A.Appendix, § 1895.

6. Contracts ⇐103

Mere words and ingenuity of expression in contract cannot, by description, make permissible a course of conduct forbidden by law, regardless of their effect between parties to contract.

7. Landlord and Tenant ⇐200(1½)
War and National Defense ⇐221

In action to recover treble damages for rental overcharges, evidence was sufficient to take to jury question whether leased house consisted of eight rooms, as stated in Housing Expediter's order fixing maximum rental thereof, or nine rooms as contended by defendant. Housing and Rent Act of 1947, § 205, as amended, 50 U.S.C.A. Appendix, § 1895.

8. Landlord and Tenant ⇐200(1½)
War and National Defense ⇐212, 217

A landlord, not seeking by proper administrative steps to obtain increase in maximum rental fixed by Housing Expediter or to change his orders in any respect, cannot raise question of extra accommoda-

tions or question validity of Expediter's orders fixing maximum rental on appeal from judgment for tenant in her action for treble damages for rental overcharges. Housing and Rent Act of 1947, § 205, as amended, 50 U.S.C.A.Appendix, § 1895.

9. Landlord and Tenant ⇐200(1½)
War and National Defense ⇐209

A housing expediter had exclusive right to determine maximum legal rent for housing accommodations in his area, and District Court of Appeal has no jurisdiction respecting expediter's maximum rent order except to enforce ceiling price fixed thereby. Housing and Rent Act of 1947, § 205, as amended, 50 U.S.C.A.Appendix, § 1895.

10. Trial ⇐118

In action to recover treble damages for rental overcharges under federal Housing and Rent Act, superior court acted within its discretion in permitting plaintiff's counsel to read, in his opening statement to jury, applicable sections of such act. Housing and Rent Act of 1947, § 205, as amended, 50 U.S.C.A.Appendix, § 1895.

11. Trial ⇐118

Counsel, in his argument to jury, may state what law is and apply law to facts in case, if he correctly states law.

12. Evidence ⇐47

In action to recover treble damages for rental overcharges under federal Housing and Rent Act and regulations thereunder, such act and regulations were properly before court, as regulations are proper subject of judicial knowledge. Housing and Rent Act of 1947, § 205, as amended, 50 U.S.C.A.Appendix, § 1895.

Dudley & Franklin, Costa Mesa, for appellant.

Richard Levitt and Harold Rubins, Los Angeles, for respondent.

MUSSELL, Justice.

In this action for rental overcharges it was alleged by plaintiff that defendant was the owner and landlord of housing accommodations described as 1625 Sunset Plaza Drive, in the city of Los Angeles; that on or about October 4, 1948, plaintiff and defendant entered into a written agreement whereby the defendant rented the premises to plaintiff for use as housing accommodations at a rental of $225 per month; that pursuant thereto, plaintiff occupied the premises as defendant's tenant and paid defendant $2,635 as rent from October 4, 1948, to October 1, 1949; that during all of said time the maximum legal rental was the sum of $150 per month. Treble damages were prayed for in the sum of $2,505 pursuant to the provisions of section 205 of the Housing and Rent Act of 1947, 1948 and 1949, 50 U.S.C.A.Appendix, §§ 925 and 1895, and the regulations thereunder, together with costs and attorney's fees. The answer admitted that the Housing and Rent Acts were in effect in Los Angeles county during the times involved and that the defendant was the owner and landlord of the premises. All other allegations of the complaint were denied.

A jury trial was had and a verdict was returned for plaintiff in the sum of $2,755, representing overcharges of $835, trebled, and attorney's fees of $250. A motion for judgment notwithstanding the verdict was made and denied and defendant appeals from the order denying the motion and from the judgment.

Plaintiff, Miss DeArmas, was a citizen of Cuba, visiting in the United States. In September, 1948, while looking for a place to rent, she saw a sign on the outside of defendant's house "For Rent As Is." Defendant conducted plaintiff through the house and there was no conversation about the rent at that time. However, plaintiff returned the following day and defendant then agreed to rent the entire house to plaintiff for $225 per month for a period of one year, the first and last months rent to be paid in advance. A few days later plaintiff called at the house and signed a lease for the premises, prepared by the defendant. Plaintiff did not have the $450 first payment required by the lease and defendant agreed to hold the lease until this money was paid to her. A few days later defendant called plaintiff on the telephone and informed her that the lease was not according to law and that it would be necessary

to make out a new and different kind of a lease. Shortly thereafter defendant gave plaintiff a new lease and told her that it was necessary to make it out in the form of an option. Plaintiff and defendant signed this document, plaintiff paid defendant the sum of $450, moved into the house and occupied it until the trial of the action.

It was stipulated by counsel that from October 4, 1948, to October 1, 1949, the defendant received from plaintiff the sum of $2,635, consisting of 11 payments of $225 each and one payment of $160.

The official records of the office of the housing expediter in Los Angeles were admitted in evidence and contained orders of the expediter fixing the ceiling rent of the premises involved for the period during which they were occupied by the plaintiff. There were two such orders, executed on the 1st day of October, 1946, one of which described the premises as "8 rooms furnished" and the maximum rental therefor to be the sum of $150 per month. The other order referred to the same premises and stated that the maximum rental therefor was changed from $175 per month to $100 per month "2 rooms furnished and bath." There were no subsequent orders changing the maximum rental.

[1, 2] Defendant's first contention is that the plaintiff failed to establish the material allegations of her complaint and that defendant's motion for a nonsuit should have been granted. The basis of this contention is that the so-called option agreement was not a rental agreement. However, this was a question of fact for the determination of the jury. There is substantial evidence to support an inference by the jury that the instrument entitled "option agreement" was executed to evade the provisions of the Housing and Rent Act of 1947, as amended, and the rent regulations issued pursuant thereto. Reference to the document itself shows that the sum of $450 was paid at the time of its execution (the same amount as was specified in the first lease as the first and last months rent); that the property referred to therein was 1625 Sunset Plaza Drive, Los Angeles; that the plaintiff was required to pay the sum of $225 per month beginning November 1, 1948, and continuing to the date when the optionee was required to exercise the option, to wit, October 1, 1949. The agreement provided that the property should be used for residential purposes only and that plaintiff could not leave the premises vacant for more than two days at a time. Evidence was introduced showing that the parties intended the document to be a rental agreement and consistently treated it as such. The defendant was advertising the place for rent and placed a "For Rent" sign outside the house. She told plaintiff that the rent would be $225 per month and prepared a written lease, which plaintiff signed and returned. In their subsequent dealings both parties referred to the payments as "rent", to plaintiff as "tenant" and to the agreement as a "lease". There is also substantial evidence that the plaintiff was not interested in buying the property and was only interested in obtaining living accommodations. Whether the document was a bona fide option agreement or a lease cloaked in the garb of an option was a question of fact properly submitted to the jury. As was said in Lynn v. Herman, 72 Cal.App.2d 614, 617, 165 P.2d 54, 56, citing Cooper v. Cooper, 3 Cal.App.2d 154, 39 P.2d 820: " 'Oral evidence is competent to prove that a purported promissory note or written contract was executed as a mere artifice affecting the relationship or conduct of the parties thereto, and that it was not the intention of the parties that it should become binding upon them. Under such circumstances the reception of oral evidence does not have the effect of varying the terms of the written instrument, but rather tends to prove the invalidity of the challenged document. P. A. Smith Co. v. Muller, 201 Cal. 219, 256 P. 411, 412; Texas Co. v. Berry Garage, 121 Cal.App. 455, 9 P.2d 241; Gleesen [Gleeson] v. Dunn, 113 Cal.App. 347, 298 P. 119; Allen's Collection Agency v. Lee, 73 Cal. App. 68, 238 P. 169; section 3097, Civ. Code.' "

[3–6] The trial court properly admitted the parol evidence to show that the written document, though lawful on its face, was

illegal, or part of an illegal transaction. Endicott v. Rosenthal, 216 Cal. 721, 728, 16 P.2d 673; Code Civ.Proc. § 1865; Lebal Co. of America v. Mastrup, 51 Cal.App.2d 232, 233, 124 P.2d 348. Evidence was also properly admitted to show that the parties considered their relationship to be one of landlord-tenant before the controversy arose. The subsequent conduct of the parties to the agreement was admissible to show their intentions. Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 761, 128 P.2d 665; Tennant v. Wilde, 98 Cal. App. 437, 453, 277 P. 137; Pacific Portland Cement Co. v. Food Machinery & Chemical Corp., 9 Cir., 178 F.2d 541, 554. Evidence of the intention of the parties was admissible to show that the so-called option agreement was in fact a lease. As was said in Porter v. Fiske, 74 Cal.App.2d 332, 336, 171 P.2d 971, 973: "The terminology adopted by the parties in reaching their agreement did not operate to relieve appellant of the amercement provided by the statute. 'Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law.' United States v. City and County of San Francisco, 310 U.S. 16, 28, 60 S.Ct. 749, 756, 84 L.Ed. 1050."

[7] Defendant argues that the plaintiff failed to establish that the maximum rental per month for the premises was $150 and argues that the evidence shows that the building had 9 rooms instead of 8 and that no maximum ceiling was fixed by the housing expediter for the whole building. However, there was testimony in the record that the house in fact contained 8 rooms. The defendant's testimony shows that it had 8 rooms and a sleeping porch. From this evidence the jury may well have found that the entire house consisted of 8 rooms.

[8, 9] The two orders fixing the maximum rental were executed October 1, 1946, and by their terms remained in effect until changed by the Office of Price Administration. It was admitted that the Housing and Rent Acts were in effect during all times material here and there was no indication in the record that the defendant sought by proper administrative steps to obtain an increase in the maximum rental or to change the orders in any respect. Under such circumstances she cannot here raise the question of extra accommodations or question the validity of the orders of the rent expediter. Woods v. Contestabile, D. C., 81 F.Supp. 737, 738. The rent expediter had the exclusive right to determine the maximum legal rent for the housing accommodations and this court has no jurisdiction with respect to such maximum rent order other than to enforce the ceiling price. Parshalle v. Curl, 90 Cal.App.2d 641, 648, 203 P.2d 802.

[10, 11] Defendant argues that the trial court erred in permitting counsel for plaintiff to read in his opening statement to the jury excerpts from the Housing and Rent Act of 1947, as amended. The sections read were statements of the law applicable to the case and it was within the discretion of the court to permit the reading of the statutes under the circumstances. As was said in People v. Dykes, 107 Cal.App. 107, 118, 290 P. 102, 107: "That counsel may, in his argument, state what the law is and apply the law to the facts in the case is well established in California, provided, of course, the statement of what he considers the law to be is correct."

[12] Defendant contends that the rent acts and regulations were not properly before the court. This contention is without merit as these regulations are the proper subject of judicial knowledge. Parker v. James Granger, Inc., 4 Cal.2d 668, 677, 52 P.2d 226; Livermore v. Beal, 18 Cal.App. 2d 535, 542, 64 P.2d 987.

Defendant finally argues that the instructions to the jury were erroneous and conflicting. The objection to many of these instructions is that they contained certain rules and regulations made by the housing expediter under the Housing and Rent Act, and when considered separately or together they had the effect of instructing the jury to find a verdict for the plaintiff. We have examined these instructions and conclude that no error resulted in instruct-

ing the jury as to the regulations contained in the acts applicable. We are unable to find any prejudicial error in the instructions given.

The judgment and order are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



108 Cal.App.2d 568

FRY et al. v. LOST KEY MINES, Inc. et al. (two cases).

Civ. 8050.

District Court of Appeal, Third District, California.

Jan. 7, 1952.

Rehearing Denied Feb. 1, 1952.

Hearing Denied March 6, 1952.

Action by Ernest Fry and another, assignees of chattel mortgages, against the Lost Key Mines, Inc., lessee, for foreclosure. Josie Goodwin, lessor, filed a third-party claim. The Superior Court, Tuolumne County, J. A. Smith, J., entered judgment for plaintiffs and disallowed lessor's third-party claim and the lessor appealed. The District Court of Appeal, Van Dyke, J., held that mortgaged electric pump, and dragline were not attached to the land or intended to be fixtures.

Judgment affirmed.

1. Fixtures ⇐5

An electric pump not used in mining operations nor in any way physically annexed to the soil was not a "fixture". Public Resources Code, § 2601; Civ.Code, § 660.

See publication Words and Phrases, for other judicial constructions and definitions of "Fixture".

2. Fixtures ⇐14

Under statute providing machinery or tools used in working or developing a mine are deemed to be affixed to the mine, lessee's mortgaged dragline which was used in mining operations and which was not attached to the land but was designed for general excavating and dirt-moving work was not a "fixture" and did not belong to lessor as part of realty. Public Resources Code, § 2601; Civ.Code, § 660.

3. Fixtures ⇐35(2)

Proof of either equipment being used in mining operations or being physically attached to realty makes a prima facie case for the one claiming that the article has become a fixture, but the prima facie case is rebuttable. Public Resources Code, § 2601; Civ.Code, § 660.

4. Fixtures ⇐1

The manner of attachment, the adaptability of the thing attached to the use to which the realty is applied, and the intention of the parties determine whether chattels have become a part of the land. Public Resources Code, § 2601; Civ.Code, § 660.

5. Evidence ⇐20(1)

It is common knowledge that draglines are often moved from job to job.

St. Sure & Moore, Oakland, Jesse M. Zimmerman, San Jose, for appellant.

Dannenbrink & Graves, Oakland, for respondents.

VAN DYKE, Justice.

Appellant Josie Goodwin has appealed from judgments which disallowed her third party claims in two separate proceedings to foreclose chattel mortgages on certain equipment owned by The Lost Key Mines, Inc., a corporation, defendant and respondent here, which equipment had been mortgaged by that corporation to respondent's assignors. The mortgages were executed during the time certain real property owned by appellant was under contract to The Lost Key Mines, Inc., by an agreement called a lease by the parties thereto, which in substance gave to the corporation the right to extract minerals from the real property. Appellant claims ownership of the mortgaged equipment, which consists of a dragline and an electric pump, upon the ground that said equipment had become affixed to the real property and constituted a part thereof. This claim is based mainly upon the provisions of Section 2601 of the Public Resources Code, formerly Section 661 of

the Civil Code. This section provides: "Sluice-boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine." A contract between appellant and The Lost Key Mines, Inc., was entered into on July 30, 1946. It provided that there was leased to the corporation "the mineral rights in the following described real property." There was then described property consisting of almost 200 acres of land. It was provided that "the lease shall run from date hereof, unless sooner terminated by reason of the failure of the party of the second part to comply with the same." The corporation agreed to "release all land or portions of land as soon as * * * mined" and it further agreed to "start work immediately and continue until all machinery is installed necessary to handle 100 yards per day or more on placer and 25 tons per day or more on quartz." It was to pay royalties from all gold, silver or other precious metals extracted at a rate of 15% gross until $35,000 had been paid, but it was agreed that this full sum must be paid within five years and three months from the date of the contract; and if so paid then the mineral rights of the corporation were to continue until the property had been mined. The Lost Key Mines, Inc., entered upon the property and brought thereon a large dragline with a 60 foot boom and a 1½ yard and a 2½ yard bucket and also a Sterling electric pump. The pump was never used in the operation of the mine, but the dragline was so used.

The corporation gave a chattel mortgage on the electric pump and a chattel mortgage upon the dragline, which mortgages were assigned to the plaintiffs and respondents, Ernest and Edward Fry. Defaults occurred and foreclosure proceedings resulted in judgments of foreclosure, which were made and entered May 26, 1950. When the sheriff of the county was proceeding under court order to sell the mortgaged items the appellant filed third party claims and after hearings were held thereon these claims were disallowed.

The only claim that appellant has asserted or could assert to the two machines is that based upon her contention that when placed upon her property and used, as she alleged, in the mining operations of the corporation, they became affixed to the land, a part thereof, and therefore belonged to her as a part of the real property.

[1] First as to the electric pump, the evidence is ample to the effect that it was never used in mining operations on the real property and it is apparent, therefore, that since it was neither used nor in any way physically annexed to the soil it never became a fixture. The fictional annexation referred to in Section 2601 of the Public Resources Code requires as a condition that the personal property involved be used in the mining operations before it can be "deemed" to be affixed. The judgment of the trial court, therefore, disallowing appellant's third party claim to the electric pump must be affirmed.

[2, 3] With regard to the dragline, although there is some dispute as to the extent of use it is clear from the evidence that there was at least some use made of the machine in mining operations upon the appellant's land, and consequently that condition of fictional annexation was complied with. However, it by no means follows that by virtue of the code section all personal property that is brought upon mining property and used in mining becomes a fixture so that the title leaves its former owner and vests in the owner of the real property. The code section declares that personal property used in mining is to be "deemed" to be affixed. The same language is used in Section 660 of the Civil Code, which defines fixtures generally. It is therein provided that a thing is "deemed" to be affixed to land when it is physically attached in certain ways described in the section. Section 2601 substitutes use in mining operations for physical attachment and when this condition has been met, fixation is "deemed" to have occurred just as it is "deemed" to have occurred under the Civil Code section when physical attachment has occurred. On proof of either, a prima facie case is made for the one claiming that the article has become a fixture and a part of the real property. But the prima facie case thus made is rebuttable. Montana

has the same statute as is contained in our Section 2601 of the Public Resources Code, and in construing the statute of that state its supreme court in the case of Story Gold Dredging Co. v. Wilson, 106 Mont. 166, 76 P.2d 73, 77, said that in a previous case, Montana Electric Co. v. Northern Valley Min. Co., 51 Mont. 266, 153 P. 1017, 1018, it had given consideration to the meaning and purport of the statute. Said the court:

"* * * The precise question there under consideration was whether certain machinery used in the operation of the mine had become a part of the real estate. The court there declared: '(1) Whether what would otherwise be personal property has become a fixture by reason of its attachment to the soil is primarily a question of intention on the part of the person attaching it; (2) the attachment in the manner indicated in our Code sections above raises a presumption that the one who made the attachment intended the thing affixed to become a part of the realty; this presumption, however, is a disputable one; (3) as a general rule, the manner in which the attachment is made, the adaptability of the thing attached to the use to which the realty is applied, and the intention of the one making the attachment determine whether the thing attached is realty or personalty.' * * *

"Considering only the facts, namely, that the dredge was mining machinery placed on mining ground and used for working and developing the mine, and applying section 6670, supra, [the same as our Section 2601 of the Public Resources Code] the disputable presumption arises to the effect that the dredge became a part of the real property. Cheadle v. Bardwell, 95 Mont. 299, 26 P.2d 336. * * *

* * * * * *

"Opposed to the disputable presumption which we have noticed are certain facts, namely: Plaintiff, at great expense to it, placed this dredge upon the land of the defendant. The land was mortgaged. Plaintiff did not own the land and had no interest in it other than the rights accorded to it by the lease to dredge the land. It was contemplated by the contract that at some time in the future all of the ground capable of being profitably worked would be dredged, and the contract performed and ended. The dredge was not physically attached to the land. * * *

* * * * * *

"When we attempt to determine the intention of the parties in accordance with the foregoing rules, we find that different inferences may be drawn from the evidence by different reasonable men, and, hence, a question of fact is presented which can be determined only by the jury." See also, Hendy v. Dinkerhoff, 57 Cal. 3, and Oroville-Wyandotte Irr. Dist. v. Ford, 47 Cal. App.2d 531, 118 P.2d 340, citing Story Gold Dredging Co. v. Wilson, supra.

[4] Considering that the use of machinery in mining operations does not necessarily compel the conclusion that it has become a part of the land, we turn to the rules by which the ultimate question of whether such machinery is a fixture or not is to be determined. We find that we must consider the intention of the parties, the adaptability of the article in question to the normal uses of the land, the character of the chattel, the purpose to which it is to be put and the relations of the parties claiming its ownership. These are the usual rules applied generally in determining whether chattels have by reason of fixation become a part of the land. In M. P. Moller, Inc., v. Wilson, 8 Cal.2d 31, 63 P.2d 818, 821, the Supreme Court, in discussing whether or not a pipe organ that had been installed in a residence was a fixture so as to pass with the land declared:

"* * * This court has recognized the test of intention to make the article a permanent addition to the realty as manifested by the physical facts, and has accepted the character of the annexation and the use for which the article is designed as subsidiary elements employed for the purpose of testing the intention of permanency. * * * Thus whether an article is or was physically affixed to the building is only one of the criteria in determining whether there was an intention to make it a permanent accession to the real property.

"Annexation by weight and gravity, therefore, is not always alone a sufficient in-

dication of an intent to make the article a permanent fixture and part of the realty. It must also appear from the nature of the chattel that if used for the purpose for which it was designed it would naturally and necessarily be annexed to and become a permanent and integral part of some realty; in other words, that it would become essential to the ordinary and convenient use of the property to which it was annexed."

And even though the character of annexation of the organ was such that ordinarily it might well have been considered that it was intended it should become a part of the building and so a part of the land, nevertheless the Supreme Court said: "With this record before us we are of the opinion that the court was justified in concluding that the facts of installation and removal did not indicate that the organ lost its inherent character of personal property such as any other furniture or musical instrument designed for personal enjoyment or entertainment and not as an essential, integral or necessary part of real property."

[5] In the instant case the following facts must be considered. The dragline was not a machine primarily designed for or generally used in mining. These machines are more often seen in use away from rather than on or in a mine. They are heavy and cumbersome mechanical units that are automotive, although when moving from job to job they are often transported on other automotive equipment or by train or boat. They are specially designed, not for mining, but for general excavating and dirt-moving work. In this case the dragline involved was brought upon the appellant's land not solely by its own power but with the aid of additional machines and it would have to be, according to the testimony, removed in the same fashion. But it is common knowledge that these machines are often so moved from job to job. It was not a machine designed or adapted to being physically attached to land or buildings. The relations between appellant and The Lost Key Mines, Inc., as declared in the contract between them, were such that it was clearly the purpose of the parties that no title to the real property should pass to the corporation; that as soon as an area had been mined and the precious metals extracted the land would be abandoned by the corporation to appellant; that in the end if the contract was fully performed appellant's share of the precious metals in the land would have been received by her, the balance would have been taken by the corporation, and it would cease to have any interest, possessory or otherwise, in the land. We cannot believe it to have been the intent of either party to this contract that such equipment as a dragline would ever have become a part of the land. At least such an inference could reasonably have been drawn by the trial court, and that is sufficient here.

We hold that the record supports the judgments appealed from and they are, therefore, affirmed.

SCHOTTKY, J. pro tem, and ADAMS, P. J., concur.



108 Cal.App.2d 557

OWENS v. McMANUS et al.

Civ. 18532.

District Court of Appeal, Second District, Division 1, California.

Jan. 7, 1952.

Rehearing Denied Jan. 28, 1952.

Hearing Denied March 6, 1952.

Action by H. C. Owens against Bert F. McManus, doing business as Mutual Credit Bureau, to recover damages for wrongful attachment. The Superior Court of Los Angeles County, Roger Alton Pfaff, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Doran, J., held that malice and want of probable cause were questions of fact for trial court under conflicting evidence.

Judgment affirmed.

1. Appeal and Error ⇐1011(1)

In action for wrongful attachment, malice and want of probable cause were issues of fact for trial court under conflicting evidence.

2. Appeal and Error ⇐989, 1010(1)

Where the record discloses substantial evidence in support of trial court's findings of fact, appellate court will not attempt to weigh the evidence.

3. Malicious Prosecution ⇐64(2)

In action against collection agency for wrongful attachment in connection with action on a claim assigned to agency, evidence supported finding that collection agency caused attachment to issue maliciously and without probable cause.

4. Attachment ⇐378

Award of $7,085.89, including award of $500 punitive damages, for wrongful attachment, which resulted in complete cessation of gasoline service station business which had been earning a net profit of $600 per month and cancellation of a valuable lease, was not excessive.

Joseph J. Weissman, Los Angeles, for appellant.

Alfred R. Meyers, Beverly Hills, for respondent.

DORAN, Justice.

The judgment of which appellant complains was in the amount of $7,085.89 which included an award of $500 punitive damages for wrongful attachment. Appellant, a collection agency, as the assignee of a Mrs. Marion Winner, filed an action in Municipal Court and in connection therewith secured a writ of attachment, and caused a keeper to be placed in possession of respondent's gasoline station. Respondent's personal property on said premises was placed in storage by the marshal on October 25, 1948 and on November 3, 1948 was restored to respondent upon the posting of a cash bond. On January 12, 1949, the Municipal Court rendered judgment in favor of respondent and against the appellant.

It is appellant's contention that the trial court erred in denying a motion for nonsuit; that the evidence failed to establish either malice or want of probable cause but showed that the action was instituted and the attachment levied by appellant in the regular course of business, upon the advice of an attorney. Appellant further argues that the trial court failed "to draw the distinction between an action for wrongful attachment against the sureties * * *, and an action for wrongful attachment maintained solely against the attachment plaintiff."

The record discloses evidence that the original claim on which appellant collection agency, as assignee, instituted the Municipal Court action, consisted of two parts, one of $341 for the purchase of a piano on a conditional sale contract; the other of $50 for refinishing a piano. Appellant and the assignor "were to split fifty-fifty any money recovered on the claim, and the Appellant was to pay all of the Court costs involved". Respondent testified that in September, 1948 a collection agency telephoned concerning the claim, that respondent denied owing the money or having the piano; that nothing more was heard about the matter until October 19, 1948 when two uniformed officers and a plainclothes marshal took possession of the gas station under the writ of attachment.

The trial court found that appellant caused the attachment to issue maliciously and without probable cause; that as a result of the levy and removal of equipment, respondent found it "impossible * * * to continue in the operation of said business", and was "compelled to enter into a mutual cancellation of the lease"; further, that respondent had been earning a net profit of $600 per month, and that the cancelled lease had approximately seven years yet to run at the time of cancellation, all of which resulted in a loss to respondent of $6,585.89.

On the issue of malice and want of probable cause, appellant relies on a showing that previous to instituting the action, a usual nightly conference took place between appellant and two attorneys regularly retained in handling the collection business; that after reviewing the file appellant was advised that a good cause of action existed. Full disclosure to appellant's attorneys is claimed, but in respect to this matter, the trial court referring to the testimony of Attorney Cooper, said: "Mr. Cooper tried

awfully hard, but was not very convincing. His testimony was completely inconsistent".

Respondent calls attention to the fact that the record fails to show any investigation by appellant as to the truth of the claim after the respondent had denied owing the money; that with the exception of testimony of "considerable conversation concerning all of the items of this particular claim", the record "is completely sterile" as to "what disclosure, if any, had been made to the attorney, or on what the attorney based his advice".

[1] The appellant apparently seeks to remove the issues in the instant case from the realm of questions of fact to that of absolute law, and to procure an appellate pronouncement that under the facts there was no fault on the part of the appellant in levying the writ of attachment. However, from the evidence disclosed by the record, substantial support is found for the trial court's determination to the contrary. The issues of malice and want of probable cause, under the circumstances of the case, were issues of fact on which the contending parties offered divergent theories and conflicting evidence.

As pointed out in respondent's brief, there was evidence which, if believed, would indicate that appellant collection agency made "no attempt to ascertain the truth of respondent's denials of the claim", but proceeded to "the irresponsible closing of a place of business", and "impatient with one who resists their demands, sought to coerce him into either payment or settlement of an obligation which he did not owe". That respondent sustained serious damage from appellant's acts cannot well be doubted.

[2] It is conceded in appellant's brief that "lack of probable cause supports an inference of malice". As hereinbefore mentioned, whether probable cause existed, or whether there was a lack of such cause, is a question of fact involving credibility of witnesses and weight of evidence. These were matters which the trial court hearing and observing the witnesses, was better able to determine than an appellate tribunal which of necessity must depend entirely upon the printed record. And from this and other reasons stems the well established rule that where the record discloses substantial evidence in support of the trial court's findings, the appellate court will not attempt to weigh the evidence.

[3] What has been said relates particularly to appellant's argument that there should be a reversal because of the fact that appellant had sought the advice of an attorney before instituting the action. Here, much of the evidence was equivocal. At most, it indicated that prior to commencement of the action, there was a routine conference between appellant and attorneys who were associated with the appellant collection agency, at which it was determined to attach respondent's place of business. Whether the evidence in relation thereto showed good faith, a full disclosure, etc., necessarily had to be determined by the trier of facts. The findings of the trial court recite that "the defendant, Bert F. McManus, caused an attachment to issue in the said action maliciously and without probable cause". There is evidence in the record to support this finding.

[4] Appellant's contention that the trial court failed to "draw the distinction between an action for damages for wrongful attachment against the sureties * * *, and an action for wrongful attachment maintained solely against the attachment plaintiff", is not borne out by the record. On the contrary, it appears that the trial court was entirely cognizant of the nature of the action, and that the damages awarded were not excessive. The attachment resulted in a complete cessation of respondent's gas station business, together with the cancellation of a valuable lease and loss of profits.

No reversible error has been pointed out. Under the evidence disclosed by the record, the overruling of appellant's motion for a nonsuit cannot be deemed error, and there is substantial evidence in support of the findings and judgment.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

108 Cal.App.2d 584

PEOPLE v. ABRAMS.

Cr. 4702.

District Court of Appeal, Second District, Division 3, California.

Jan. 8, 1952.

Irvin S. Abrams was convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., of unlawfully receiving money offered for the purpose of being wagered on the result of a horse race, and defendant appealed from the judgment, verdict and the denial of his motion for a new trial. The District Court of Appeal, Wood, J., held that an appeal from a verdict or a sentence was not authorized and therefore purported appeals therefrom would be dismissed and that evidence was sufficient to sustain the conviction.

Purported appeals from verdict and sentence dismissed. Judgment and order denying motion for new trial affirmed.

1. Criminal Law ⇐1023(10)

An appeal from a verdict or a sentence is not authorized and therefore purported appeals therefrom would be dismissed.

2. Gaming ⇐73

Under statute defining offense of unlawfully receiving money offered for purpose of being wagered on result of a horse race, it is not a requirement that defendant's handwriting appear on any paper used in connection with a wager on a horse race, or that defendant be in possession of a betting marker or any other paper used in connection with a wager on a horse race, and only requirement is that he receive money as a wager on a race or purported race. Pen.Code, § 337a, subd. 3.

3. Gaming ⇐98(3)

Evidence sustained conviction of defendant for unlawfully receiving money offered for purpose of being wagered on result of horse race. Pen.Code, § 337a, subd. 3.

Arthur E. Boyd, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Dan Kaufmann, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

[1] Defendant was accused of violating section 337a, subdivision 3, of the Penal Code, in that, he unlawfully received money offered for the purpose of being wagered upon the result of a horse race. Trial by jury was waived. He was adjudged guilty. His motion for a new trial was denied. Probation was granted and execution of sentence was suspended. The notice of appeal recites that he appeals from the judgment, verdict, sentence and the "denial" of his motion for a new trial. Since an appeal from a verdict or sentence is not authorized, the purported appeals therefrom will be dismissed. People v. D'Elia, 73 Cal.App. 2d 764, 766, 167 P.2d 253.

Appellant contends that the evidence was insufficient to justify the conviction.

By stipulation the People's case was submitted upon the transcript of the preliminary examination and the exhibits referred to therein.

On February 15, 1951, at 12:05 p. m., when a police officer entered a restaurant which was operated by defendant, there were numerous customers therein and the defendant was waiting on them. The officer testified that he sat at the counter beside an unidentified man who said to the defendant, "Let me see your sheet"; the defendant took a scratch sheet from his pocket and handed it to the man; the man looked at the sheet, engaged in conversation with another man next to him, and handed the sheet to the defendant; shortly after that another man, who was sitting about four seats from the officer, stopped the defendant and they looked at a slip of paper, which was on the counter, on which there were pencil notations; they had a conversation, which the witness could not hear, and when the defendant left the man he stated that "he was in the first race"; the defendant then walked to the rear of the restaurant and gave the scratch sheet to another man; that man looked at the sheet for a few minutes and gave it to the defendant; about 12:20 p. m., a man entered the restaurant and the defendant went to the cash register which was about 10 feet from the officer, and the man who had just

entered the restaurant said to the defendant, "Poor Idea in the fifth"; the defendant said, "O.K.," picked up the racing section of the newspaper, which was on the counter near the cash register, looked at it, and then stated, "That is Poor Idea. O.K. How do you want it?" and the man replied, "To win"; the man extended his hand with two one dollar bills in it; the defendant accepted the bills and placed them in his pocket; and man then left the restaurant; he did not eat in the restaurant at that time; about 12:27 p. m., the defendant turned on the radio and in a few minutes the race results were broadcast; defendant opened the scratch sheet and made notations thereon with a pencil. Then the officer arrested the defendant.

It was stipulated that the officer was qualified as an expert regarding the manner in which bookmaking is conducted in Los Angeles County. The witness testified that in his opinion the conversation, between the defendant and the man who paid the $2, regarding "Poor Idea" related to a wager on a horse purportedly running in the fifth race at the Santa Anita track on the day defendant was arrested.

The defendant testified that he had been in the restaurant business about 12 years, and that no one assisted him in operating this restaurant; there were about ten persons in his restaurant when the officer came in; defendant had a scratch sheet in his possession; when he went to serve one of the customers, the customer said he wanted defendant's scratch sheet and the defendant showed it to him and walked away; defendant had no conversation with a man concerning a horse named "Poor Idea"; a customer came in and said, "Here is the two dollars that I owe you," and he gave the defendant two single dollars and 47 cents; the customer owed defendant the $2 for four lunches, and he gave defendant the 47 cents "for [lunch] that day"; after he had paid the defendant the customer said, "I got a hot tip in the First at Santa Anita"; the newspaper happened to be there, and the defendant said, "Is that the one?" and the customer replied, "Yes," and he walked out; then the officer arrested the defendant. He testified further that some of his customers go to the races and sometimes they look at scratch sheets; he accepted no bets in his restaurant.

A witness, called by the defendant, testified that he works at a place across the street from defendant's restaurant; shortly after 12 o'clock on said February 15th, he was in the restaurant and paid defendant $2.47 which he owed him for meals including lunch that day; he had no conversation with defendant about a horse named "Poor Idea" and he did not give defendant a bet on that horse or any other horse on that occasion.

[2] Appellant argues that there was no testimony that defendant's handwriting was on any of the exhibits, and there was no betting marker. The charge herein is that defendant violated subdivision 3 of section 337a of the Penal Code by receiving money as a wager upon a horse race. It is not a requirement, under said subdivision, that the defendant's handwriting appear on any paper used in connection with a wager on a horse race or that the defendant be in possession of a betting marker or any other paper used in connection with a wager on a horse race. People v. Hoffman, 94 Cal. App.2d 379, 382, 210 P.2d 885, 887. "The only requirement is that he receive money [Citation.] as a wager on a race or a purported race * * *." Ibid.

[3] Appellant also argues to the effect that the only evidence regarding a specific horse in a specific race was snatches of a conversation between defendant and the man; and that nothing was said about placing a bet or about any specific amount of money. The evidence shows, with respect to the name of a horse and a race, that the words "Poor Idea in the fifth" referred to a horse by the name of "Poor Idea" which was listed on the scratch sheet as being in the fifth race at the Santa Anita race track. The evidence shows, with respect to betting a specific sum, that the defendant, after referring to the racing section of the newspaper, said to the man, "That is Poor Idea. O.K. How do you want it?" and that the man replied, "To win" and then handed $2 to the defendant.

The court could have inferred from all the evidence that the defendant received the $2 as a wager on the result of a horse race.

The purported appeals from a verdict and sentence are dismissed. The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and VALLÉE, J., concur.



108 Cal.App.2d 615

Ex parte GARDO.

Cr. 2333.

District Court of Appeal, Third District, California.

Jan. 10, 1952.

Ed Gardo brought habeas corpus proceedings to secure his release from prison on ground that he had been improperly adjudged an habitual criminal. The District Court of Appeal, Schottky, J., pro tem, held that where the record showed that petitioner had been convicted of two prior offenses charged and had served a term in State prison on each of them, the petitioner had been properly imprisoned as an habitual criminal.

Petition denied.

Criminal Law ⇐1202(1)

Where record shows that petitioner had been convicted of two prior offenses charged and had served a term in state prison on each of them, petitioner had been properly imprisoned as an habitual criminal.

Ed Gardo in pro. per.

Gail A. Strader, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice pro tem.

Petitioner Ed Gardo filed in this court a petition for a writ of habeas corpus seeking his release from imprisonment in the state penitentiary at Folsom, contending that he was improperly adjudged to be an habitual criminal for the reason that the information insufficiently charged two prior convictions in that it was not specifically alleged that petitioner served time in a state prison upon each of the prior convictions, but merely that he served time in a penal institution. An order to show cause was issued by this court, directed to Robert A. Heinze, warden of the state prison at Folsom, and an answer and return has been filed by said warden.

It appears from the petition and the exhibits attached thereto that Gardo was convicted in the Superior Court of Fresno County of the crime of sodomy. He was charged with two prior convictions of burglary, one in Siskiyou County and one in Sacremento County. As to each prior conviction, which he admitted, it was alleged that the defendant "served time in a penal institution therefor." He admitted each of said prior convictions and entered a plea of not guilty to the principal charge of sodomy. Following his trial by jury and conviction upon the charge of sodomy, petitioner was adjudged an habitual criminal and sentenced to imprisonment in the state prison for the term of his natural life. The duly authenticated exhibits attached to the return of Warden Heinze show that in each of the prior convictions charged in the information petitioner served a term in a state prison in California.

The case of In re Wolfson, 30 Cal.2d 20, 180 P.2d 326, considered the problem presented in this proceeding. It was therein held that, although the use of the phrase "penal institution" rather than "State prison" in charging a prior conviction and service of a term of imprisonment therefor might be insufficient, nevertheless, on habeas corpus the court could determine the actual facts, and if it were shown that petitioner did serve time in a state prison his status as an habitual criminal would be supported. In that case the Supreme Court took evidence showing that petitioner had in fact served time in a state prison, whereas he was merely charged with having served time in a penal institution. In holding that such evidence was proper in a proceeding in habeas corpus, the court

stated, 30 Cal.2d at page 26, 180 P.2d at page 330:

"Petitioner contends that for the 1913 Pennsylvania conviction he did not serve a term in a state prison or federal penitentiary as required by section 644 of the Penal Code. The California information charged and the trial court found that petitioner served the term 'in a penal institution.' This is insufficient to bring the prior conviction within section 644, for the phrase 'penal institution,' as used by the Legislature in other sections of the Penal Code which deal with repeated offenders, refers to a county jail as well as a state prison or federal penitentiary. Thus section 666 provides for punishment of offenders who have suffered a previous conviction of petty theft and 'served a term therefor in any penal institution.' The 'penal institution' there referred to must include a county jail, for in California one who is convicted of petty theft and who has suffered no previous conviction can be imprisoned only in a county jail. (Pen.Code, § 490.)

"However, the determination of service of a term of imprisonment, a necessary part of the determination of habitual criminality, 'does not involve the validity or finality of a judgment of conviction, as such,' and both petitioner and respondent, as already stated, may refer to matters outside the California judgment roll in order to show the actual status of petitioner. (In re McVickers (1946), supra, pages 271, 272, 279 of 29 Cal.2d 176 P.2d 40, 45; In re Seeley (1946), supra, pages 298, 299 of 29 Cal.2d, 176 P.2d 24.)"

The Supreme Court then proceeded to examine the facts and found that petitioner had served a term of imprisonment in a state prison on his prior convictions, and thereupon discharged the writ previously issued.

In view of the fact that upon the record now before us it appears clearly that the petitioner was convicted of the two prior offenses charged, and served a term in the state prison on each of them, the petition for writ of habeas corpus should be and it is hereby denied.

PEEK and VAN DYKE, JJ., concur.

DAVIS v. BOARD OF MEDICAL EXAMINERS.

No. 14839.

District Court of Appeal, First District, Division 1, California.

Dec. 27, 1951.

Rehearing Denied Jan. 26, 1952.

Hearing Denied Feb. 21, 1952.

Mandate proceedings by Barnard Davis against Board of Medical Examiners of State of California in relation to revocation by board of petitioner's license as physician and surgeon. The Superior Court, City & County of San Francisco, Preston Devine, J., denied petition, and petitioner appealed. The District Court of Appeal, Bray, J., held that evidence was sufficient to sustain finding that petitioner had furnished narcotics to one who had represented himself to be an addict, and who was believed by petitioner to be an addict within meaning of inhibitory statute.

Judgment affirmed.

1. Mandamus ⇐168(4)

In mandamus proceeding by physician against Board of Medical Examiners which had revoked physician's license pursuant to provision of Business and Professions Code specifying that violation of any of statutes regulating narcotics constitutes unprofessional conduct, evidence supported finding that person to whom physician had furnished narcotics had by his conduct represented himself to be an addict within meaning of statute inhibiting furnishing of narcotics to such persons and that physician had believed such representation. Health and Safety Code, §§ 11163, 11164, 11500; Business and Professions Code, § 2391.5.

2. Mandamus ⇐168(4)

In mandamus action by physician whose license had been revoked by Board of Medical Examiners on ground of unprofessional conduct arising from violation by physician of statutes regulating narcotics, wherein it was established that narcotics had been furnished by physician without any real examination of alleged patient and upon representation by patient that he was user of narcotics, physician was not entitled to have question whether he acted in good faith and according to fair medical standards determined by tes-

timony of medical experts, since it is within common knowledge of laymen that doctors do not diagnose illness or furnish narcotics without examination.

3. Mandamus ⇐168(4)

In mandamus action by physician whose license had been revoked by Board of Medical Examiners by reason of alleged unprofessional conduct of physician as result of violation of narcotics law, evidence established that physician had furnished narcotics to alleged patient, and that such was not done in regular practice of his profession, but to person representing himself to be an addict. Health and Safety Code, §§ 11163, 11164, 11500; Business and Professions Code, § 2391.5.

4. Poisons ⇐4

As used in statute inhibiting the dispensing of narcotics to person representing himself as an addict, word "dispense" does not refer only to filling of prescriptions, but was intended to prohibit the giving or distributing of narcotics. Health and Safety Code, §§ 11163, 11164, 11500; Business and Professions Code, § 2391.5.

See publication Words and Phrases, for other judicial constructions and definitions of "Dispense".

5. Physicians and Surgeons ⇐11(3)

Fact that complaint in criminal action wherein physician was charged with violation of Health and Safety Code was dismissed after jury disagreement does not prevent acceptance of evidence adduced in such proceeding as being sufficient to support charges of violation of sections of Health and Safety Code and Business and Professions Code regulating dispensing of narcotics by physicians. Health and Safety Code, §§ 11163, 11164, 11500; Business and Professions Code § 2391.5.

6. Physicians and Surgeons ⇐11(2)

Revocation of license of physician and surgeon was warranted upon finding that physician had dispensed narcotics in violation of statutes, notwithstanding previous excellent professional reputation of physician and reputation as law-abiding citizen in community.

7. Physicians and Surgeons ⇐11(3)

Question on appeal by physician from revocation of his license is whether evidence, viewed in light most favorable to Board of Medical Examiners, sustains finding of trial court that penalty of revocation is not so disproportionate to offenses found to have been committed by petitioner as to amount to abuse of discretion on part of board.

Leslie C. Gillen, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., J. Albert Hutchinson, Deputy Atty. Gen., San Francisco, for respondent.

BRAY, Justice.

Respondent, after a hearing, revoked petitioner's license as a physician and surgeon. The superior court in a mandate proceeding, after reviewing the board's action, found that the findings and order of the latter were supported by the weight of the evidence, that the hearing was fair and regular, and that the peremptory writ of mandate should be denied. Petitioner appeals from the court's judgment.

Questions Presented.

(1) Sufficiency of the evidence before the board and court, and (2) alleged abuse of discretion in the penalty imposed.

Facts.

By stipulation the evidence presented to the board and reviewed by the superior court was the 728 page transcript of the proceedings in criminal action No. 41,781, Superior Court of San Francisco, in People v. Davis, wherein petitioner had been charged with violation of section 11500 of the Health and Safety Code. The trial of that action resulted in a disagreement of the jury and the action was dismissed. After reading the transcript in the criminal action we feel that we cannot improve upon the statement of the facts set forth in the memorandum opinion of the Hon. Preston Devine, the judge who heard the mandate proceeding. That statement, in part, is as follows:

"3. *It is contended that the findings are not supported by the weight of the evidence.*

"The facts may be stated as follows:

"Petitioner was a very reputable physician whose specialty was internal medicine with particular reference to diseases of the heart. About two years before the occurrences which brought about these proceedings, he wrote two narcotic prescriptions for a woman who either was at that time or who later became, an informer for the Division of Narcotic Enforcement. As this informer did not testify at the trial, and as the doctor testified to the legitimacy of these transactions, and as they are not the subject of any charges against him, they are presumed to be legitimate and they simply give an introduction to the facts of the case.

"On April 19, 1948, this informer 'phoned to Doctor Davis and, according to the doctor's testimony, said that she had a friend who was suffering from cancer. The doctor endeavored to have her bring him to some one else, but she said that he was a stranger in town. She arrived in the doctor's office with Inspector Fennell, who passed as a 'Mr. Wilson,' and she asked 'Is there anything you can do to help us?' The doctor replied, 'I haven't any now,' and said, either 'You know we can't write for you people' or 'We can't write prescriptions for you,' or words to that effect. He asked Fennell, 'Do you use it, too?' to which Fennell replied that he did. This question and answer, which are quite important, Fennell testified to on direct examination, and on cross-examination, saying that he remembered it distinctly. He told the woman, whom he called Bonnie, or Mrs. Barney, to call him up later and he would let her know.

"That the transaction was of suspicious nature from the start appears from the facts that (a) the doctor made no inquiry of Fennell's pathology; (b) he announced from the start that he could not write a prescription (he understood that morphine was desired) though if there were a pathology requiring narcotics, there was no reason why he should not write a prescription; (c) the woman asked if the doctor couldn't help 'us' out; (d) if Fennell were really ill, there was no reason for deferring treatment and asking that the woman call up later. However, the doctor committed no offense at that time, for no narcotics were furnished.

"On April 27, the informer and the inspector visited the doctor the second time. The doctor required the woman to come into his office first, and since the informer did not appear at the trial, the only testimony we have is that of the doctor as to what occurred in his office then. In a short time, according to Fennell perhaps thirty or forty-five seconds, or perhaps a minute and a half, he invited Fennell in. At this point, the informer said 'He will let us have three half grains (or perhaps "three halves") for $20.' The doctor handed over three tablets of morphine in a tissue, and the $20 was either left on the table or taken by the doctor, but in any event, paid.

"The illegitimacy of this transaction is apparent. No medical history of Fennell was taken, no inquiry was made as to previous medication, no examination whatever was made except looking at Fennell (Fennell denies that his glasses were removed, though the doctor asserts they were), and the alleged diagnosis was a combination of arthritis, tic and possibly gastric ulcers, summed up as pain, although at the trial, at least, the doctor remembered that the informer had said he had cancer. The woman related the quantity, three half grains, to a stated sum of $20, and she said he will let 'us' have the (morphine), though it was admitted the woman was not a patient. The 'fee' was $20 for a few minutes' visit. And, although the furnishing of narcotics by giving part of the office supply was not in itself an illegal method, combined with the other factors, it is plain why no prescription was issued. No record of the amount appears in the doctor's log book, though that fact may not be very important.

"Thereafter, the visits of Fennell alone on May 4, May 14 and May 21 were, in the main, repetitious of the first visit, with the added factors that the doctor required $50

thereafter, required payment in smaller bills than the $50 offered, inquired as to whether the money was marked, asked if anyone had followed Fennell, told Fennell not to have his name or address on his person, kept no records of the $50 payments, dropped the $50 on May 21 into a sterilizer when the officers came, was told by Fennell that the latter made his money by 'hustling' a girl and had never been arrested for vagrancy but never for 'junk,' never did any of the common examinations, such as blood pressure, and never prescribed any treatment, and upon his apprehension he claimed not to remember nearly everything that had happened. * * *

"The last question is: Did Fennell represent himself to be a narcotic addict, as set forth in Section 11164? He did not do so expressly. He did not say 'I am an addict,' or 'I am an habitual user'; but in answer 'Do you use it, too?' he said that he did. This was, I think, sufficient to brand him as an addict unless and until the doctor should, by a reasonable examination, become reasonably satisfied that Fennell's use of morphine was a legitimate use. The 'representation' likewise was by conduct, which was sufficient to cause the doctor to be fearful of marked money, fearful that someone had followed Fennell, and unwilling to write a prescription."

Sufficiency of the Evidence.

The board found that petitioner had violated sections 11163, 11164 and 11500 of the Health and Safety Code, thereby constituting unprofessional conduct within the meaning of section 2391.5 of the Business and Professions Code, which provides that the violation of any of the statutes of this state regulating narcotics constitutes unprofessional conduct. Section 11163, Health and Safety Code, provides: "Except in the regular practice of his profession, no person shall prescribe, administer, or furnish, a narcotic to or for any person who is not under his treatment for a pathology or condition other than narcotic addiction, except as provided in this division." Section 11164 provides: "No person shall prescribe for or administer, or dispense a narcotic to an addict, or to any person representing himself as such, except as permitted by this division." Section 11500 provides: "Except as otherwise provided in this division, no person shall possess, transport, sell, furnish, administer or give away, or offer to transport, sell, furnish, administer, or give away, or attempt to transport a narcotic except upon the written prescription of a physician, dentist, chiropodist, or veterinarian licensed to practice in this State."

Petitioner admits the furnishing of the narcotics to Fennell but contends that the evidence shows that they were furnished as stated in section 11163, "in the regular practice of his profession"; that Fennell was not a person referred to in section 11164 as "an addict, or * * * person representing himself as such" or at least that the evidence does not establish that the narcotics were not furnished as allowed by these sections. He also contends that the narcotics were furnished as allowed by section 11330, Health and Safety Code, which provides:

"A physician may prescribe for, furnish to, or administer narcotics to his patient when the patient is suffering from a disease, ailment, injury, or infirmities attendant upon old age, other than narcotic addiction.

"The physician shall prescribe, furnish, or administer narcotics only when in good faith he believes the disease, ailment, injury, or infirmity, requires such treatment.

"The physician shall prescribe, furnish, or administer narcotics only in such quantity and for such length of time as are reasonably necessary."

[1] Admittedly Fennell was not an addict. The board so found. It found, however, that he represented himself to be an addict or habitual user of narcotics. Petitioner challenges this finding and points out that Fennell at no time said he was an addict. However, as set forth in the extract from Judge Devine's opinion hereinbefore set forth, the evidence reasonably supports the conclusion that by his conduct he represented himself to be an addict and that petitioner thought he was, in spite of

petitioner's testimony that he knew that Fennell was not an addict.

[2] Petitioner testified that the informer, Mrs. Barney, told him on the phone that her friend was a very sick man, that he had cancer and was in great pain; that when Fennell walked into his office he had a marked forward and flexed position, a forward tilt with one arm lower than the other with a painful expression on his face, one side of it tilted up as though he had a facial paralysis, a marked twitching of the oral region and of the eyebrows, an abnormal movement of the eyeballs, and "this marked painful expression in the face, such as from a gaseous eruption." As a medical man he diagnosed the condition as spondylitis plus a neurological disorder or nervous involvement, and that Fennell was in great pain. Thus, says petitioner, the record establishes as a matter of law that he acted in good faith and according to fair medical standards. He then contends that whether he so acted must be determined solely by the testimony of medical experts, citing Engelking v. Carlson, 13 Cal.2d 216, 88 P. 2d 695. However, there, in a malpractice case, the court was considering the tests of whether the doctor had the degree of skill and learning ordinarily possessed by physicians of good standing practicing in the same locality, and stated that whether the doctor had used ordinary care and diligence in applying that learning and skill was a question for medical experts, and that where the matter is one within the knowledge of experts only and is not within the common knowledge of laymen, the expert knowledge is conclusive. In our case the fact of the lack of any real examination of the alleged patient, the short time involved in the interviews, the answer by Fennell to the doctor's question if he used narcotics, the fees charged, the petitioner's question as to whether the currency was marked, his requirement that he be paid in smaller bills, his hiding the last payment in the sterilizer, the lack of instructions to the patient as to treatment, care of himself, or use of the pills, the lack of making a record of Fennell's visits, the petitioner's lack of inquiry as to examination or treatment of Fennell by other medical men, coupled with the petitioner's ready acceptance of Fennell's alleged statement that morphine was the only medicine that would give him relief, the temporary character of the remedy without any attempted consideration of permanent remedy or care, —all are within the common knowledge of laymen that doctors do not diagnose or treat illness that way nor do they, or are they legally permitted to, furnish narcotics that way. In Moran v. Board of Medical Examiners, 32 Cal.2d 301, 196 P.2d 20, the trial court found that the weight of the evidence did not support the board's finding that the doctor's treatment of the patient was not legally and medically proper. The facts are so dissimilar to those in our case that the case is not in point here. For one thing, there the doctor obtained from the patient and other doctors a long history of illness, complicated by the presence of an incurable disease. The court pointed out that the evidence was conflicting, and that as the trial court had resolved the conflict, the reviewing court's only province is to determine whether the evidence, viewed in the light most favorable to the trial court's findings, sustains those findings. Here, petitioner's evasiveness in his testimony and his own version of the circumstances of the various visits of Fennell are completely incompatible with action in good faith. The following language from People v. Kinsley, 118 Cal.App. 593, 601, 5 P. 2d 938, 942, is applicable here: "It is obvious that it was not necessary to prescribe morphine to her, and that a cursory examination was given only for the purpose of furnishing an excuse or in pretended compliance with the law. At the times the other sales were made no examination was given to determine the necessity of prescribing morphine. * * * he also testified that he did not direct her as to the quantity she should take."

[3, 4] As to section 11163 the evidence shows that petitioner furnished narcotics to Fennell and that it was done not in the regular practice of his profession. As to section 11164 the evidence shows that petitioner dispensed narcotics to a person representing himself as an addict. Petitioner gives the word "dispense" too narrow a

definition, contending that it has reference only to the filling of prescriptions. Webster's New International Dictionary, 1931 edition, gives among other definitions of the word "to distribute; to give"; it refers to the pharmaceutical definition, "to put up (a prescription or medicine)" as obsolete. Dorland's American Illustrated Medical Dictionary (1929 ed.) defines "dispense" "To prepare and distribute medicines to those who are to use them." It is obvious that in section 11164, which was intended to prevent addicts from obtaining narcotics, the word "dispense" was never intended to have the narrow meaning given in Dorland above, and which Webster says is an obsolete meaning, but was intended to prohibit the giving or distributing of it. And as to section 11500 the evidence shows that petitioner sold and furnished to Fennell narcotics without a written prescription.

[5] It is not clear from petitioner's briefs whether he contends the fact of the dismissal of the complaint in the criminal action after jury disagreement prevents the acceptance of the evidence therein as being sufficient to support charges of violation of the above-mentioned sections of the Health and Safety and the Business and Professions Codes. If so, the contention is erroneous. Stuck v. Board of Medical Examiners, 94 Cal.App.2d 751, 211 P.2d 389.

The Penalty.

[6, 7] Petitioner contends that the revocation of his license is a penalty so disproportionate to the violations involved as to amount to an abuse of discretion by the board, and necessarily that the trial court erred in not revising the penalty. Assuming that this court has the power in a proper case to reverse a judgment of this type for reconsideration of the penalty, we do not deem that this is such a case. True, the board found by way of mitigation that he is a married man, father of two children, had an excellent war record, had established an extensive and busy practice in the special field of internal medicine, specifically heart conditions, in which the use of narcotics is an essential element; that he had expended a substantial portion of his time in charitable work for a number of San Francisco hospitals and clinics; that he has a good reputation in his community as a law abiding citizen, a conscientious and ethical physician, and for truth, morality, honesty and integrity among members of his own profession and others, and that he attempted to discourage the repetition of visits by Fennell. We cannot say, however, that such a man is entitled to any more leniency when he violates the law and his duty as a physician for the sole motive shown by the evidence, money, than the physician who does not stand so high in his profession, does not have such a large practice, and who, perhaps, needs the money more than petitioner did. In fact, the temptation for petitioner should have been easier to resist. In Cooper v. State Board of Public Health, 102 Cal.App.2d 926, 229 P.2d 27, where the same, contention of excessive penalty was made as here, the court stated, 102 Cal.App.2d at page 932, 229 P. 2d at page 31: "The question on appeal is whether the evidence, viewed in the light most favorable to the board, sustains the finding of the trial court to the effect that the penalty of revocation is not so disproportionate to the offenses found to have been committed by the petitioner as to amount to an abuse of discretion on the part of the board." Its characterization of the situation applies to the one here, 102 Cal.App.2d at page 932, 229 P.2d at page 31: "The record shows, largely on petitioner's own testimony, that * * * he deliberately and consciously violated the statutes we have referred to, for personal, financial aggrandizement—without excuse, mitigation or palliation. Manifestly, the findings of the trial court are supported by the evidence."

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

108 Cal.App.2d 200

PEOPLE v. BEAL.

Cr. 2723.

District Court of Appeal, First District, Division 2, California.

Dec. 14, 1951.

Rehearing Denied Dec. 29, 1951.

Hearing Denied Jan. 11, 1952.

Willis L. Beal was convicted in the Superior Court in and for the County of Alameda, Charles Wade Snook, J., of robbery of the first degree, and he appealed. The District Court of Appeal, Patterson, J., held that the information and the evidence supported the judgment.

Judgment and order denying new trial affirmed.

1. Criminal Law ⇐741(2)

In prosecution for robbery, proof of the identity of the accused as the one who committed the offense was for the jury.

2. Criminal Law ⇐1160

Where there is substantial evidence to support jury's finding and a new trial has been denied, jury's finding will not be disturbed on appeal.

3. Indictment and Information ⇐37

Information, charging that defendant robbed another of $2,490, more or less, lawful money of the United States, charged a public offense in the approved form. Pen. Code, §§ 211, 951.

4. Criminal Law ⇐1036(2)

In prosecution for robbery where defendant voluntarily testified in his own behalf and failed to object to cross-examination of himself by District Attorney regarding his previous offenses and the fact that he was on parole at the time of the alleged robbery, defendant could not object for the first time on appeal.

5. Witnesses ⇐337(5), 359

When a defendant in a criminal action takes the stand as a witness he subjects himself to impeachment by proof that he had been convicted of a felony and thereby waives provisions of statute regarding manner in which an accused may be impeached by showing of previous felony conviction. Code Civ.Proc. § 2051; Pen.Code, § 1025.

6. Criminal Law ⇐429(1)

In prosecution for robbery, accused's past prison record was properly introduced as prima facie evidence of fact of imprisonment. Pen.Code, § 969b.

7. Criminal Law ⇐444

In prosecution for robbery, district attorney laid proper foundation for introduction of accused's prison record when he offered a certificate of the Department of Corrections signed by the director and deputy director and accompanying certified prison record. Pen.Code, § 969b.

8. Criminal Law ⇐322, 444

In prosecution for robbery where District Attorney offered a certificate of the Department of Corrections signed by a Deputy Director together with previous prison records of the defendant, Deputy Director was presumed prima facie to be a regularly appointed Deputy and the exhibits were properly authenticated. Pen.Code, § 969b.

9. Criminal Law ⇐598(1)

In prosecution for robbery where there was no showing of due diligence on the part of the defendant to obtain testimony of absent witnesses, trial court did not abuse its discretion in denying defendant's application for continuance.

10. Criminal Law ⇐814(17)

Where there is both direct and circumstantial evidence the trial court is justified in giving an instruction on circumstantial evidence.

11. Criminal Law ⇐814(17)

In prosecution for robbery, where prosecution relied upon testimony of witnesses as to identity of perpetrator's automobile as the one registered in the defendant's name, and as to character of money found a few hours later in possession of defendant's woman companion, instruction to jury as to definitive distinction between direct and circumstantial evidence, manner in which it is to be applied, weight to be given circumstantial evidence and type of circumstantial evidence needed to convict accused was authorized by evidence.

12. Criminal Law ⇐824(1)

It is the duty of the court in criminal cases to give, of its own motion, instructions on pertinent general principles of law where they are not proposed or presented in writing by the parties themselves, but the court need not give instructions on specific points developed through evidence introduced at trial unless such instructions are requested.

13. Criminal Law ⇐824(4, 5)

In prosecution for robbery where defendant requested no instruction to jury not to consider cross-examination of defendant with reference to parole violations, or instruction with reference to importance of identification of defendant and to use of defendant's automobile in the robbery, failure to give such instructions was not error.

14. Criminal Law ⇐1036(1)

In prosecution for robbery where accused failed to object to testimony as to his parole status, that testimony was properly before jury and could not be questioned as prejudicial for first time on appeal.

Ernest Spagnoli, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Dep. Atty. Gen., for respondent.

PATTERSON, Justice pro tem.

Defendant was charged in an information with the crime of robbery. He was tried by a jury and found guilty of robbery of the first degree. He was also charged with and admitted two previous felony convictions. This appeal is from the judgment and from an order denying a motion for a new trial.

At about 10 a.m. on November 19, 1949, a man armed with a revolver robbed the Mel-O-Dee Club, a tavern in Albany, California. The robber entered the tavern shortly after one of the owners, Emil Guisto, opened for the day's business. Guisto was directed to lock the door and close the blinds on the windows. A janitor who was also present was marched into a back room. Guisto was ordered at the point of a revolver to open the safe and deliver its contents, which he did. During the course of the robbery a man named Greenwood, a friend of the owner, came to the club and finding the front door locked entered through a rear door. He was not aware of the robbery. The robber ordered the owner to get rid of him and Guisto sent him next door on an errand. The robber left shortly thereafter with the proceeds of the robbery, amounting to some $2450.00 in cash and checks. While on the sidewalk Greenwood saw a man dressed as described by Guisto leave the tavern, enter a new Oldsmobile car with Nevada license plates and drive away. Greenwood pursued the car and, although unable to catch up with it, did secure the license number. Two other witnesses saw the car with the Nevada license plates and, although unable to identify the defendant, described the driver of the car as similar in dress and appearance to that described by Guisto.

That afternoon the defendant was arrested in San Jose riding in the car observed by the witnesses at the scene of the robbery. The car bore Nevada license plates and was registered in the name of the defendant and Virginia Beal, a woman with whom the defendant was living at the time. She was in the car with the defendant when he was arrested. The woman was searched by the San Jose Police Department and there was found upon her person $1353.00 in currency, a portion of which was in new $10.00 and $20.00 bills. One of the owners of the Mel-O-Dee Club had obtained some new $10.00 and $20.00 bills at the bank on the day preceding the robbery. The woman admitted the money had been given to her by the defendant.

The defendant denied the commission of the robbery and sought to establish an alibi. He testified that he drove to the Labor Temple in Oakland the morning of the robbery at about 9:30 a.m. to keep a business appointment with a man named Jim Ross or Bob Ross. He claimed he loaned the car to Ross and it was returned to him at about 11 a.m. He was unable to produce Ross, could not tell where he lived or could be located, and he had not seen Ross since he loaned the car to him. The only infor-

mation he could give about Ross was that he was a gambler. Three witnesses testified on behalf of defendant that they had seen him at the Labor Temple at or shortly after 10 a.m. on the day of the robbery.

[1, 2] Defendant first contends that the evidence is insufficient as a matter of law to uphold the conviction of robbery. That a robbery occurred is indisputable and the only question presented is as to the identity of the defendant. He was identified at the trial by the two witnesses who saw him at the time of the robbery, Emil Guisto and the janitor. In addition there is strong circumstantial evidence consisting of the fact that the get-away car was registered in defendant's name and there was found on the person of his woman companion money of the same kind and denomination as was taken in the robbery. Proof of the identity is a matter for the jury's determination. Where there is substantial evidence as support the jury's finding and a new trial has been denied by the trial judge, it will not be disturbed on appeal. People v. Newland, 15 Cal.2d 678, 104 P.2d 778.

[3] Defendant next contends that the information charging "defendant robbed Emil Guisto of $2490, more or less, lawful money of the United States" did not charge a public offense. He complains that it does not contain the technical elements of robbery as defined in Penal Code Section 211. The information is in the short form prescribed by Section 951 of the Penal Code. This form of information has been approved in People v. Quinn, 94 Cal.App.2d 112, 210 P.2d 280; People v. Kent, 90 Cal.App.2d 77, 202 P.2d 376; People v. Fallai, 99 Cal. App. 297, 278 P. 449; People v. Sampsell, 104 Cal.App. 431, 286 P. 434.

[4] Defendant next complains that the trial court erred in permitting the District Attorney to examine the defendant concerning his penal servitudes and paroles. The defendant voluntarily testified in his own behalf and by way of impeachment he was cross-examined regarding his previous offenses and the fact that he was on parole at the time of the present offense. Although no objections were made to this line of cross-examination nor was a motion to strike made, he urges that it was the duty of the court *sua sponte* to exclude this evidence. No authorities are cited in support of this contention. The failure to object to evidence offered waives the objection and the defendant cannot object for the first time on appeal. People v. One Ford V8 Coach, 21 Cal.App.2d 445, 69 P.2d 473; Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 461, 168 P. 1037; Campbell v. Genshlea, 180 Cal. 213, 180 P. 336; People v. Ines, 90 Cal.App.2d 495, 203 P. 2d 540.

[5–8] Over the objection of the defendant the court admitted into evidence a copy of the defendant's prison record. Defendant charges that a proper foundation was not laid for the introduction of this evidence. When the defendant takes the stand as a witness he subjects himself to impeachment by proof that he has been convicted of a felony. He thereby waives the provisions of Section 1025 of the Penal Code. Code of Civil Procedure, Section 2051; People v. Richardson, 74 Cal.App.2d 528, 169 P.2d 44; People v. Cordero, 92 Cal. App.2d 196, 206 P.2d 665. The records were properly admitted in accordance with the Penal Code Section 969b. Under this section a copy of the record of incarceration certified by the official custodian of such records is admissible to establish prima facie evidence of the fact of imprisonment. The District Attorney laid the proper foundation for the introduction of these records when he offered "under the provisions of Section 969b of the Penal Code, a certificate of the Department of Corrections signed by the Director and Deputy Director and the accompanying prison record certified as provided by the section." There is no merit to appellant's contention that these exhibits were not properly authenticated. People v. Richardson, supra, 74 Cal.App.2d 528, 169 P.2d 44. Defendant argues there is no evidence that Mr. Klinger was a Deputy Director. As Klinger purported to act as such it would be presumed *prima facie* that he was a regularly appointed deputy. People v. Howard, 72 Cal.App. 561, 237 P. 780.

[9] Defendant charges an abuse of the trial court's discretion in denying a contin-

uance. After both sides had rested and during a discussion of record in chambers defendant requested permission to reopen his case "so I can tell my own story" and to subpoena several witnesses who had not appeared. Defendant had testified fully on his own behalf and no reason was shown why he should be allowed to testify again. Although the case had been pending more than nine months no effort had been made to subpoena the witnesses. Defendant did not disclose what witnesses he expected to call or in what way their testimony would be material. In People v. Beard, 36 Cal. App.2d 35, 96 P.2d 961, in considering a similar situation the court said: "An application for continuance on the ground of the absence of witnesses is addressed to the sound discretion of the trial court, and its ruling will not be reviewed except for the most cogent reasons." There was no showing of due diligence to obtain this testimony and the court did not abuse its discretion in denying the application.

[10, 11] Defendant argues that the trial court committed prejudicial error in giving instructions on circumstantial evidence, his argument being that, "The theory and the sole and only theory of the case maintained throughout by the state was that two eye witnesses saw and observed the defendant commit the alleged robbery." This is not true. In addition to the direct evidence, the prosecution relied upon the testimony of witnesses as to the identity of the get-away car which was registered in the defendant's name, and the kind and character of money found a few hours after the robbery in the possession of defendant's woman companion. Where there is both direct and circumstantial evidence the court is justified in giving an instruction on circumstantial evidence. People v. Richardson, supra, 74 Cal.App.2d 528, 169 P.2d 44. Defendant's cases deal with the propriety of the court's refusal to give an instruction on circumstantial evidence at the request of defendant where the prosecution relied primarily upon direct testimony and circumstantial evidence was merely incidental. They are not in point here.

The court did not commit error in instructing the jury as to the definitive distinction between direct and circumstantial evidence, the manner in which it is to be applied, the weight to be given circumstantial evidence and the type of circumstantial evidence needed to convict the accused. People v. Lim Foon, 29 Cal.App. 270, 155 P. 477.

[12–14] Defendant complains that the court on its own motion should have instructed the jury not to consider the cross-examination of defendant with reference to his parole violations and further should have instructed with reference to the importance of the identification of the defendant and relative to the use of defendant's car in the robbery. No instructions were requested on these points. The testimony as to defendant's parole status was received without objection, was properly before the jury and cannot be questioned as prejudicial for the first time on appeal. The court's duty to instruct on its own motion in criminal cases is stated in People v. Warren, 16 Cal.2d 103, 104 P.2d 1024, 1031, quoting from 8 Cal.Jur. 309, as follows: "It is the duty of a court in criminal cases to give, of its own motion, instructions on the general principles of law pertinent to such cases, where they are not proposed or presented in writing by the parties themselves. But it is not its duty to give instructions upon specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them. When the court fully and fairly charges the jury upon the law appertaining to the facts of the case, its failure to instruct on any particular matter deemed essential is not error in the absence of a request for such an instruction."

The judgment and order denying a new trial are affirmed.

NOURSE, P. J., and GOODELL, J., concur.

108 Cal.App.2d 397

FORMOSA CORP. et al. v. ROGERS et al.

Civ. 17911.

District Court of Appeal, Second District, Division 3, California.

Dec. 27, 1951.

Rehearing Denied Jan. 14, 1952.

Hearing Denied Feb. 21, 1952.

The Formosa Corporation, a corporation, brought action for partition against Mary Pickford Rogers, formerly Mary Pickford Fairbanks, also known as Mary Pickford, and Sylvia Stanley of Alderly, formerly Sylvia Fairbanks, and Mary Pickford Rogers filed a cross-complaint against the Formosa Corporation, Sylvia Stanley, and Samuel Goldwyn to quiet title as to certain buildings and improvements as against Samuel Goldwyn. An amended and supplemental complaint for partition was filed in which Samuel Goldwyn Productions, Inc., was joined as plaintiff. The Superior Court of Los Angeles County, Paul Nourse, J., entered an interlocutory judgment adverse to Mary Pickford Rogers, and she appealed. The District Court of Appeal, Wood, J., held that evidence sustained finding of Superior Court that partition by sale rather than partition in kind was required.

Portions of judgment appealed from affirmed.

1. Landlord and Tenant ⇐161(3)

In partition action by tenants in common against tenants in common owning majority undivided interest in realty used for making moving pictures, and against lessee who was allegedly the alter ego of plaintiffs, and who owned certain personalty on the realty and buildings removable on compliance with terms of lease, wherein defendant tenant in common filed cross-complaint against lessee to quiet title to personalty and buildings on ground that lessee was in default under lease, and was not entitled to remove personalty and buildings, evidence sustained finding that defendant tenant in common had waived any right to prevent lessee from removing the property that he claimed, and that defendant tenant in common was estopped to claim that lessee was in default under lease.

2. Contracts ⇐168

Implied covenants are not favored in the law, and courts will declare them to exist only when there is a satisfactory basis in express contract of parties making it necessary to imply certain duties and obligations in order to effect the purposes of parties.

3. Landlord and Tenant ⇐160(2)

Where there was no express provision in lease of realty used for making moving pictures that in event lessee exercised right under lease to remove his property from realty he should restore realty to condition that it was in before removal of property, though earlier lease had contained express covenant to restore the premises, and it appeared that lease was carefully prepared with intention of expressing complete agreement, there was no implied covenant on part of lessee to restore premises.

4. Partition ⇐14

A tenant in common has an absolute right to partition.

5. Partition ⇐77(3)

The law favors partition in kind rather than partition by sale, and a sale will be ordered only when it is necessary to prevent great prejudice to the owners, or in cases of imperious necessity.

6. Partition ⇐77(4)

In partition action by tenants in common against tenant in common owning majority undivided interest in realty used for making moving pictures and improved with about 64 buildings and structures of the kind used in a moving picture studio, burden of proving necessity for partition by sale was on the parties seeking partition by sale. Code Civ.Proc. § 763.

7. Trial ⇐375

Observations of trial judge in viewing realty in partition action were evidence in the case.

8. Appeal and Error ⇐1009(1)

In partition action by tenants in common against tenant in common owning majority undivided interest in realty used for making moving pictures and improved with about 64 buildings and structures of the kind used in a moving picture studio, question whether great prejudice would result if the realty was divided in kind was a fac-

tual question to be determined by the trial court as trier of the facts.

9. Appeal and Error ⇐1009(3)

Where evidence, even though conflicting, is such that trial court in partition action might reasonably draw conclusion therefrom that partition in kind would result in great prejudice to the owners, and the trial court orders partition by sale, such determination will not be disturbed on appeal. Code Civ.Proc. § 763.

10. Partition ⇐77(4)

In partition action by tenants in common against tenant in common owning majority undivided interest in realty used for making moving pictures and improved with about 64 buildings and structures of the kind used in a moving picture studio, evidence was sufficient to sustain finding that partition by sale was necessary because great prejudice might result from partition in kind. Code Civ.Proc. § 763.

11. Partition ⇐77(1)

Where trial court in partition action did not abuse its discretion in ordering partition by sale, it was immaterial whether the court might, as an alternative method, have ordered realty partitioned in kind if it could not be sold for a minimum value as found by the court. Code Civ.Proc. § 763.

12. Appeal and Error ⇐717

Statements given by trial judge as reasons for his ruling or decision do not prevail on appeal over the formal findings and judgment of the court.

13. Appeal and Error ⇐854(1)

On appeal, it is the result reached by the trial court that is reviewed, not the reason assigned by the trial court for its decision.

14. Appeal and Error ⇐852

If findings, supported by evidence, are sufficient to warrant relief granted on any legal theory, judgment should be affirmed.

15. Landlord and Tenant ⇐161(3)

In partition action, wherein a cross-complaint was filed against lessee to quiet title to certain personalty and buildings on realty on ground that lessee was in default under lease and was not entitled to remove such property, burden was on lessee to establish what property was removable by him.

16. Landlord and Tenant ⇐161(3)

In partition action, wherein a cross-complaint was filed against lessee to quiet title to certain personalty and buildings on realty on ground that lessee was in default under lease and was not entitled to remove such property, court erred in finding that lessee was entitled to remove property other than that specifically listed by him, where there was no proof that he was entitled to any property other than that listed by him and specifically found by court to be removable.

O'Melveny & Myers, Jackson W. Chance, and W. B. Carman, Jr., Los Angeles, for appellant.

Loeb & Loeb, Herman Selvin, and George Slaff, Los Angeles, for respondents.

WOOD, Justice.

The Formosa Corporation, a corporation, commenced an action against Mary Pickford Rogers and Sylvia Stanley for partition of 17.4 acres of land, upon which there were buildings and other improvements used in making motion pictures. It was alleged in the complaint that the plaintiff and the defendants owned the property as tenants in common; plaintiff owned an undivided 19/80 of the property; defendant Rogers owned an undivided 41/80 of the property; defendant Stanley owned an undivided 20/80 of the property; and that Samuel Goldwyn owned certain buildings which were upon the property. Defendant Rogers, in answering the complaint, admitted that she owned 41/80 of the property, and she denied that Samuel Goldwyn owned certain buildings upon the real property but she alleged that his rights, if any, in certain buildings thereon were set forth in leases referred to in the complaint. Defendant Stanley, in answering the complaint, denied that Samuel Goldwyn owned any buildings upon said property except as provided in leases referred to in the complaint. Defendant Rogers filed a cross-complaint wherein she named the plaintiff

Formosa Corporation, defendant Stanley, and Samuel Goldwyn as cross-defendants, and wherein she asked that the court quiet her title against Samuel Goldwyn with respect to all buildings and permanent improvements upon said property. The cross-defendants Formosa Corporation and Samuel Goldwyn, in answering the cross-complaint, alleged that Samuel Goldwyn is the owner of certain buildings and improvements upon said property by virtue of the provisions of a supplemental lease dated February 4, 1933, as thereafter modified and supplemented, and that cross-defendant Samuel Goldwyn has the right, under certain conditions and within 30 days after the expiration of his lease on said property, to elect to remove said buildings and improvements.

About a year after the original complaint had been filed, the Samuel Goldwyn Productions, Inc., purchased defendant Stanley's 20/80 interest in said property. On January 25, 1949, an amended and supplemental complaint for partition of real property was filed in which the Samuel Goldwyn Productions, Inc., was joined as plaintiff with the Formosa Corporation. It was alleged in the amended and supplemental complaint that a partition of the real property in kind would render each of the parts so divided useless for the purposes of conducting thereon a motion picture studio, and would substantially reduce the value of each of said parts as compared with its proportionate value as a part of said real property as a whole; that the real property is so situated and the permanent construction thereon is such that physical partition of the property cannot be made without great prejudice to the owners; and that it is necessary that the property be sold and the proceeds of such sale divided among the owners as their interest shall appear. It was also alleged in the amended and supplemental complaint that certain buildings, improvements and personal property on the land were owned by Samuel Goldwyn.

Defendant Rogers, in answering the amended and supplemental complaint, denied that Samuel Goldwyn is the owner of any buildings on the land, and denied that he has any right to remove any buildings, improvements or any other property from the land and denied that the property could not be partitioned in kind without great prejudice to the owners thereof. As an affirmative defense, she alleged in that answer that Samuel Goldwyn is the owner of all the issued and outstanding stock of the Formosa Corporation and is the owner of all the issued and outstanding stock of Samuel Goldwyn Productions Inc., except 20 per cent of one class of the stock which has no voting rights; that said Goldwyn controls all the affairs and business of both said plaintiffs and that he is the alter ego of said two plaintiffs, and unless he is treated as the alter ego of said two corporations injustice will result to the defendant. As another affirmative defense, she alleged therein that the plaintiffs had failed to join as a defendant in the action a necessary party defendant, to wit: Samuel Goldwyn.

Samuel Goldwyn was made a party defendant in the action before evidence was introduced. In his answer to the amended and supplemental complaint he admitted all the allegations of that complaint; he alleged that he is the successor in interest of the lessee named in the lease, referred to in said complaint, and as such is the owner of the rights and options granted to the lessee, including the right to remove all personal property, equipment, and certain buildings and improvements on the premises.

Mr. Goldwyn and the plaintiffs Formosa and Goldwyn Productions, Inc., specified in their pleadings numerous items of property which they claimed Goldwyn had the right to remove. The property which they claimed he had a right to remove may be referred to as three classes of property as follows: (a) 146 items of claimed "new buildings and improvements"; (b) personal property not affixed to the land or improvements thereon; (c) property affixed to the land or improvements thereon. With respect to the said 146 items in class "(a)," claimed as "new buildings and improvements," Goldwyn conceded during the trial that all of said items except 11 were not removable by him. The court decided that 3 of said 11 remaining items were not new buildings and improvements and were not removable by Goldwyn. It was adjudged

that the 8 remaining items were removable. With respect to the property in said class "(b)," personal property not affixed to land or improvements, defendant Rogers, during the trial, waived any objection to removal of this kind of property within the time limited by the 1933 modification of the lease. This property, therefore, is not in controversy on appeal. With respect to the property in said class "(c)," property affixed to land or improvements, defendant Rogers, during the trial, conceded that if Goldwyn is not in default under the 1933 lease and the 1933 modifying agreement the certain affixed property involved here, except property so affixed that its removal could not be effected without substantial injury to the premises, is removable by Goldwyn within the time limited by the 1933 modifying agreement. A considerable part of the affixed property is in controversy on this appeal.

In order to ascertain the extent of the property to be partitioned, it was necessary to determine whether Goldwyn was in default under the provisions of the lease. Appellant (defendant Rogers) asserts that Goldwyn was in default because he failed to obtain building permits and certificates of occupancy, and he failed to submit building plans and specifications to the lessors for their approval. The court made findings (hereinafter stated more fully) that Goldwyn was not in default.

The controversy, with respect to partition, was whether the partition should be by sale, or in kind, or by an alternative form of decree ordering a sale for not less than a certain price and if that price could not be obtained then ordering a division of the property in kind. The court found that partition in kind could not be made without great prejudice to the cotenants.

It was adjudged that Formosa, Goldwyn Productions, Inc., and Rogers were owners in fee simple as tenants in common of the real property in undivided proportions as follows: Formosa, 19/80; Goldwyn Productions, Inc., 20/80; Rogers, 41/80. It was also adjudged that Goldwyn is the owner of, and has the right to remove, the following described 8 items of property which are on said real property: stage 8 and everything therein or affixed thereto; feeder lines to stage 8; soloists booth located on stage 7; set storage sheds along west fence; new meter on water line to outdoor tank; 3 camera vault buildings; housing for ice machine equipment; bulletin boards on east side of stage 5. It was also adjudged that Goldwyn had the right to remove, within 30 days after November 21, 1949, (1) all personal property of every sort now, or hereafter placed by Goldwyn, on the real property, which is not affixed to some building; and (2) all furniture, machinery and equipment of every sort now, or hereafter placed by Goldwyn, on the real property, regardless of whether any of it is affixed to any building or structure, excepting only the items set forth in finding XV (which finding relates to the items claimed by Goldwyn in exhibit 29, hereinafter referred to). It was also adjudged that in exercising said right of removal Goldwyn must use reasonable care to cause as little damage as possible to the premises, but is not otherwise obligated to restore the real property or any structure thereon to the condition it was in before "any such removal"; and that any item of property which he does not remove becomes, on expiration of the time for removal, the common property of Formosa, Goldwyn Productions, Inc., and Rogers as tenants in common in the same respective undivided proportions as they own the real property. It was ordered that said real property be sold at private sale, and that the proceeds of the sale, after deducting expenses, should be divided among Formosa, Goldwyn Productions, Inc., and Rogers in the same proportions as they own the real property. Three referees were appointed to conduct the sale, and they were directed not to accept any bid for the real property in an amount less than $1,500,000 without first reporting to, and receiving such instructions as may then be given by, the court. The court expressly reserved jurisdiction for the purpose of receiving and acting upon reports from the referees, directing and instructing the referees, and ordering them to sell said real property in parts and to

make terms of sale different from those theretofore fixed in the interlocutory judgment.

Defendant Rogers appeals from certain portions of the interlocutory judgment of partition, which portions are to the effect as follows: (1) that Goldwyn is the owner of the described 8 items of property on said real property; (2) that Goldwyn has the right to remove said 8 items of property and all other personal property of any kind now or hereafter placed on the property by Goldwyn, whether or not the property is affixed to a building or structure; (3) that Goldwyn is not required to restore the real property or any building or structure to the condition it was before any such removal; (4) that the property be sold in its entirety and the proceeds divided among the three owners; (5) that certain persons are appointed referees and directed not to sell the property for less than $1,500,000; and (6) that the court reserved certain jurisdiction with respect to instructing the referees.

In 1926 the Pickford-Fairbanks Studios leased the property to United Artists Studios Corporation, Ltd. Under that lease all the buildings and other improvements were owned by the lessee, but nothing was said therein about the ownership of property other than buildings and improvements; and it was stated therein that upon the expiration of the lease, provided the lessee had complied with every covenant, the lessee might remove, within 60 days, all the improvements and personal property placed on the premises by the lessee. In 1928 the lease was amended to provide that all buildings and improvements should become a part of the realty upon expiration of the lease, and the provisions of the 1926 lease which permitted removal of improvements were cancelled. On February 4, 1933, Miss Pickford and Douglas Fairbanks, Sr., (successors to the original lessor and referred to in the lease as lessor) entered into a supplemental lease with the United Artists Studios Corporation (the name of the lessee had been changed by omitting "Ltd."). That lease recited that the 1926 lease and the 1928 amendment thereto terminated on February 4, 1933, and that the 1933 lease was substituted therefor. Under that lease all buildings and improvements and all personal property were owned by the lessee and should not become a part of the realty, provided, however, that all buildings and improvements should become a part of the realty at the expiration of the lease and belong to the lessor, and that all personal property and replacements, which formed part of lessee's plant account (as then shown by lessee's books) should become the property of the lessor upon expiration of the lease. That lease was modified on December 7, 1933, to provide that all the personal property and replacements forming part of the lessee's plant account (referred to as "old personal property") and all other personal property, and all buildings and improvements erected on the premises after February 4, 1933, shall be the sole and separate property of lessee; and that the lessee, *if not then in default under said lease,* shall have the right to remove all of said personal property, (including the "old personal property") and all such *new buildings or improvements* at any time during the term of the lease or within 30 days after the termination thereof; and that all such personal property and new buildings or improvements not so removed within such 30 days shall become the property of the lessor. It therefore appears that under the 1933 lease as modified, the lessee had the right to remove certain personal property, buildings and improvements within 30 days after termination of the lease if he was not then in default.

In 1937 Samuel Goldwyn, Inc., Ltd., (a California corporation) acquired all the stock of the lessee United Artists Studios Corporation. Thereafter the name of said lessee was changed to Samuel Goldwyn Studies (a corporation). In 1944 Samuel Goldwyn personally acquired all the assets of the Samuel Goldwyn Studios, and thereafter he was the lessee. From 1933 to 1949 the lessee constructed buildings, additions to existing buildings and structures, and made other improvements upon the premises.

The 1933 lease also provided that the lessee agrees that all additions, alterations, new buildings or improvements thereafter constructed upon the premises shall be

made in strict conformity with the laws and ordinances in force in the city and the county of Los Angeles. It also provided therein that the lessee agrees that before commencing to make alterations or to construct new buildings, the plans and specifications therefor must be approved in writing by the lessor.

The land involved here is bounded on the north by Santa Monica Boulevard, on the east by Formosa Street and on the west by Poinsettia Street. Approximately the south half of the land is in the city of Los Angeles and approximately the north half is in an unincorporated part of the county of Los Angeles. The boundary line between the part of the land in the city and the part in the county is about midway between, and parallel with, the north and south boundaries of the property.

Under provisions of the city and county ordinances, permits were required to be obtained prior to the construction of many of the 146 items of "new buildings and improvements" which the lessee built upon the premises after making the lease in 1933. Also under such ordinances, certificates of occupancy were required for some of those items. As to many of those items, it appears that the lessee did not obtain such permits and certificates. It also appears that the lessee did not obtain the lessor's approval of plans and specifications for the construction of many of said 146 items. With reference to the 8 items of property which the court found to be removable by the lessee, it appears that the lessee did not obtain the lessor's approval of plans and specifications for the construction of stage 8, the set storage sheds, and the 3 camera vault buildings.

Appellant contends, as above stated, that the lessee was in default under the provisions of the lease because, in connection with the construction of new buildings and improvements, he did not obtain building permits and certificates of occupancy as required by the city and county ordinances, and because he did not obtain the lessor's approval of plans and specifications as required by the lease; that the default was not excused or condoned, and since the lessee was in such default, he was not entitled to remove any of the property which he claims.

The court found that the lessee had performed all the terms and covenants of the lease on his part to be performed; that he was not in default; that it was not the intention of the parties to the lease that the lessee should be obligated, so far as the lessors were concerned, to obtain building permits or certificates of occupancy, or that the lessee should be required to obtain the lessors' approval of plans or specifications for any new building or addition except when plans or specifications were in fact prepared therefor; that under the lease the lessee had the right to remove certain "old buildings" from the premises, but that by reason of the lessee's election, during the trial, not to exercise that right he does not have the right to remove any of the old buildings. The court further found (in paragraph XVIII of the findings) that defendant Rogers and her co-lessor had knowledge of the placement of new buildings and improvements on the premises during the time of the placement or shortly thereafter, and neither objected to the placement or the continuance in place of any such new building or improvement, or objected to the failure to submit or have approval of any plans or specifications therefor; that on the contrary, the lessors, with such knowledge, (1) acquiesced in such placement of new buildings and improvements, made use thereof personally, and accepted them as having been placed in substantial compliance with the lease; (2) accepted, without objection, the rent required to be paid for the real property on which the improvements were placed; (3) acquiesced in the exercise by the lessee of options to extend the term of the lease; (4) consented to various assignments of the lease, including an assignment to Goldwyn; (5) agreed to various changes in the provisions of the lease; (6) permitted the lessee to erect various new buildings and improvements without requiring strict performance of the provisions claimed to have been violated by the lessee; (7) and did not request the lessee to remove any such new building or improvement, but they insisted, and appellant still insists, that such build-

ings and improvements remain permanently on the real property. The court further found that by reason of the foregoing facts, found in said paragraph XVIII, the lessors waived any right to prevent the lessee from removing the new buildings and improvements or any of the equipage; and that they are now estopped from asserting that the lessee (Goldwyn or his predecessor lessee) was in default under the 1933 lease or that the lessee's right to remove any of the new buildings or improvements or equipage has been lost or is unenforceable by reason of any such claimed default. The court also found that to the extent that the provisions of the 1933 lease, relating to the lessee's right to remove new buildings, improvements or equipage, are conditioned upon the absence of default on the part of the lessee, it was the intention of the parties to the lease that said provisions, to that extent, should be a deterrent to any default by the lessee and should be a penalty against the lessee for any such default; that the damage resulting from a violation of said provisions would not be impracticable or extremely difficult to fix; that to enforce said default provisions would bring about, regardless of the extent of any damage caused by the default, the forfeiture of all of Goldwyn's right and interest in the new buildings, improvements and equipage, the value of which equipage alone is in excess of $1,000,000; that appellant has not been damaged by the placement of the new buildings or improvements on the real property, or by the failure to obtain her approval of the plans or specifications, or to obtain building permits or certificates of occupancy.

Appellant contends that the findings (1) that she waived any right to prevent Goldwyn from removing the property he claims, and (2) that she is estopped to claim that he is in default, are not supported by the evidence. The findings with respect to waiver and estoppel pertain to the lessee's failure to obtain building permits, occupancy certificates, and lessor's approval of plans and specifications. She argues that waiver or estoppel must be based upon actual knowledge on the part of the person against whom the waiver is sought to be established, and that there was no evidence that she (appellant) had any knowledge that the buildings and improvements were not constructed in compliance with the ordinances. The only asserted defaults, as above stated, are that the lessee did not obtain building permits or certificates of occupancy and he did not submit plans or specifications to the lessor for approval. The lease provisions which appellant claims were violated had as their object the protection of the lessor against undesirable, improper or unlawful construction. There was no evidence that any of the construction was undesirable, or in violation of building or safety laws or ordinances, or that building permits or certificates of occupancy would not be or would not have been issued for any of the construction. As above stated, the court found that appellant had knowledge of the construction work on the premises at the time the work was being done or shortly thereafter, and that she did not object to the construction work. Most of the buildings and improvements involved here were placed on the premises during the years from 1933 to and including 1939 and from 1944 to and including 1948. During those times appellant visited the premises frequently, and the extensive construction work was visible and much of it was near appellant's office on the premises or near the studio dining room where she usually ate lunch. Mr. McKay, who was her general bookkeeper, was on the premises almost daily from 1926 until his death on December 5, 1939. One of his duties was to inform himself concerning her affairs and business and to communicate that information to her. He inquired frequently about the construction work which was being done. He was in and about stage 8 during its construction. He requested that certain offices in one of the buildings be remodeled, and he was present while that remodeling work was being performed. For approximately three years next preceding his death he and another person, acting jointly, were her attorneys in fact. The court could have inferred that her said agent performed his duty and conveyed information to her regarding the construction work. Also the court could

have inferred that she was in possession of sufficient facts regarding the extensive construction work to put her on inquiry concerning compliance with building ordinances. In view of the nature, visibility and location of the buildings and improvements which were being constructed, the appellant's frequent visits to the property, her duty to inquire regarding the lessee's compliance with the lease, the duty of her agent (who was on the premises almost daily) to obtain information and communicate it to her, and in view of all the other evidence, the court could have inferred that she had actual knowledge as to whether or not the lessee had complied with building ordinances. As to the matter of her approval of plans and specifications, it is clear that she had actual knowledge as to whether or not the lessee submitted plans and specifications to her and as to whether or not she approved them.

[1] There was no evidence that appellant ever made objection to the lessee regarding the matter of obtaining building permits or certificates of occupancy, and there was no evidence that she ever objected to the lessee's failure to submit plans and specifications for her approval. She never objected to the construction of any of the buildings or improvements. On the contrary, it appears that over a period of many years she acquiesced in the construction of the buildings and improvements upon the premises, and she acquiesced in the exercise by the lessee of options to extend the term of the lease, and she consented to assignments of the lease. Her indifference at all times, prior to the commencement of this action, with respect to the permits, certificates, and plans and specifications indicates that she did not regard the failure to obtain permits or certificates or her approval of plans and specifications as a breach of the lease. Also her present insistence that the buildings and improvements remain upon the premises is inconsistent with the idea that the construction of some of them, without permits or her approval of plans and specifications, was a breach of the lease. The findings as to waiver and estoppel are supported by the evidence.

[2, 3] Appellant also contends that the court erred in adjudging that the lessee was not required to restore the real property to the condition it was in before "any such removal." There was no express provision in the lease that, in the event the lessee exercised the right to remove property from the premises, the lessee should restore the premises to the condition the premises were in before the removal of property which had been constructed or placed thereon. Appellant argues that there is an implied covenant on the part of the lessee to restore the premises in the event the lessee was entitled to and did exercise the right of removal. The 1926 lease contained an express covenant to restore the premises, but the 1933 lease as modified in 1933 omitted such a provision. In Cousins Inv. Co. v. Hastings Clothing Co., 45 Cal.App.2d 141, at page 143, 113 P.2d 878, at page 879, it was said: "It may be stated generally that implied covenants are not favored in the law; and courts will declare the same to exist only when there is a satisfactory basis in the express contract of the parties which makes it necessary to imply certain duties and obligations in order to effect the purposes of the parties to the contract made." It was contemplated by the parties to the lease herein that the lessee would construct various buildings and improvements on the premises. It appears that the lease was carefully prepared with the intention of expressing the complete agreement. Under the circumstances here, the court did not err in deciding that there was no implied covenant to restore the premises.

[4–6] Appellant also contends that the court erred in finding (1) that a partition of the real property in kind cannot be made without great prejudice to the owners and that it is necessary that the property be sold; and (2) that it is not inequitable to have a sale of the property. Section 763 of the Code of Civil Procedure provides: "If it appears * * * that the property * * is so situated that partition can not be made without great prejudice to the owners, or where property is subject to a life estate and the remainder is a contingent remainder, the court may and in the latter case

must order the sale thereof; * * *." A tenant in common has an absolute right to partition. De Roulet v. Mitchel, 70 Cal. App.2d 120, 123, 160 P.2d 574. The law favors partition in kind rather than partition by sale, and a sale will be ordered only when it is necessary to prevent great prejudice to the owners, and a person will not be compelled to sell his property against his will except in cases of imperious necessity. Williams v. Wells Fargo Bank & Union Trust Co., 56 Cal.App.2d 645, 647, 133 P. 2d 73, 77. The burden of proving the necessity for a sale is upon the person seeking a partition by sale. Ibid. As above stated, the court found that the value of the land is $1,500,000 exclusive of buildings and improvements thereon. It appears that an increment in value exists by reason of (1) the general utility of the buildings and improvements for commercial use and (2) the special utility of the buildings and improvements for motion picture use. The court did not make a finding as to the increment in value above the value of the land alone by reason of the existence of the buildings and improvements thereon, either for general commercial use or for motion picture use. Appellant asserts that the findings of the court as to great prejudice from partition in kind and as to the equitability of a sale cannot be supported on the basis of the value of the land alone. She also asserts that the matter of great prejudice to the owners is determined by comparing results of partition in kind and partition by sale; and that the test whether a partition in kind can be made without great prejudice to the owners is whether "a sale will make the aggregate value of the land any greater than the value of the parcels into which it may be divided." The property is improved with approximately 64 buildings and structures of the kind used in a motion picture studio, and buildings representing about 90 per cent of the value of all the buildings are on the north half of the property which is outside the city of Los Angeles. The buildings consist of enclosed photographing and sound-recording stages, office buildings, dressing rooms, mechanical and technical shops, electrical power house, scene and set storage sheds, film storage vaults, projection rooms, and film editing rooms. There are eight photographing and sound-recording stages which are large buildings. Two of the buildings have exterior foundation dimensions of approximately 225 feet by 255 feet and with an interior ceiling height of approximately 45 feet. Under the floors of some of them there are tanks which, when the floor is removed, are available for lake scenes. The sound-recording equipment is in the sound building which is the center of a recording system, and all recording is done in that building by transmission from microphones on the various stages. A power house in which there are generators and transformers supplies electric power throughout the studio. Installations for electricity, water, gas, compressed air, telephones, sewers and storm drains are on the property. Water is obtained from the city and county and it is supplied through one system of pipes. There are 97 fire hose connections and 5 sewer connections on the property. Telephone service is furnished to all parts of the studio from a central switchboard. Most of the pipes, lines and wires required by the various installations are underground at depths ranging from a few inches to approximately 3 feet.

A real estate appraiser, called as a witness by plaintiffs, testified that the market value of the property is $3,000,000, and of that amount he attributed $1,440,000 to the land and $1,560,000 to the buildings; that, in said appraised value of the land, he included $150,000 as the value of the utilities installations. He also testified that stage 8 was of the value of approximately $300,000; that if the buildings were removed, the land as a single 17.4-acre-site would be worth $1,143,000, that is, the value of the land would be reduced from $1,440,000 to $1,143,000 or about 21 per cent; that a conversion of the premises for subdivision or industrial uses would require an expenditure of a substantial amount of money in remodeling and preparing to serve those uses; that the division of the property in kind, as suggested by appellant (shown by Exhibit D), would

reduce the value of the land about 30 per cent. He also testified that if the property were divided into two parcels of approximately equal value, and each parcel was under separate ownership, the property would be damaged in the aggregate amount of approximately $1,500,000.

[7–10] It thus appears that there was substantial evidence to the effect that the aggregate value of the separate parcels after a division in kind would be less than the value of the property as a whole. In Muller v. Muller, 14 Cal.App. 347, at page 348, 112 P. 200, wherein a partition by sale was upheld, it was said that several witnesses testified, among other things, that if the lot were subdivided into two lots, the combined value of the two lots would not be as great as the value of the lot as a whole. In the present case, as above stated, the trial judge viewed the premises. The observations of the trial judge in viewing the premises are evidence in the case. Gates v. McKinnon, 18 Cal.2d 179, 183, 114 P.2d 576. From all the evidence in the case, which included maps, diagrams, pictures and his own observations from his inspection of the premises, the trial judge could give consideration to the kind, construction, arrangement, and uses of the buildings, structures and installations on the premises and to their locations thereon. Presumably his observations of the premises were of assistance in evaluating the adaptability of the buildings and improvements to various uses, and in determining whether a partition of the property in kind could be made without great prejudice to the owners. In Priddel v. Shankie, 69 Cal.App.2d 319, 159 P.2d 438, wherein it was asserted that the evidence did not support a judgment of partition by sale, it was held that the testimony therein as to the size of the property, the kind of improvements and their location on the property was sufficient evidence. It was said therein, 69 Cal.App.2d at page 326, 159 P.2d at page 442 that the property is an "inside lot, 40 by 140 feet, improved by two dwelling houses and three garages so situated that the property could not be partitioned in kind without great prejudice to the parties." The question as to great prejudice is a factual question to be determined by the trial court, Sting v. Beckham, 94 Cal.App.2d 823, 825, 211 P.2d 586, and where the evidence, even though conflicting, is such that the court might reasonably draw the conclusion therefrom that partition in kind would result in great prejudice to the owners, and the court ordered partition by sale, the determination will not be disturbed on appeal. Ibid. The evidence herein was sufficient to support the judgment.

[11] Appellant argues that the court in ordering partition of the property was not restricted to ordering partition in kind or partition by sale, but that the court, sitting as a court of equity, had such broad power inherently that it could, as an alternative method, order that the property be sold for not less than the minimum value of the property, as found by the court, and if the property could not be sold for that amount then the property should be partitioned in kind. According to her argument, the court in the exercise of its broad equity power should adjust its decree in partition so that the decree will be sufficiently flexible to prevent greater prejudice to the owners from a partition by sale than would result from a partition in kind; and that if a sale cannot be made for an adequate price and thereby a partition by sale would result in greater prejudice than a partition in kind, the court can then adopt the method of partition which would result in less prejudice, that is, partition in kind. She asserts that the proposed alternative method, whereby the court would set a minimum sale price, would afford the owners some assurance that they would not suffer greater prejudice from a partition by sale than they would suffer if the partition were made in kind. In other words, it is appellant's view that if it is a fact that the property cannot be divided in kind without great prejudice to the owners, and if it also is a fact that the property cannot be partitioned by sale without greater prejudice, then a partition in kind is appropriate. It is not necessary to determine herein whether the court could have, or should have, entered such an alternative decree as that advo-

cated by appellant. It is clear that the court was empowered under the provisions of said section 763 of the Code of Civil Procedure, above referred to, to order partition by sale if the property was so situated that partition in kind could not be made without great prejudice to the owners. Therefore, irrespective of whether the court had power in equity to render such an alternative form of decree as that advocated by appellant, the question is whether the court, in exercising an express statutory power to order partition by sale, abused its discretion. The question is not whether the court might have awarded some other form of relief, but it is whether the court abused its discretion in rendering a judgment it was empowered to render. There was no abuse of discretion.

[12–14] Appellant argues that the trial judge was of the opinion that such an alternative form of decree should be entered, but the judge concluded that, inasmuch as the court was not specifically empowered by the partition statutes to make such an alternative form of decree, it lacked such power. That argument is based upon statements of the trial judge which were in part as follows: (1) "The sections of the code dealing with partition by sale do not give to the court the broad powers that are granted it in the sections covering partitions in kind"; and (2) "As I have intimated before, what you said as to the manner of determining this [the proposed alternative decree] is the practicable solution, which it seems the legislature might have provided for * * * maybe it has; I don't know until I study these cases * * *." Statements of the trial judge, given as reasons for his ruling or decision, do not prevail over the formal findings and judgment of the court. See Williams v. Kinsey, 74 Cal.App.2d 583, 600, 601, 169 P.2d 487. On appeal it is the result which is reached by the trial court that is reviewed, not the reasoning which the trial court assigns for its decision. If the findings, supported by the evidence, are sufficient to warrant the relief granted on any legal theory, the judgment should be affirmed. See Sears v. Rule, 27 Cal.2d 131, 140, 141, 163 P.2d 443.

Appellant also contends that the plaintiffs Formosa Corporation and Samuel Goldwyn Productions, Inc., are alter egos of Samuel Goldwyn, and that the recognition of them as entities separate from him would produce an inequitable result and promote injustice in that it would require a partition in kind to be made among three separate owners rather than between two owners. She also asserts that the trial court was of the opinion that a division of the property into three parts was an insurmountable obstacle to partition in kind. The court found that it is not true that Samuel Goldwyn is the alter ego of Goldwyn Productions, Inc., but it is true that Goldwyn Productions, Inc., is a separate entity from Samuel Goldwyn, in which entity five employees of Goldwyn Productions, Inc., own approximately 15 per cent of the non-voting stock. No finding was made as to whether Samuel Goldwyn is the alter ego of Formosa Corporation, but the court found that Goldwyn was the sole stockholder of Formosa Corporation and that it was formed for the sole purpose of owning and controlling its undivided interest in the property. Appellant asserts that the finding that Samuel Goldwyn is not the alter ego of Goldwyn Productions, Inc., is not supported by the evidence. The court found that a partition of the property in kind, whether the interests of Formosa Corporation and Goldwyn Productions, Inc., "be considered together or separately," cannot be made without great prejudice to the owners, and accordingly it is necessary that the property be sold. It appears therefore that the court found, in effect, that a partition in kind could not be made without great prejudice to the owners even if the division should be made in two parcels—one parcel representing the combined interests of Formosa Corporation and Goldwyn Productions, Inc., and the other parcel representing the interest of appellant. In view of that finding, the appellant was not prejudiced even if the findings on the subject of alter ego were erroneous.

[15, 16] Appellant contends further that a part of finding XV is erroneous in that it subjects to Goldwyn's ownership and

right of removal property as to which no evidence was introduced. In finding XI and XII there is a general description of each class of property owned and removable by Goldwyn. It was there found that he owned (1) all the loose personal property; (2) all personal property and equipment forming a part of lessee's plant account on February 4, 1933, regardless of manner of affixation; (3) all personal property and equipment brought onto the property after February 4, 1933, except that affixed to an old building in such a way as to become an integral part thereof; (4) all new buildings and improvements. The items of new buildings which Goldwyn claims the right to remove were listed in exhibit "A" attached to his answer to the amended and supplemental complaint; and the items of affixed equipage which he claims the right to remove were listed in exhibit 29. The evidence with respect to such items was limited to those exhibits. In finding XIV the court found specifically as to new buildings and improvements listed on exhibit "A" which were removable by Goldwyn. In finding XV the court found specifically (in a list covering about 8 pages of the clerk's transcript) as to the items of equipage listed on exhibit 29 which were not removable by Goldwyn, and then the finding stated, "but he does have the right * * * to remove any of the remaining items appearing in said Exhibit 29, *as well as the right to remove any and all other equipage and/or new buildings and improvements not hereinabove specifically found to be non-removable.*" It is the italicized part of the finding to which appellant objects. The burden was upon Goldwyn to establish what property was removable by him. Appellant argues that the absence of evidence that Goldwyn claimed any other property than that specified in said exhibits "A" and 29 defeats any right of removal by Goldwyn as to any other property than that so listed in said exhibits and specifically found to be removable by him. It is also to be noted that finding XXVII states that the Formosa Corporation, Goldwyn Productions, Inc., and appellant are the owners of all buildings, improvements and equipage "not hereinabove found to be owned by Goldwyn." This last mentioned finding is inconsistent with the said italicized portion of finding XV. There was no proof that Goldwyn claimed any property other than that specifically listed by him, and there was no proof that he was entitled to any property other than that specifically found by the court to be removable by him. The said italicized portion of finding XV should be stricken from finding XV.

Appellant makes a further contention to the effect that findings XI and XV are inconsistent because finding XI ignores a basis of differentiation stated in finding XV as to what is an integral part of the premises. She also contends that finding XV with respect to certain heating equipment is not supported by the evidence. She also contends that the court did not rule whether certain air-compressing equipment was an integral part of the premises except inferentially, and that such ruling was erroneous. The arguments in regard to these contentions are based in part upon statements made by the trial judge in his memorandum of opinion as to what he intended to find. These contentions are not sustainable.

It is ordered that the said part of finding XV, hereinabove set forth in italics, be stricken from said finding XV, which said part so stricken from the finding reads as follows: "as well as the right to remove any and all other equipage and/or new buildings and improvements not hereinabove specifically found to be non-removable."

The portions of the judgment appealed from are affirmed.

SHINN, P. J., concurs.

VALLÉE, J., deeming himself disqualified, did not participate.

108 Cal.App.2d 451

SLAVICH v. SLAVICH.

Civ. 14767.

District Court of Appeal, First District, Division 1, California.

Dec. 28, 1951.

Rehearing Denied Jan. 26, 1952.

Hearing Denied Feb. 25, 1952.

Ivan L. Slavich brought action for divorce on the ground of cruelty, and Mary F. Slavich cross-complained for separate maintenance, alleging cruelty and desertion. The Superior Court, City and County of San Francisco, Sylvain J. Lazarus, J., rendered an interlocutory decree granting plaintiff a divorce, dividing the community property, and awarding defendant support money, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held, inter alia, that the evidence sustained findings that defendant had been guilty of cruelty, and that plaintiff had not voluntarily and wilfully separated from defendant with intent to desert her but that the words presently disposing of the community property would be stricken from the decree and words to the effect that upon the entering of the final decree the parties would be entitled to have assigned to them the portions of the community property mentioned in the interlocutory decree would be inserted therefor.

Modified and affirmed.

1. Divorce ⇐127(3)

Testimony of a party to divorce action need not be corroborated as to each and every item.

2. Judgment ⇐524

A judgment is tested by trial court's judicial action, not judicial comment, as recorded in findings of fact and conclusions of law, viewed in light of the evidence received.

3. Divorce ⇐130

In husband's divorce suit, evidence was sufficient to sustain finding of wife's cruelty to husband.

4. Husband and Wife ⇐295

In husband's divorce suit, wherein wife cross-complained for separate maintenance, alleging cruelty and desertion, evidence sustained finding that husband had not voluntarily and willfully separated from wife with intent to desert her and that husband had not been guilty of cruelty toward wife.

5. Divorce ⇐186

Where portion of decree which granted husband divorce because of wife's cruelty was valid, such portion would be affirmed on appeal regardless of validity of portions providing for division of community property and award of support money to wife.

6. Divorce ⇐281

Where husband was granted divorce, wife was not in a position to challenge portions of decree awarding support and share of community property to her, since she was not the aggrieved party. Code Civ.Proc. § 475.

7. Divorce ⇐287

On appeal from interlocutory divorce decree, District Court of Appeal would strike from decree words presently disposing of community property and insert therefor words to effect that in final decree parties would be entitled to have assigned to them the specified portions of the community property enumerated in the interlocutory decree.

8. Trial ⇐18

Even if judge were mistaken in his concept of applicable provisions of law, that would be judicial error, correctible upon appeal by aggrieved party, but would not render the trial unfair.

9. Husband and Wife ⇐298½

On appeal from decree granting husband a divorce, record showed that wife, who claimed that judge had denied her a decree for separate maintenance because he harbored belief that marriage should be dissolved when parties thereto could no longer live happily together, had been accorded a fair trial.

Edward A. Cunha, Dean Cunha, San Francisco, for appellant.

J. W. Ehrlich, Roy A. Sharff, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff filed an action for divorce upon the ground of cruelty, and defendant cross-complained for separate maintenance, alleging cruelty and desertion. The trial court found in favor of plaintiff and against the defendant, and rendered its interlocutory decree, granting plaintiff a divorce, dividing the community property, and ordering plaintiff to pay defendant support and maintenance of $100 a month for three years.

The defendant has appealed from the decree, plaintiff has not.

Appellant predicates her appeal upon asserted insufficiency of the evidence to support the findings of facts, inconsistencies in the findings, and denial of a fair trial by certain acts and conduct of the trial judge.

(1) *As to the sufficiency of the evidence,* appellant questions four of six acts of cruelty which the court found she committed.

A finding that in the presence of one McGill appellant cursed respondent and used profane language toward him on numerous occasions, is supported by the testimony of the witness Francis McGill. He said he visited the home frequently between 1942 and 1948, at times when respondent's son was there; heard appellant swear at respondent, in words he would rather not repeat.

A finding that on one occasion appellant locked respondent out of their home despite the requests of his son, and refused to admit respondent, making it necessary for him to obtain lodging at a hotel that night, is supported by the testimony of respondent, corroborated by that of his son.

A finding that for a period of three years prior to their separation, appellant on various occasions nagged, criticized, cursed, and used profane language to respondent, and that she habitually engaged therein so that it constituted a continuous course of conduct toward respondent, is supported by respondent's testimony that she would swear at him and cursed and raised her voice at him all the time of their married life. That was corroborated by Vernon Williams, a neighbor, who said that on quite a few occasions between 1942 and 1948 he heard appellant call respondent vile and profane names; and by respondent's son, who testified she used profane language, which he would prefer not to repeat. McGill's testimony, above mentioned, is also corroborative.

Appellant denied having said or done any of these things. That produced a conflict in the testimony, which it was the function of the trial court to resolve.

[1] The court also found that when respondent was appointed clerk of the municipal court, and many times thereafter, he requested appellant to quit her employment; that it was reasonable for her to do so but she refused, to the embarrassment of respondent. Respondent testified to that effect, adding that his salary having been increased he wanted her to stay home and take care of the home. Appellant said that he discussed the matter with her and it was decided that she would quit her employment when the house was put in condition, but the war intervened, help was in great demand, and one could not really quit a job; and that as late as 1948 it was agreed she would quit work when they were free from debt. Respondent's testimony on this subject was not corroborated by that of any other witness, but the law does not require that the testimony of a party to a divorce action be corroborated as to each and every item. Bastjan v. Bastjan, 215 Cal. 662, 664–665, 12 P.2d 627; Price v. Price, 71 Cal.App.2d 734, 736, 163 P.2d 501.

The findings which appellant does not question as to sufficiency of the evidence, are that on one occasion appellant called respondent a name of opprobrious connotation, in the presence of Vernon Williams, and that on another occasion in the presence of respondent's son she called respondent a "North Beach Hoodlum," told him to get out of the house, and said "You do not have enough guts to get out" and "I made you and I will break you."

[2] In support of her claim that the evidence was slight and trivial, appellant cites certain remarks made by the judge during the course of the trial, such as "I

have been waiting patiently for something specific," early in the trial, and, later, "I received the impression at the hearing yesterday that this case is made up almost exclusively of trivial incidents." The answer to this contention is that a judgment is tested by the trial court's judicial action (not judicial comment), as recorded in the findings of fact and conclusions of law, viewed in the light of the evidence received. See authorities cited in 2 Cal.Jur. p. 808, § 476.

[3] It is clear that the facts found show a course of conduct sufficient to sustain a judgment of divorce for respondent upon the ground of extreme cruelty, with or without consideration of the facts which were evidenced by respondent's uncorroborated testimony.

[4] Concerning the allegations of the cross-complaint, the court found that respondent left home because of appellant's acts of cruelty and because she locked him out of the family home at that time; he did not voluntarily and wilfully separate from her with intent to desert her. That finds support in the evidence despite appellant's sole testimony to the contrary. The court also found that respondent at no time has been guilty of extreme cruelty toward appellant, and that the allegations of the cross-complaint in respect thereto are untrue. It is not necessary to review those allegations and her testimony in detail. She said, among other things, that her principal claim for anything like mental cruelty had to do with his leaving her; that she had no difficulties with him any more than would occur in any family; and that his gambling from time to time affected her. It was the function of the trial judge to appraise her testimony and weigh it with other facts in evidence, which he did.

(2) The asserted inconsistencies in the findings are not subject to challenge by appellant.

Appellant claims the judgment should be reversed because, while granting respondent a divorce upon the ground of extreme cruelty, the court awarded appellant maintenance and support and the greater part of the community property.

First, it is important to note that the asserted inconsistencies occur in the conclusions of law, not in the findings of fact. The court separately found: (1) Appellant committed certain acts of cruelty, (2) certain items of real and personal property belong to the community, (3) respondent is able to pay appellant $100 a month for her support for three years and has stipulated to do so. From these facts, the court drew these conclusions of law: (a) respondent is entitled to a divorce, (b) the community property should be divided in a certain manner, and (c) respondent should pay appellant $100 a month for three years. The interlocutory decree was entered in accordance with the conclusions of law.

[5] Since that portion of the decree which grants plaintiff a divorce is valid and is separable from the award of support and the division of community property, it may and should be affirmed regardless of the validity of the other portions. Harwell v. Harwell, 26 Cal.App.2d 143, 144–145, 78 P.2d 1167.

[6] But appellant is not in a position to challenge the support award and the division of the community property. At most, these awards gave her more than is her right. If anyone may complain, it is the respondent, as the party aggrieved. He is not complaining. He has not appealed. "No judgment * * * shall be reversed or affected by reason of any error * * *, unless it shall appear from the record that such error * * * was prejudicial, and also that by reason of such error * * * the said party complaining or appealing sustained and suffered substantial injury * * *." Code Civ. Proc. § 475. This principle is accorded judicial recognition. Estate of Funkenstein, 170 Cal. 594, 150 P. 987; Bostock v. Hulse, 54 Cal.App.2d 334, 338, 128 P.2d 912. Therefore, we do not undertake to determine the validity or invalidity of the award for support or the division of community property, nor whether the

court awarded the respondent a smaller portion of the community than may have been his right.

[7] With reference to the community property, appellant directs attention to the fact that the decree purports to make a present disposition of it. That is an error which may and should be corrected by striking out the words of present disposition and inserting words to indicate that the disposition will be made in the final decree. Wilson v. Wilson, 76 Cal.App.2d 119, 129–133, 172 P.2d 568.

(3) *The asserted denial of a fair trial* is predicated upon the claim that the trial judge harbored the view that a marriage should be dissolved when the parties can no longer live happily together and for that reason denied appellant a decree for separate maintenance.

In support thereof, appellant invokes certain statements made by the judge during the trial and statements appearing in affidavits used upon her motion for new trial.

In one of the affidavits the statement is made that after respondent had presented his evidence a conference was had in the chambers of the judge and the suggestion was made that the case be settled with regard to a division of the community property and support and maintenance to appellant upon the basis of her being granted a divorce on her cross-complaint, but it is not stated therein, or elsewhere, that the judge made that suggestion.

Appellant directs attention to the fact that during the trial the court asked her counsel, "The lady is going to insist on a decree of separate maintenance, is that correct?" Her counsel responded in the affirmative, adding that he wanted an opportunity to further explain his position and to argue on the facts and the law. The court responded: "I will give you plenty of opportunity. I will say this, that never in my experience have I tried a case of this character, a divorce case or plea for separate maintenance, where there were so many intangibles that have been enlarged into apparently important features," and added: "You gentlemen might as well both remember that in making your arguments, when that time comes, that I have to be convinced that some of these matters that have been referred to at great length here are of importance in determining the merits of the case." We find in these remarks nothing to indicate that the judge had predetermined the case in any manner. On the following day, he said: "I received the impression at the hearing yesterday that this case is made up almost exclusively of trivial incidents. Perhaps collectively they are going to be more convincing than they now appear."

At the conclusion of the trial, the judge observed: "the facts developed in the course of this trial are very fragmentary, they are not of extreme importance, and I don't know how these people are going to be happy together if he accepts her invitation to come back to the home again. How is happiness ever going to be restored to that disturbed household. I can't see it. * * * There is a question involved as to whether, under the limited facts that he has developed, whether he is entitled to a divorce or not. The question, then, is whether she is entitled to a decree of separate maintenance under the facts as she had developed them. In order to obtain a decree of separate maintenance, she has to establish that she is entitled to a divorce if she wanted to claim a divorce. * * * It seems an immense amount of discussion here over very little. Of course, the case has to be decided." The trial judge also commented: "I think both these parties are acting very, very silly indeed, very silly. * * * [F]rom an economic standpoint, these people are way superior to the average American family. The only thing they lack, they don't lack any income, but they lacked happiness and the ability to get along with one another—but I think it has got beyond that point. They both exhibit, I think, extreme dislike for one another, both of them." These remarks were made after the evidence was in and after oral argument. They were the statement merely of tentative impressions, not of a definite decision, impressions which any trier of the facts might have. By his remarks, this judge brought these impressions

to the attention of counsel on both sides and invited further discussion. He concluded with these words, "If you gentlemen want to discuss the case with me in chambers, you are at liberty to do so."

Counsel did further discuss the case, in writing. Counsel for respondent wrote a letter to the judge in response to a memorandum appellant had presented, and counsel for appellant replied by letter.

One of the affidavits presented upon the hearing of appellant's motion for a new trial contains a statement that after the judge had announced his decision he was asked if he had decided to give the respondent a divorce, he said: "I had to. I couldn't keep these people together. Mrs. Slavich wouldn't take a divorce, so I gave the divorce to him." It does not appear to whom or under what circumstances the alleged statement was made. That the judge made it, is denied in an affidavit of counsel for respondent.

Upon the hearing of the motion for new trial, the judge stated that the case was tried patiently and thoroughly, the arguments presented were given due consideration, and that he arrived at what he considered a well-considered, just, and fair decision; that he listened patiently to appellant's lengthy dissertation at the conclusion of the case; denied having any secret conferences with counsel for respondent in reference to any matters connected with the trial or decision of the case; and, as to the alimony, he doubted if it could be granted a losing party, but in this case it was supported by a stipulation which respondent made and the court confirmed during the course of the trial, and for that reason he believed it valid. As to the apportionment of the community property, we observe that the court was presented with a difficult problem. There was evidence that the home was initially equipped with appellant's furniture (augmented by furniture later acquired, for which appellant remains indebted, upon her personal note, in the sum of $586), and evidence tending to show that a considerable portion of the purchase price of $8,250 was paid with moneys inherited by appellant. Due, apparently, to a loan subsequently made, the home is encumbered for a debt of about $5,290, which the decree orders appellant to assume and pay. The other principal items were the sum of $4,500 credited to respondent in a retirement fund, awarded to him, and $2,600 credited to appellant in the same fund, awarded to her. An automobile valued at $1,600, subject to an encumbrance of $835, was awarded to respondent.

[8] These facts support the view that the trial judge rendered his decision in an earnest and conscientious endeavor to ascertain, declare and confirm the respective rights and duties of the parties under the law. Even if he were mistaken in his concept of the applicable provisions of law in some respects, that would be judicial error, correctible upon appeal by a party aggrieved. It would not render the trial "unfair."

[9] Appellant directs attention to no improper ruling during the trial, nor curtailment of issues by the judge in the presentation of her case. We find none such in the record, which we have carefully examined. The question presented is one of fact. Our review of the record convinces us that the trial judge accorded appellant a fair trial and rendered judgment upon the facts and under the law as he honestly and conscientiously found them to be. The principles of law applicable when such a question as this is raised, are exhaustively expounded in a recent decision of our Supreme Court, in Weil v. Weil, 100 Cal.App. 2d 472, 236 P.2d 159.

The interlocutory decree is modified by striking therefrom all words presently disposing of the community property and inserting words to the effect that upon the entering of the final decree the parties are entitled to have assigned to them the portions of the community property mentioned in the decree. As so modified, the judgment is affirmed as of the date of its entry.

PETERS, P. J., and BRAY, J., concur.

108 Cal.App.2d 582

PEOPLE v. LEE.

Cr. 2757.

District Court of Appeal, First District, Division 1, California.

Jan. 8, 1952.

Lillian Louise Lee was convicted in the Superior Court of the State of California in and for the City and County of San Francisco, Twain Michelsen, J., of possession of marijuana in violation of the Health and Safety Code, and the defendant appealed from the judgment and an order denying a new trial. The District Court of Appeals, Fred B. Wood, J., held that evidence supported the judgment.

Affirmed.

1. Criminal Law ⇐15

In prosecution for possession of marijuana, statute which made possession unlawful only when preparation or compound contained more than two grains of marijuana to each fluid or avoirdupois ounce, and which had been repealed five years and four months prior to commission of offense involved, was inapplicable. Health and Safety Code, § 11500.

2. Poisons ⇐9

Evidence, including defendant's admission and state chemist's analysis, was sufficient to support judgment finding defendant guilty of possession of marijuana in violation of Health and Safety Code. Health and Safety Code, § 11500.

Geo. C. W. Egan, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Dep. Atty. Gen., and Winslow Christian, Dep. Atty. Gen., for respondent.

FRED B. WOOD, Justice.

This appeal by defendant from a judgment finding her guilty of possession of marijuana in violation of section 11500 of the Health and Safety Code, and from an order denying a new trial, is without merit.

[1] The sole basis of the appeal is the asserted applicability of section 11531 of the Health and Safety Code making possession unlawful only when the preparation or compound contains more than two grains of marijuana to each fluid or avoirdupois ounce. Section 11531 was repealed by chapter 955 of the Statutes of 1945, p. 1839, at p. 1843, effective September 15, 1945, five years and four months prior to the commission of the offense involved.

[2] We have examined the record and find that the evidence, including appellant's admission and the state chemist's analysis, amply supports the judgment.

The judgment and the order appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.



108 Cal.App.2d 583

In re CLAYTON'S ESTATE.

McMILLON et al. v. CLAYTON.

Civ. 18820.

District Court of Appeal, Second District, Division 1, California.

Jan. 8, 1952.

Proceeding in the matter of the estate of Walter Clayton, deceased. Quincy McMillon and others filed a motion to vacate and set aside an order which admitted a will to probate and granted letters of administration with will annexed. The Superior Court, Los Angeles County, Philbrick McCoy, J., denied the motion and the petitioners appealed. Ethel Rowe Clayton moved to dismiss the appeal. The District Court of Appeal held that the order denying a motion to set aside an order admitting a will to probate and granting letters of administration with will annexed, was an appealable order.

Motion denied.

Wills ⇐358

Order denying motion to set aside order which admitted will to probate and granted letters of administration with will

annexed, was "appealable order". Code Civ.Proc. § 473.

See publication Words and Phrases, for other judicial constructions and definitions of "Appealable Order".

Walter L. Gordon, Jr., Los Angeles, for appellants.

Noel Edwards, Los Angeles, for respondent.

PER CURIAM.

Respondent Ethel Rowe Clayton moves to dismiss the appeal taken by appellants from an order denying a motion made under Section 473 of the Code of Civil Procedure which sought to vacate and set aside an order which admitted a will to probate and granted letters of administration with will annexed.

The case is governed by the holding of the Supreme Court in Estate of Estrem, 16 Cal.2d 563, 107 P.2d 36, and accordingly upon the authority of that decision the appeal lies and the motion to dismiss must be and it is denied. So ordered.



108 Cal.App.2d 605

WALKER v. WALKER et al.

Civ. 18620.

District Court of Appeal, Second District, Division 3, California.

Jan. 9, 1952.

Divorce action by Leona B. Walker against Harry H. Walker and California Trust Company, a corporation. The Superior Court of Los Angeles County, Frank G. Swain, J., awarded divorce to plaintiff, adjudged a postal savings account and a diamond ring to be the separate property of plaintiff and a parcel of realty to be community property, and defendant Walker appealed. The District Court of Appeals, Vallée, J., held that evidence sustained findings that defendant was guilty of extreme cruelty and that diamond ring was separate property of plaintiff, but evidence did not sustain finding that postal savings account was separate property of plaintiff and that the parcel of realty was community property.

Judgment reversed in part and affirmed in part and cause remanded with directions.

1. Divorce ⇐130

Evidence supported decree granting wife a divorce on ground of extreme cruelty.

2. Divorce ⇐147, 184(10)

Whether in any case there has been wrongful infliction of grievous mental suffering is question of fact to be deduced from all circumstances in case, keeping in mind the intelligence, refinement and delicacy of sentiment of complaining party, and finding, based on any reasonable analysis of evidence, will not be disturbed on appeal.

3. Husband and Wife ⇐264

In divorce action, evidence sustained finding that postal savings account was separate property of wife.

4. Husband and Wife ⇐264

In divorce action, wife's testimony that husband had given her diamond ring was sufficient to sustain finding that diamond ring was separate property of wife.

5. Husband and Wife ⇐264

In divorce action, finding that a parcel of realty was community property, was not sustained by evidence.

6. Husband and Wife ⇐262(1)

Statute which creates a presumption that property acquired by husband and wife is community property has no application where husband and wife acquire title to real property in joint tenancy. Civ.Code, § 164.

7. Husband and Wife ⇐263

Evidence is admissible to establish that a husband and wife who took real property as joint tenants actually intended it to be community property.

8. Husband and Wife ⇐266

Real property may be converted into community property at any time by oral

agreement of spouses and an agreement at time property is acquired to convert it into community property has same effect.

9. Husband and Wife ⇐254

Purchase of property with community funds and taking of title thereto in names of spouses as joint tenants is insufficient to establish that property is community property in absence of any evidence of an intent to contrary.

10. Divorce ⇐249(3)

In action for divorce, where realty of parties was held in joint tenancy and there was no evidence of any agreement or intention of spouses to convert realty into community property, court was without power to make disposition of realty.

Ernest P. Morgan, Los Angeles, for appellant.

Catlin & Catlin, Henry W. Catlin and Frank D. Catlin, all of Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant from an interlocutory judgment of divorce.

The divorce was awarded to plaintiff on the ground of extreme cruelty. A postal savings account and a diamond ring were found and adjudged to be the separate property of plaintiff. A parcel of realty, described as lot 4 in block 5 of the Williamson Tract, was found to be community property. The court decreed that all community property be sold and that after the payment of $1500 to plaintiff, the proceeds be divided equally between plaintiff and defendant.

Defendant's assignments of error are that the evidence does not 1) establish extreme cruelty, 2) support the findings that the postal savings account and the diamond ring are the separate property of plaintiff, 3) support the finding that the parcel of realty is community property.

[1,2] No purpose would be served in reciting the evidence of cruelty, much of which is offensive and revolting. Suffice it to say that the findings of the ultimate facts, from which the court concluded that defendant had been guilty of extreme cruelty, are amply supported by the evidence. The question before the trial court was simply which witnesses were to be believed, and to evaluate the evidence. As Mr. Justice McComb stated in Marson v. Rand, 107 Cal.App.2d 466, 237 P.2d 18, 20; "'It is not the province of a reviewing court to present, by way of opinion, a detailed argument on the sufficiency of the evidence to support the judgment, where it appears that the question is one purely of determining which side shall be believed. The trial court having determined this with the witnesses before it, the controversy is settled.'" Whether in any given case there has been the wrongful infliction of grievous mental suffering is a question of fact to be deduced from all the circumstances in the particular case, keeping always in mind the intelligence, refinement, and delicacy of sentiment of the complaining party; and the finding of the trial court, based on any reasonable analysis of the facts and circumstances as shown by the evidence, will not be disturbed on appeal. McFall v. McFall, 58 Cal.App.2d 208, 211, 136 P.2d 580; Tompkins v. Tompkins, 83 Cal.App.2d 71, 74–75, 187 P.2d 840.

[3] The parties stipulated "there is $725 in the Postal Savings account." They did not agree that it was in the name of plaintiff nor did they agree it was either community or separate property. The court stated at the opening of the trial that it "is an open question as to whether it is community property or separate property." There was no evidence bearing directly on the question. The only evidence from which an inference could be drawn was that the parties had no assets when they married and that all property they possessed was acquired during marriage. There was no evidence that the account was the separate property of plaintiff, and the finding that it was is unsupported.

[4] Plaintiff testified that defendant gave her the diamond ring. This is sufficient to support the finding that the ring is the separate property of plaintiff.

[5] The record title to the parcel of realty is in joint tenancy. The complaint alleged it is community property. The answer denied it is community property and alleged it is the separate property of defendant, "although title thereto, as a matter of convenience only, has been and is vested in said parties as joint tenants." The only evidence on the subject was the testimony of plaintiff as follows:

"Q. Mr. Walker did place just about all his property in your joint names, did he not? A. All that was acquired after our marriage.

"Q. When you married him, neither one of you had any assets; is that right? A. Yes.

"Q. The property he acquired afterwards he put it jointly with you? A. Yes, so far as I know."

Defendant contends this evidence is insufficient to support the finding that the parcel of realty is community property. We agree.

[6–10] The burden of proving that the parcel was community property was on plaintiff. Civil Code section 164, which creates a presumption that property acquired by husband and wife is community property, has no application to a case where a different intention is expressed in the instrument; and an instrument by which husband and wife acquire title to real property in joint tenancy is, of necessity, an expression of an intention to hold the property otherwise than as community property. Siberell v. Siberell, 214 Cal. 767, 773, 7 P.2d 1003. Unless there is evidence to support a conclusion that real property held in joint tenancy is in fact community property, the court in an action for divorce is without power to make disposition of such property. Turknette v. Turknette, 100 Cal.App.2d 271, 278, 223 P.2d 495. Evidence is admissible to establish that a husband and wife who took real property as joint tenants actually intended it to be community property. LaMar v. LaMar, 30 Cal.2d 898, 903, 186 P.2d 678. Real property may be converted into community property at any time by oral agreement of the spouses, and an agreement at the time the property is acquired has the same effect. Tomaier v. Tomaier, 23 Cal.2d 754, 757–758, 146 P.2d 905. The purchase of the property with community funds and the taking of title thereto in the names of the spouses as joint tenants is insufficient to establish that the property is community property in the absence of any evidence of an intent to the contrary. Tomaier v. Tomaier, 23 Cal.2d 754, 758–759, 146 P.2d 905; Siberell v. Siberell, 214 Cal. 767, 773, 7 P.2d 1003; Lazzarevich v. Lazzarevich, 88 Cal.App.2d 708, 717, 200 P.2d 49; In re Rauer's Collection Co., 87 Cal.App.2d 248, 257, 196 P.2d 803. In the present case there was no evidence of an agreement and no evidence from which it can be inferred that the parties intended the parcel of realty should be community property.

The judgment, insofar as it decrees that the postal savings account is the separate property of plaintiff and insofar as it decrees that lot 4 in block 5 of the Williamson Tract is community property, is reversed and the cause remanded for a trial of those issues only; in all other respects it is affirmed. Defendant shall bear plaintiff's costs on appeal.

SHINN, P. J., and PARKER WOOD, J., concur.

108 Cal.App.2d 329

THERMALITO IRRIGATION DIST. v. CALIFORNIA WATER SERVICE CO. et al.

Civ. 7942.

District Court of Appeal,
Third District, California.
Dec. 26, 1951.

The Thermalito Irrigation District brought action against the California Water Service Company and the Pacific Gas and Electric Company, wherein the Pacific Gas and Electric Company filed a cross-complaint seeking a declaratory judgment that it was not under any duty to supply water or water service to the plaintiff, and that it was entitled to suspend water service to the California Water Service Company for a period of four months, while making repairs. The Superior Court of Butte County, J. O. Moncur, J., entered a judgment adverse to the Pacific Gas and Electric Company, and it appealed. The District Court of Appeal, Schottky, J., held that provision in contracts giving appellant right to "suspend temporarily" delivery of water if necessary to make repairs or improvements in water system, did not entitle appellant to suspend water service for four months.

Judgment affirmed.

1. Waters and Water Courses ⇐254

The substitution of water company in place of electric water power company as direct seller to irrigation district of water taken from river by electric water power company, did not relieve electric water power company from the responsibility incumbent on it to see that water for irrigation district was supplied to irrigation district through the water company, and the obligation of the electric water power company was in no wise changed and it was implied that electric water power company's obligation would continue except that instead of supplying water directly to irrigation, it would supply the water through the medium of the water company.

2. Appeal and Error ⇐1071(2)

Even if conclusion of law of trial court could be considered a determination that one of the defendants violated the contract, conclusion could not be considered a ground for appeal by that defendant, insofar as it related to the contract, where the conclusion was not carried into the judgments.

3. Waters and Water Courses ⇐263

Where contracts by electric water power company for the furnishing of water provided that whenever company should find it necessary for purpose of making repairs or improvements to its water system, it should have right to "suspend temporarily" the delivery of water, evidence of facts and circumstances existing when the contracts were entered into, was properly admitted and considered by the trial court in action against the company by irrigation district, for purpose of determining what the parties intended by the phrase "suspend temporarily." Code Civ.Proc. § 1860.

4. Contracts ⇐170(1)

Where a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court.

5. Contracts ⇐147(1)

In construing a contract, it is the duty of the court to give effect to the intention of the parties where such intention is not wholly at variance with the correct legal interpretation of the terms of the contract.

6. Contracts ⇐170(1)

A practical construction placed by the parties to a written contract on the contract is the best evidence of their intention.

7. Waters and Water Courses ⇐254

Where contracts by electric water power company to furnish water provided that company should have the right to "suspend temporarily" the delivery of water, and that the making of repairs by company should be prosecuted as rapidly as may be practicable, and over period of years, company did not take canal out of service for repairs and did not refuse to take care of needs of water company, including needs of irrigation district, by by-passing or cutting canal into service, electric water power

company was not authorized to suspend delivery of water for four months while it made repairs.

See publication Words and Phrases, for other judicial constructions and definitions of "Suspend Temporarily".

Gerdes & Dunn, San Francisco, Price & Morony, Chico, for appellant.

Minasian & Steadman, Oroville, McCutchen, Thomas, Matthew, Griffiths & Greene, San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

On December 18, 1946, respondent Thermalito Irrigation District (hereinafter referred to as "District") commenced this action against respondent California Water Service Company (hereinafter referred to as "Water Company") and appellant Pacific Gas and Electric Company (hereinafter referred to as "Pacific"). In its complaint it alleged that on April 25, 1923, Pacific had agreed to supply 9.1 cfs. of water to District, at wholesale, but that in 1927 Water Company had become Pacific's assignee in a transaction authorized by the California Railroad Commission, and that Water Company had thereafter supplied District; that Pacific owned and controlled Miocene Ditch (Canal) and has supplied Water Company with water therefrom, which was carried in Coal Canyon Ditch (Powers Canal) from which it supplied District.

It was further alleged that on December 6, 1946, District had received a letter from Water Company notifying it that Pacific intended to commence major repairs on Miocene Canal on December 15, 1946, and continue thereon until about April 15, 1947, during which period the Miocene supply would be shut off entirely, and that Water Company and Pacific had notified District that neither of them would furnish auxiliary water supply for District use.

District alleged that it had three other sources of water supply, Concow or Wilenor Reservoir, waters from which were carried through its Cherokee Ditch into and through Miocene Canal, which would be cut off for approximately half of the above stated period of making repairs, and natural runoff after rains, diminishing from about four cfs. when operated continuously. District alleged further in its complaint that if the water in the Miocene Ditch was shut off as proposed by defendants, District would not have sufficient water to meet its minimum needs.

District obtained a mandatory order commanding said defendants to restore certain minimum flows of water through said Miocene Canal to District and thereupon Pacific restored service to a limited degree through said canal.

On December 23, 1946, the parties entered into a stipulation which provided that the parties should, at joint expense, pump water from Feather River for District uses until Wilenor water became available to District, and that the entire cost should be assessed by the judgment against the party finally adjudged in the action to have been obligated to supply *auxiliary, emergency or stand-by* water during such outage of Miocene Canal. It was further agreed in the stipulation that a mandatory order to restore delivery of Miocene water should be dissolved.

Pacific had complied with that order by carrying Miocene water in a canvas pipe, at an expense of about $2,000, past a place near the lower end of Miocene Canal where a 447 foot wooden flume was being replaced by a steel structure.

Pacific and Water Company each filed an answer, and Pacific filed a cross-complaint seeking a declaratory judgment that it was not under any duty to supply water or water service to the District, and that it was entitled to suspend water service to Water Company on or about December 15, 1946. Following a trial the court determined that Pacific's suspension of deliveries in 1946 was in breach of its obligations under the various contracts and in breach of its obligation as a public utility water corporation; that by reason of the unauthorized outage of the Miocene Canal Pacific alone became obligated to supply emergency, auxiliary or stand-by waters during said outage, and that District and Water Company were entitled to recover from Pacific the net amounts expended by them under the stipulation, with interest. Judgment was

entered accordingly and this appeal is by Pacific from said judgment.

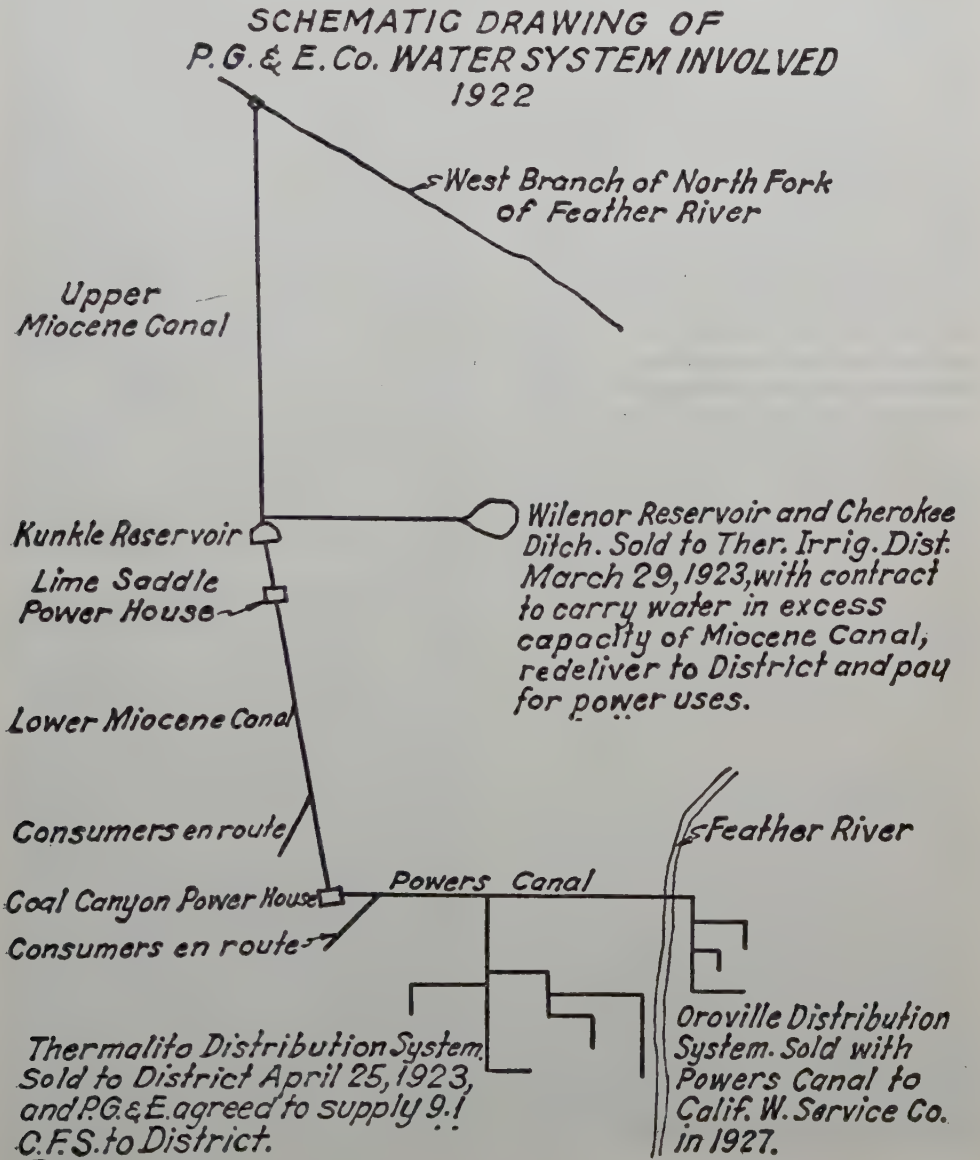
In arguing for a reversal of the judgment appellant Pacific makes the following main contentions:

1. That Pacific is under no obligation to sell or supply any water to District.

2. That the Wilenor water contract cannot be taken as controlling in any way Pacific's conduct of the public uses to which Miocene Canal is dedicated.

3. That it plainly appears from the contracts involved that Pacific has the right to suspend delivery of Miocene Water whenever it finds such suspension necessary for the purpose of making repairs upon or improvements in the Miocene Canal and for the duration of such necessity, without supplying either District or Water Company with other water.

Before discussing these contentions we shall review the factual situation as shown by the record. The water properties involved in the litigation are shown, schematically, in the drawing below:



Water flowing in the West Branch of the North Fork of the Feather River is diverted by Pacific at the intake of the Miocene Canal, is passed through Pacific's power houses and is delivered to the Water Company at the head of the Powers Canal, through which the water flows to the City of Oroville, certain irrigation consumers and Thermalito being served en route.

Pacific's appropriation dates back to the early mining days and is known as the Miocene water right. Prior to 1917 the Miocene and Powers Canals and the Miocene water right were owned by Oro Water Light & Power Company. The water right was dedicated to power and irrigation use on the Miocene Canal and to the consumers on the Powers Canal, in Thermalito and in the City of Oroville for irrigation, domestic, municipal and other uses. In 1917 the properties of the Oro Company were acquired by Pacific. The dedication of the Miocene right to the water users on the Powers Canal, in Thermalito and in the City of Oroville continued. Pacific was a public utility administering this dedicated water and, as such, was and is a public utility water company, having the ordinary duties and obligations of such a company.

In 1923 Pacific sold to Thermalito the distribution system within the District then owned by Pacific, and entered into an agreement with Thermalito dated April 25, 1923, by which Pacific agreed to furnish 9.1 second feet of water to the District from the Powers Canal at wholesale. Pacific pleads that by this contract it undertook the public service duty of supplying water to the District at wholesale.

As a part of the same transaction Pacific also sold to Thermalito a reservoir and reservoir site on Concow Creek, known as Concow Reservoir, which was enlarged into and became known as Lake Wilenor, together with a ditch or canal leading from Concow Reservoir to its connection with the Miocene Canal, and entered into an agreement with Thermalito dated March 29, 1923, providing for the transmission of Lake Wilenor water through the Miocene Canal (including the Powers Canal) to the District's point of diversion, when there should be unused capacity in the Miocene Canal for such purpose, and for the use of the water in Pacific's power houses. This agreement is known as the Wilenor Contract. The contract contains the provision which, together with a like provision in the Oroville Water Contract hereinafter referred to, gives rise to the principal controversy in this case. Paragraph 8 of the Thermalito Contract reads as follows: "The Company, whenever it shall find it necessary for the purpose of making repairs or improvements to its water system, shall have the right to *suspend temporarily* the delivery of water hereunder, but in all such cases as reasonable notice thereof as circumstances will permit will be given to the District and the making of such repairs or improvement will be prosecuted as rapidly as may be practicable, and, if practicable, at such times as will cause the least inconvenience to the District." (Italics added.)

The situation at this point then was the Pacific owned the Miocene Canal, upper and lower, the Powers Canal, the two power houses and the distribution system in Oroville. It owned and administered the Miocene water right, which was dedicated to public use for power purposes in the two power houses and then to irrigation, domestic, commercial and other uses along the Lower Miocene Canal, and the Powers Canal, including the wholesale supply to Thermalito and in the City of Oroville and vicinity.

In 1927 Pacific sold the Powers Canal and its distribution system in Oroville and vicinity to the Water Company. This sale did not include the Miocene Canal, either upper or lower, nor either of the power houses nor the Miocene water right. Upon the transfer the Water Company assumed the duty of furnishing water to the consumers on the system so sold (hereinafter referred to as the Oroville water system), including Pacific's obligation under the Thermalito Contract to deliver water to Thermalito as and to the extent provided in the Oroville Water Contract next referred to.

This purchase was part of a larger purchase by which the Water Company acquired from Pacific some six water properties. In most instances the Water Com-

pany purchased, along with the distribution system, Pacific's source of water supply for the system; but in the case of the Oroville water system, inasmuch as Pacific was retaining the Miocene Canal and the Lime Saddle and Coal Canyon power houses it also retained the Miocene water right by which the power houses were operated.

Under date of April 19, 1927, Pacific and the Water Company entered into a contract known as the Oroville Water Contract, by virtue of which Pacific undertook the public service obligation of supplying water to the Water Company, at wholesale, at the head of the Powers Canal and out of the Miocene water right, for the Oroville water system, including Thermalito. The purchase price for the system included the water for a period of 25 years, which was to be delivered free of charge until after May 1, 1952, after which the water is to be furnished at rates fixed by the Railroad Commission, now the Public Utilities Commission. The contract provided that the Water Company assumed all of the obligations imposed on Pacific, by law or contract, to supply water for municipal, domestic, irrigation and other uses, "which is now (i. e., in 1927) furnished by means of the aforesaid water properties this day conveyed by the Seller to the Buyer as hereinbefore recited, including the obligation of the Seller to deliver water to said Thermalito Irrigation District * * *." in accordance with the terms of the Thermalito Contract.

The Oroville Water Contract contained a provision like the one quoted above from the Thermalito Contract providing as follows: "10. The Seller, whenever it shall find it necessary for the purpose of making repairs upon or improvements in its water system from which water shall be delivered to the Buyer hereunder, shall have the right to *suspend temporarily* the delivery of water hereunder but in all such cases as reasonable notice thereof as circumstances will permit will be given to the Buyer and the making of such repairs or improvements will be prosecuted as rapidly as may be practicable and, if practicable, at such times as will cause the least inconvenience to the Buyer." (Italics added.)

At the time of Pacific's sale of its system in the District to Thermalito, and again at the time of the sale of its Oroville water system to the Water Company, Pacific had no stand-by service of any kind, either for Thermalito or for the Oroville water system. The district and the City were dependent, for their water supply, upon water furnished through the Powers Canal from the Miocene Canal, except for temporary run-off which could be picked up by the Powers Canal during and for a short time after storms.

The evidence was that the Water Company and the District could take care of themselves for a few hours up to a day or so, particularly in winter months when water consumption was low, without a supply of Miocene water, by the water in the Powers Canal and in the small system reservoirs owned by the District and the Company, and, if there was a local run-off, for a longer period of time, but, except for such temporary periods, repairs and improvements on the Miocene Canal would have to be made either (a) without interrupting the service through the canal, or (b) by agreeing to restore service on short notice should local run-off be insufficient to meet the needs of Oroville and vicinity, including Thermalito, or (c) by the installation of temporary by-passes or by furnishing auxiliary or substitute facilities for supplying water.

As to the method of actual operation under the contracts for a period of nineteen years and up to the time of the incidents which gave rise to this litigation the consistent practice as shown by the evidence was as follows:

(a) Whether the proposed outage of the Miocene Canal was an emergency or planned outage, Pacific would give the Water Company notice and would inquire as to what the water needs of the Water Company would be for supplying the City and Thermalito during the period of the proposed outage.

(b) Pacific then would make provision to take care of the Water Company's needs by either (1) by-passing sufficient water to take care of the needs over and above the water available to the Water Company from

local run-off and from the well which it put down in 1929 supplying about 900 gallons per minute, which is about 2 second feet, or (2) agreeing to restore service in the Miocene Canal on short notice from the Water Company that its needs could not be met by local run-off and the well supply. On occasions special arrangements were made between the two companies, and, of course, the Pacific was only undertaking to supply Miocene water.

On no occasion prior to the 1946 outage, which brought on this litigation, did Pacific ever give notice of an outage of the Miocene Canal or take it out of service and refuse to take care of the Water Company's needs in one of the ways stated above.

The record shows that Pacific regularly took the Miocene Canal out of service for annual maintenance and major repairs for periods ranging from a few days up to as much as eleven weeks. Extended outages through the years were common, but until 1946 the needs of the Water Company, over and above what could be obtained from local run-off and the well supply, were always provided by Pacific.

In 1946 there was an abrupt change. In November of that year Pacific gave notice that it would take the Miocene Canal out for repairs for a period from about December 15, 1946, until about April 15, 1947, and that during such period it would not furnish water to the Water Company, as in the past, either by by-passing or restoring service on short notice, should the Water Company be in need of water. On December 15, 1946, Pacific actually cut service in the Miocene Canal and furnished no further service until this suit was brought by Thermalito and a mandatory injunction obtained requiring Pacific to restore service. Thereupon, the parties by stipulation arranged for an auxiliary service while repairs on the Miocene Canal were being made, the burden of the cost to abide the event of this litigation.

In support of its contention that it is under no obligation to sell or supply water to the District, Pacific asserts that by virtue of the Railroad Commission's decision authorizing Pacific to sell and transfer the Oroville water system to the Water Company, it was relieved of its public service obligation in the area served by that system, which included Thermalito Irrigation District. The Commissioner's order provided that upon the transfer Pacific "may cease to furnish and supply water service and is hereby relieved of the duties and functions of a water corporation in the territory in which it now furnishes water service by means of the water systems or properties it hereby authorized to sell."

The District in reply argues that the Railroad Commission had no authority to relieve Pacific of its obligation under the Thermalito contract, as the District was not a party to said proceeding, and also because the Railroad Commission had no jurisdiction over irrigation districts.

It is unnecessary to discuss this contention of appellant Pacific at any length because there is nothing in the judgment holding that Pacific is under any obligation to sell or supply any water or water service to the District. Pacific is obligated to the Water Company to supply it with water for its needs and this includes the need of the District as one of the Water Company's consumers (at wholesale), and this is what the conclusions of law provide and what the judgment contemplates.

[1] We agree with the following statement of the learned trial judge in his memorandum opinion: "It is my opinion that by the substitution of the Water Company in place of the P. G. & E. as a direct seller of water to the District, the P. G. & E. did not thereby escape the responsibility incumbent upon it to see that the water for the District was supplied through the Water Company. The obligation of the P. G. & E. was in no wise changed, it was implied that the P. G. & E.'s obligation would continue, except that instead of the P. G. & E. supplying the water directly to the District it was supplied through the medium of the Water Company. I cannot believe that the Public Utilities Commission would have sanctioned the transfer unless there was carried with it this implied obligation."

Likewise appellant's second contention, that the Wilenor water contract cannot be

taken as controlling in any way Pacific's conduct of the public uses to which the Miocene Canal is dedicated, requires little discussion.

[2] The judgment does not mention the Wilenor contract. The first two paragraphs of the judgment relate solely to the recovery by the District and the Water Company of their expenses in the 1946 outage pursuant to the stipulation, and have no relation to the Wilenor Contract. The third paragraph granting declaratory relief refers solely to the Oroville Water Contract and the Thermalito Contract, both containing clauses providing that water deliveries may be suspended "temporarily" for repairs, and declares the meaning of those clauses. The judgment makes no attempt to construe the Wilenor Contract, and the mere fact that in the third conclusion of law it was stated that "P. G. & E. had no right under said Thermalito contract or under said Wilenor Contract or under said Oroville Water Contract, or as a possible utility water corporation or otherwise to suspend water service," etc., would not constitute a ground for appeal even if, as appellant contends, said conclusion can be considered a determination that Pacific violated the Wilenor Contract, as said conclusion, in so far as it relates to the Wilenor Contract, was not carried into the judgment.

The final and principal contention of appellant is that it "plainly appears from the contracts involved that Pacific has the right to suspend delivery of Miocene water whenever it finds such suspension necessary for the purpose of making repairs upon or improvements in the Miocene Canal and for the duration of such necessity, without supplying either District or Water Company with other water."

Appellant states that under the Thermalito Contract and the Oroville Water Contract appellant Pacific obligated itself to exercise reasonable care and diligence to maintain the Miocene Canal in condition to carry water continuously and to its capacity in critical periods of the year, and appellant quotes the following provision in the Oroville Water Contract (there being a like provision in the Thermalito Contract): "The Seller, whenever it shall find it necessary for the purpose of making repairs upon or improvements in its water system from which water shall be delivered to the Buyer hereunder, shall have the right to suspend temporarily the delivery of water hereunder but in all such cases as reasonable notice thereof as circumstances will permit will be given to the Buyer and the making of such repairs or improvements will be prosecuted as rapidly as may be practicable and, if practicable, at such times as will cause the least inconvenience to the Buyer."

Appellant argues that the judgment destroys its rights under the above quoted provision of the contract because, asserts appellant, under the judgment only suspensions not adversely affecting District or Water Company are permissible and if they are adversely affected by any suspension of delivery another water supply must be provided by appellant Pacific. It argues further that if it had been intended by the parties that Pacific should not have the right to suspend deliveries so as to affect the other parties adversely, the above quoted paragraph would not have been included in the contract; and then if it had been intended that Pacific should supply water in lieu of Miocene water when Miocene Canal is out of service for repairs or improvements, it would have been so written in the contract.

Appellant contends that the contracts clearly state that Pacific shall have the right to suspend delivery of Miocene water whenever Pacific finds it necessary for the purpose of making repairs upon or improvements in its Miocene Canal and for the duration of such necessity, and that, by providing in its judgment that the phrase "suspend temporarily" is limited to a time not adversely affecting Water Company and District, the court ignored the fact that the contract itself defines the period of any "temporary" suspension of delivery as the time necessary for the purpose of making repairs or improvements as rapidly as practicable.

Appellant cites section 1858 of the Code of Civil Procedure and other authorities

setting forth the familiar rule that in the construction of a contract the office of the judge is simply to ascertain and declare what is in terms or substance contained therein, and not to insert what has been omitted or to omit what has been inserted; and appellant argues that the terms of the contracts here involved are so clear that there is no room for reference to extrinsic evidence in aid of construction.

Respondents in reply argue that the word "temporarily" is a relative term and that what might be temporary under one set of circumstances might not be so under a different set of circumstances; that there is nothing in the contracts defining the word "temporarily", and that in its very nature the word lacks definite connotation, and what is meant by it in any particular context depends upon the circumstances under which it was used. They argue further that such being the case, the trial court was plainly authorized to consider the facts and circumstances surrounding the parties at the time they made the contract. They cite section 1860 of the Code of Civil Procedure, which provides: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

They also quote from Universal Sales Corp. v. California Press Mfg. Co., 20 Cal. 2d 751, at page 761, 128 P.2d 665, at page 671, where it is said: "As an aid in discovering the all-important element of intent of the parties to the contract, the trial court may look to the circumstances surrounding the making of the agreement [citing authorities] including the object, nature and subject matter of the writing [citing authorities] and the preliminary negotiations between the parties [citing authorities], and thus place itself in the same situation in which the parties found themselves at the time of contracting [citing authorities]."

[3-6] We believe that evidence of the facts and circumstances existing when the contracts were entered into was properly admitted and considered by the trial court. This evidence shows that in the year 1923 there were 3100 acres in the District, that its population was 528, that there were 158 domestic connections, including a county hospital, and that the area and its inhabitants were entirely dependent for a water supply and fire protection upon water taken out of the West Branch of the Feather River and carried down the Miocene Canal to the District. In 1927, when the Oroville Water Contract was entered into Pacific was operating the Oroville water system, and had no stand-by or auxiliary service either for the District or for the City of Oroville, so that both the City and the District were absolutely dependent for their water supplies for water from Pacific except to the extent that local run-off might augment that supply. These facts were known to the parties and the contract was of course made in the light of these facts. We do not believe that the parties could have intended that the City and the District should be without water service during any period of the outage of the Miocene Canal; and this is shown by evidence of the actual operations under the contracts, which evidence was properly admitted and considered by the trial court. As stated by our Supreme Court in Universal Sales Corp., Ltd. v. California Press Mfg. Co., supra, 20 Cal.2d at page 761, 128 P.2d at page 672: "Also applicable here is the familiar rule that when a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court. Work v. Associated Almond Growers, 102 Cal.App. 232, 235, 282 P. 965; 6 Cal.Jur. 304, § 184. The reason underlying the rule is that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract, and a practical construction placed by the parties upon the instrument is the best evidence of their intention. 2 Elliott on Contracts, § 1537; 12 Am.Jur. 787, § 249. As was said in Mitau v. Roddan, 149 Cal. 1,

14, 84 P. 145, 150, 6 L.R.A.,N.S., 275: 'It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by the parties contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it. * * * In its execution, every executory contract requires more or less of a practical construction to be given it by the parties, and when this has been given, the law, in any subsequent litigation which involves the construction of the contract, adopts the practical construction of the parties as the true construction, and as the safest rule to be applied in the solution of the difficulty.'"

The record shows that prior to 1946 the practice had been for Pacific to give notice of curtailment of its water deliveries affecting the Water Company and the District, and to take care of the Water Company's requirements, either by by-passing the water or by arranging to cut the canal back into service on short notice if local run-off, plus the Water Company's well supply, were insufficient to meet existing needs of the Water Company and the District. Never prior to the 1946 outage that brought on this litigation, was there an occasion when Pacific took the Miocene Canal out of service for repairs and refused to take care of the Water Company's needs (which included the needs of the District) by by-passing or by cutting the canal back into service; and prior to the 1946 outage neither the District nor the Water Company was ever out of water to meet minimum needs. This indicates that for 19 years Pacific recognized the right of the Water Company to water service that would not leave consumers in the city of Oroville and in the District without water even though that imposed upon Pacific the burden of by-passing the water or restoring service in the canal on notice in cases of extended repairs.

[7] We believe that if the parties had intended that the interruptions of service should be for the duration of necessary repairs instead of "temporarily" they would have said so, and then the Water Company and the District would have been on notice that they would have to take care of themselves during such outages by finding some other source of supply without getting water from Pacific. But instead the parties stated in the contracts that Pacific might "suspend temporarily" the deliveries of water, and we believe that the trial court was fully justified in concluding that this contemplated brief interruptions of service while by-pass or other facilities were being cut in or cut out pending resumption of service on short notice should local run-off become inadequate.

We agree with the following statement of the trial judge in his memorandum opinion: "What would be classed as a temporary suspension would depend entirely upon the circumstances. The meaning of the word 'temporarily' is quite definitely ascertained. It is a relative term, and what might be considered temporary under one set of circumstances could not be so considered under another set. I am of the opinion that as applied to the facts existing in connection with this water service by the P. G. & E. to both the District and the Water Company, any outage or suspension of service extending for such a length of time that the available adequate supply of water to either the District or the Water Company becomes insufficient in any respect, it becomes the duty of the P. G. & E. to restore service to such extent and by such means as the said P. G. & E. may in its discretion select."

No other points raised require discussion.

In view of the foregoing we conclude that the trial court correctly determined that Pacific's suspension of deliveries of water in 1946 was in breach of its obliga-

tions under the contracts with the District and the Water Company and in breach of its obligation as a public utility water corporation; that, by reason of the unauthorized outage of the Miocene Canal, Pacific alone became obligated to supply emergency, auxiliary, or stand-by water during said outage; and that the District and the Water Company were entitled to recover from appellant Pacific the net amounts expended by them under the stipulation, with interest.

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.



108 Cal.App.2d 529

MEYERS v. G. W. THOMAS DRAYAGE & RIGGING CO.

Civ. 14811.

District Court of Appeal, First District, Division 2, California.

Jan. 4, 1952.

Action by Daniel Meyers against G. W. Thomas Drayage & Rigging Company for injuries sustained when contents of bucket of a power shovel operated by defendant fell on plaintiff. The Superior Court, City and County of San Francisco, Lile T. Jacks, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Jones, J. pro tem., held that instructions on doctrine of res ipsa loquitur and on presumption of due care on part of plaintiff that would stand against direct evidence to the contrary, constituted prejudicial error.

Reversed.

1. Appeal and Error ⇐1066
Negligence ⇐121(2)

In action for injuries sustained by foreman of construction company when contents of bucket of power shovel, hired from defendant, fell on plaintiff after he had entered ditch out of view of shovel operator, despite warning by defendant's employee to keep out, and had constantly changed position in ditch as bucket was hoisted, doctrine of res ipsa loquitur was not applicable and giving of instruction on such doctrine was prejudicial error.

2. Negligence ⇐121(2)

Res ipsa loquitur rule is inapplicable where there is direct evidence of cause of plaintiff's injury, or where facts are such that an inference that the mishap was due to a cause other than defendant's negligence could be as reasonably drawn as that injury was due to defendant's negligence.

3. Negligence ⇐138(2)

It is error for trial court to instruct on presumption of due care where evidence discloses acts and conduct of injured person immediately prior to or at time of the accident.

4. Appeal and Error ⇐1064(1)

Whether an instruction on presumption of due care on part of injured person, when the evidence discloses acts and conduct of injured person at time of the accident, constitutes prejudicial error, depends on circumstances of each case.

5. Negligence ⇐138(2)

In action for injuries sustained by foreman of construction company when contents of bucket of power shovel, hired from defendant, fell on plaintiff, where plaintiff's evidence disclosed acts and conduct of plaintiff immediately prior to accident, instruction on presumption of due care by plaintiff at time of accident was erroneous.

6. Appeal and Error ⇐1064(2)

In action for injuries sustained by foreman of construction company when contents of bucket of power shovel, hired from defendant, fell on plaintiff, instruction that plaintiff was clothed with presumption of due care and that such presumption would stand against direct evidence to the contrary, was prejudicial. Code Civ.Proc. § 1963.

7. Appeal and Error ⇐1064(2)

An instruction which has the effect of withdrawing from jury a consideration of

evidence which is material to an issue is prejudicial.

8. Appeal and Error ⇐1170(9)

In action for injuries sustained by foreman of construction company when contents of bucket of power shovel, hired from defendant, fell on plaintiff, combined effect of erroneous instructions on applicability of res ipsa loquitur rule and on presumption of due care was sufficient to compel a reversal. Const. art. 6, § 4½.

Partridge & O'Connell, San Francisco, for appellant.

Jack Flinn, San Francisco, for respondent.

JONES, Justice pro tem.

The appeal here is from a $19,000 judgment for plaintiff in a personal injury action.

Plaintiff was injured on December 8, 1948 while working in a water pipe line trench when a load of asphalt chunks and other materials fell from the "clamshell" of a power shovel and upon him. The power shovel was being operated by the defendant Schroff, an employee of defendant Thomas Drayage and Rigging Company, a corporation.

Plaintiff worked as a foreman for a construction firm which, on the date of the accident, was engaged in digging a pipe line ditch 6 to 8 feet wide and 6 to 7 feet deep along Highway 101. The ditch was to contain a pipe line bringing water from Crystal Springs Lake to San Francisco. Plaintiff's employer had hired from the defendant corporation a truck crane with a power shovel for the excavation work. The hire included two of the defendant corporation's employees, the defendant Schroff to operate the crane and a Mario Colombo to oil it and drive the truck. The crane had a 45 foot boom which extended in front of the operator's cab. Both the cab and boom were atop a revolvable platform on the truck bed which permitted the boom to be moved in any direction. The "clamshell" which was suspended by cables from the top of the boom was 28 inches wide, had metal jaws with 3 six inch teeth on each side and had a load capacity of ⅜ of a yard. The crane was operated through a system of coordinating pedals, levers, brakes, cables, lines, chains and pulleys, and dirt and other material within the range of the crane was dug, scooped out and carried to any desired place or position and there dumped. The surface of the roadway where the ditch was being dug was of asphalt macadam which had to be broken by a jackhammer. After the surface of the roadway had been broken, the crane would remove the macadam to the required depth and width, depositing the materials removed therefrom in a pile away from the ditch.

After the lunch period on December 8, 1948, plaintiff and another employee named Williams went down into the ditch where excavation had been completed to do some required shoring work. This was to the south of the crane as work was progressing in a northerly direction. There is some conflict in the evidence as to the length of time Meyers, the plaintiff, had been in the ditch and the number of loads the crane had removed when the accident occurred. The figure is variously given as from twelve to fifteen loads. The accident occurred when a load of the broken macadam spilled from the "clamshell" onto plaintiff some time after he entered the ditch. Neither plaintiff nor Schroff could see the other while plaintiff was in the ditch. The loads were being removed from the head of the ditch near the surface and were in the plain view of the plaintiff. No adjustment, change or repair was made in or to the machinery after the accident and it continued to operate throughout the balance of the day.

Mario Colombo who was oiler for the rig and whose duty it was to spot the bucket in the ditch when below the view of the operator testified that shortly before the accident happened: "Before I left and went down the line, I asked Meyers not to get in that ditch over there * * * and I asked Mr. Meyers about the bucket, and he says, 'Don't worry about me. I know what I am doing. You go and take care of your rig.'" This witness also testified that "After lunch, every time the bucket came

around, they would go out further, so the bucket wouldn't have a chance to drop anything on them, so they wouldn't be in the way of the bucket." When the bucket-load of macadam which fell on Meyers was hoisted he and Williams ran first up the ditch to the north and then back to the south. The load fell on him as he was proceeding southerly in the ditch.

The jury returned a verdict for plaintiff, judgment was entered accordingly and the defendant corporation filed this appeal.

Appellant urges that the judgment should be reversed for the reason that the jury was misdirected to its prejudice. In this connection it first urges that the court erred in instructing the jury on res ipsa loquitur because the accident is not the type which, in the light of common experience, was more likely than not the result of defendant's negligence. Appellant argues that the type of accident here involved was more than likely to happen to one in an exposed position in the ordinary course of events, because of "the strong probability that when a load of materials such as blacktop macadam was picked up some of the material would become wedged or jammed between the jaws or lips of the clamshell thereby preventing the clamshell from closing and thereby causing the load to spill out as it was being carried." The uncontradicted testimony is that a piece of asphalt was wedged in the jaws of the "clamshell" and prevented its closing while carrying the load which dropped on the plaintiff. It is also the uncontradicted testimony of several witnesses including plaintiff himself that it is not unusual for cranes of this type to drop loads when the material being moved contains large rocks or chunks of asphalt which might become wedged in the teeth of the "clamshell". Respondent replies to this argument by asserting that the evidence showed the "clamshell" opened all the way over the head of the plaintiff and the whole load spilled out on top of him. In this respect appellant agrees and correctly so that there was evidence that the bucket opened all the way, but also much evidence to the effect that the load slipped through the gap of 8 to 10 inches caused by the wedged chunk of asphalt. It is also testified to that this chunk disintegrated when the bucket was in mid-air and that when it broke up the whole load emptied falling on Meyers.

The first instruction on the subject of res ipsa loquitur given by the trial court reads:

"Now, from the happening of the accident involved in this case as established by the evidence there arises an inference that a proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference predominates over contradictory evidence, it warrants a verdict for the plaintiff. Therefore you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that they did in fact exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty on their part."

The court then instructed that the foregoing instruction is based on a special doctrine of law which may be applied only under special circumstances. These circumstances were recited to be:

"First, the fact that some certain instrumentality by which injury to the plaintiff was proximately caused was in the possession and under the exclusive control of the defendant at the time of the cause of the injury was set in motion, and it appearing on the face of the event that the injury was caused by some act or omission incident to defendant's management.

"Second, the fact that the accident was one of such a nature as does not happen in the ordinary course of things if those who have control of the instrumentality use ordinary care.

"Third, the fact that the circumstances surrounding the causing of the accident were such that the plaintiff is not in a position to know what specific conduct was the cause, whereas the one in charge of the instrumentality may reasonably be expected to know and to be able to explain the precise cause of the accident."

[1, 2] These instructions substantially state the doctrine of res ipsa loquitur. The difficulty is, however, that the facts of the case do not permit the application of the doctrine. The circumstances surrounding the happening of the accident are such that reasonable minds might well conclude that the cause thereof was some event over which the defendant had absolutely no control. As is said in Carlsen v. Diehl, 57 Cal.App. 731, 737, 208 P. 150, 153: "It does not apply where there is direct evidence of the cause, or where the facts are such that an inference that the mishap was due to a cause other than the defendant's negligence could be as reasonably drawn as that it was due to his negligence. 29 Cyc. 624." The plaintiff in the Carlsen case had taken a position so close to passing vehicles that a very slight movement on his part would have brought him in contact with them. The court there said that the position of the plaintiff increased the probability that the contact was due to a movement on his part. Here, likewise, the plaintiff took a position where a slight change would have brought him directly under the bucket. It is undisputed that he went into the ditch despite the warning of defendant's employee that he should keep out of it and away from the bucket. The record also discloses that from time to time as the bucket was hoisted the plaintiff and the other workmen would change their positions. This shifting about was obviously for the purpose of avoiding the falling rocks and dirt. The situation here presented shows the plaintiff entering the ditch after a warning by the defendant's agent that it was dangerous to do so, and it is undisputed that he was constantly changing his position out of view of the operator of the power rig. These acts on his part, coupled with the undisputed fact that the machinery was operating normally and that there was nothing wrong with it so increase the probability that the accident was the result of his own actions that the case is completely out of the scope of res ipsa loquitur. In Scellars v. Universal Service, 68 Cal. App. 252, 256, 228 P. 879, 880, in quoting from Lucid v. E. I. Dupont etc. Powder Co., 199 F. 377, 118 C.C.A. 61 L.R.A.1917E, 182, it is said that "the doctrine is to be applied only when the nature of the accident itself, not only supports the inference of the defendant's negligence, but excludes all others." See also Gritsch v. Pickwick Stages System, 131 Cal.App. 774, 783, 22 P.2d 554 and Olson v. Whitthorne & Swan, 203 Cal. 206 at page 208, 263 P. 518, at page 519, 58 A.L.R. 129, where it is said that, "It does not apply 'where an unexplained accident might have been caused by plaintiff's negligence, or been due to one of several causes, for some of which the defendant is not responsible.'" Biddlecomb v. Haydon, 4 Cal.App.2d 361, 40 P.2d 873 and Middleton v. Post Transportation Co., 106 Cal.App.2d 703, 235 P.2d 855, are more recent cases to the same effect. The jury could well have understood, and probably did understand, from the given instructions that the plaintiff was not bound to prove negligence on the part of the defendant but that mere proof of the accident was sufficient to impose on the defendant liability for plaintiff's injury. Tower v. Humboldt Transit Co., 176 Cal. 602, 169 P. 227. Instructions which permit the jury to find against the defendant upon mere proof of injury under the circumstances here presented must be regarded as prejudicial.

Instructions were also given with respect to the presumption of due care on the part of the plaintiff two of which the appellant assigns as error. The first is: "You are instructed that there is a presumption in law that persons take ordinary care of his own concerns. That is Code Civ.Proc. § 1963. You are instructed that a presumption that a person takes ordinary care of his own concerns is a species of evidence and stands against direct evidence to the contrary."

The second reads: "You are instructed that there is a presumption of law in this case that plaintiff Daniel Meyers was exercising ordinary care at the time of the happening of this accident. This presumption is a species of evidence and is only dispelled by clear, satisfactory evidence to the contrary."

[3, 4] The appellant points out that the plaintiff was conscious up to the very in-

stant of the injury and at the trial he testified concerning his own acts and conduct and the events immediately preceding and leading up to the accident as well as producing witnesses who testified to the same effect. The argument is made that the courts of this state have repeatedly held that it is error for the trial court to instruct on the presumption of due care in a case where the acts and conduct of the plaintiff immediately preceding the injury are fully testified to by the plaintiff or by witnesses called on his behalf. While this is true, such error may not always be prejudicial. Concerning the giving of such an instruction it is said in Barker v. City of Los Angeles, 57 Cal.App.2d 742, 749, 135 P.2d 573, 577:

"From apparently conflicting opinions of appellate courts of California, the following rules may be adduced:

"(1) It is error for the trial court to give an instruction such as that set forth above where the evidence introduced by the plaintiff discloses the acts and conduct of the injured party immediately prior to or at the time of the accident (Speck v. Sarver, 20 Cal.2d 585, 587, 588, 128 P.2d 16; Campbell v. City of Los Angeles, 28 Cal.App.2d 490, 491, 82 P.2d 720.)

"(2) Whether the giving of such an instruction when the evidence of the plaintiff discloses the acts and conduct of the injured party at the time of the accident constitutes *prejudicial error* depends on the circumstances of each case. (Speck v. Sarver, supra.)"

[5–7] In this case the negligence of each of the parties was in issue before the jury and upon these issues of negligence the proof made presented close questions of fact. The second instruction, erroneous though it is under the facts of the case, might under different circumstances be deemed not prejudicial. This, however, can not be said of the first. By its unequivocal terms the jury were told that the plaintiff was clothed with a presumption of due care, and that this presumption would stand against direct evidence to the contrary. This instruction if followed by the jury would exclude from their consideration any evidence of negligence on the part of the plaintiff and effectively bar the defense of contributory negligence. An instruction which has the effect of withdrawing from the jury a consideration of evidence which is material to an issue is prejudicial. Dotson v. International Life Ins. Co., 89 Cal.App. 653, 657, 265 P. 357.

There is no way of telling what part of the jury followed the first instruction on the presumption of due care and rejected all direct evidence of negligence on the part of the plaintiff or what jurors followed the second instruction and weighed the presumption against "clear" evidence of his negligence. In either case the evidence offered by the defendant of plaintiff's negligence could not, under the admonition of the court, receive that fair consideration to which it was entitled. The prejudicial effect of these instructions is cumulative when taken in connection with that given on the doctrine of res ipsa loquitur.

[8] We are of the opinion that the combined effect of all these erroneous instructions is such as to remove the case from the purview of Sec. 4½ of Article VI of the Constitution and compel a reversal of the judgment.

Since the judgment is to be reversed for the reasons stated, the other points made by the appellant need not be here considered.

The judgment is reversed.

NOURSE, P. J., and GOODELL, J., concur.

108 Cal.App.2d 379

FRAZIER v. MOFFATT.

Civ. 18375.

District Court of Appeal, Second District, Division 1, California.

Dec. 27, 1951.

Rehearing Denied Jan. 22, 1952.

Hearing Denied Feb. 21, 1952.

John G. Frazier sued Stanley A. Moffatt for false arrest and imprisonment. From a judgment of the Superior Court of Los Angeles County, Samuel R. Blake, J., for plaintiff, defendant appealed. The District Court of Appeal, White, P. J., held that the statute authorizing a magistrate to order a peace officer to arrest any one committing a public offense in the magistrate's presence imposed a duty with a corresponding power to exercise functions incidental to a magistrate's judicial position, so that defendant, who was a justice of the peace, in directing city police officers to arrest plaintiff for disturbing the peace in defendant's presence, performed a judicial act in execution of his office and within the purview of his general authority, and hence was not amenable to a civil action for resulting damages to plaintiff.

Judgment reversed and cause remanded with directions.

1. Justices of the Peace ⇐1

A justice of the peace is a "magistrate." Pen.Code, §§ 807, 808.

See publication Words and Phrases, for other judicial constructions and definitions of "Magistrate".

2. Judges ⇐36

Judicial officers, because of public policy, are not liable in damages for erroneous exercise of judicial powers vested in them.

3. Judges ⇐38

A judicial officer, violating criminal statute, is held to same responsibility as any citizen.

4. Judges ⇐38

Judicial officers are responsible to the people or authorities constituted thereby for manner in which they discharge their official trusts, and if they act with partiality or maliciously, corruptly, arbitrarily or oppressively in exercise of their judicial powers, they may be tried for misdemeanors or for willful or corrupt conduct in office. Government Code, §§ 3020, 3060; Const. art. 4, § 18.

5. Judges ⇐3, 11

Judicial officers are subject to recall and must submit their judicial records to people at regular elections when seeking to continue in office.

6. Judges ⇐36

A judicial officer, to claim immunity from liability in damages for erroneous exercise of his judicial powers, must restrict his actions within bounds of his jurisdiction.

7. Courts ⇐1

"Jurisdiction" is authority of law to act officially in particular matter in hand.

See publication Words and Phrases, for other judicial constructions and definitions of "Jurisdiction".

8. Judges ⇐36

A judicial officer's immunity from civil suit for damages because of his erroneous exercise of judicial power must be determined on basis of whether his act was within general scope of his judicial powers and whether he honestly believed he was legally warranted in doing such act, not whether he committed error of judgment in so acting.

9. Constitutional Law ⇐56

The Legislature is without power to confer on courts jurisdiction not given or authorized to be given them by Constitution and can impose on judiciary no duties which are not of judicial character. Const. art. 3.

10. Arrest ⇐63(1)

The statute authorizing magistrate to order peace officer to arrest anyone committing public offense in magistrate's presence imposes on magistrate a duty with corresponding power to exercise functions incidental to his judicial position. Pen.Code, § 838.

11. Constitutional Law ⇐67

A power or duty imposed by Legislature on judiciary is not subject to constitutional infirmity if it partakes of judicial or quasi judicial character. Const. art. 3.

12. Arrest ⇐58

The power to make arrest is not per se an exclusive function of executive department of government, in view of statute authorizing arrests by private persons. Pen.Code, § 837.

13. Justices of the Peace ⇐25

A magistrate, acting pursuant to statute authorizing magistrate to order peace officer to arrest anyone committing public offense in magistrate's presence, acts within his jurisdiction in performance of judicial act within purview of his general authority, as in case of justice of the peace directing city police officers to arrest a person for disturbing peace in justice's presence, and hence is not amenable to civil action for resulting damages to such person. Pen. Code, §§ 410, 415, 838.

14. Constitutional Law ⇐70(1)

Judicial officers' statutory immunity from civil action for damages because of erroneous judicial conduct can be abolished only by Legislature through amendment or repeal of applicable statutory provisions, not by courts. Pen.Code, § 838; Const. art. 3.

Morris Lavine, Los Angeles, for appellant.

Harry R. Simon, Huntington Park, for respondent.

WHITE, Presiding Justice.

This is an appeal by defendant from a judgment for $3,150 compensatory damages and $1,000 punitive damages in an action for false arrest and false imprisonment. The cause was tried before the court without a jury.

Consideration of the ground for reversal urged upon this appeal requires that attention be given to the evidence adduced at the trial. In that regard the record reflects that during the noon hour of May 16, 1949, at approximately 1 o'clock, defendant went to a cafe in Huntington Park, County of Los Angeles, as did plaintiff. In addition to the plaintiff there were present in the cafe Pearl Jacobsen, Fay Hudgins, Charles Bell, and a Mrs. Burt.

It is conceded that the defendant at all times here pertinent, was the duly elected, qualified and acting Justice of the Peace of San Antonio Township in Los Angeles County, and that the above mentioned cafe was located within said township.

As to what occurred in the cafe, the evidence is in rather sharp conflict. However, to us, the following appears to be a fair epitome thereof.

The plaintiff testified, "Well, we were in there and we were just laughing and having a real good time, and somebody got up and said, 'Shut your mouths.' We shut up and Mr. Moffatt came around and said to me, 'I guess you don't knew who I am.' I said no. He said, 'I am Judge Moffatt.' I said 'That don't spell anything to me,' and he said, 'It will when I call the law because I am going to have you arrested,' and then he called the law."

Fay Hudgins, a witness for plaintiff, testified, "We were talking and laughing a little and then Pop (Frazier, the plaintiff) tickled Mrs. Burt under the chin and we all laughed a little bit louder, so when we were all laughing Judge Moffatt raised up in the booth and he said, 'Shut up, I am Judge Moffatt an dI want it quiet in here,' * *".

Another witness for plaintiff, Pearl Jacobsen, testified that there was "quite a lot of conversation going on"; that except for Judge Moffatt, all were laughing, that plaintiff "laughed, just a hearty laugh"; that when defendant was "pretty near through with his lunch and we were all sitting there talking and laughing, he got up and he said, 'Shut up, you are making a lot of noise,' he said to John" (plaintiff).

Charles Bell, a witness for plaintiff, testified that "Right after John (plaintiff) got down off his stool and walked over to Mrs. Burt and tickled her under the chin and laughed with her and everybody started laughing, I heard Judge Moffatt jump up and holler, 'Shut up, you disturb my lunch.'" That defendant Judge Moffatt said to plaintiff, "Well, you are disturbing my peace and I am going to have you arrested."

Hamilton E. Robinson, another witness for plaintiff, testified that he had formerly employed the latter who, on occasions, "was

given to making loud noises", that "He could laugh out loud you bet"; that plaintiff's laughter "is usually a loud laughter but not extreme."

Defendant Judge Moffatt testified that while eating his lunch his attention was attracted to plaintiff when the latter "let out a warwhoop or a yell like a coyote or jackass or something like that, that almost split my eardrums." That he (Judge Moffatt) did nothing at that time but, "looked at him (plaintiff) to see whether he was crazy or drunk or something of that kind, and then he began a lot of very loud guffaw laughter"; that "the next thing that I heard or the next thing that happened was, as far as I am conscious, I heard another one of these horrible war whoops or screams, I don't know what you would call it,—I never heard a noise like that in my life before, it was terribly loud, it was right at my left, about 12 feet away, and I involuntarily jumped out of the booth, just from the force of the impact of the scream * * * I jumped up and turned toward him in this aisle going down in the direction of F-2, as marked on this map, and when I got half way down there, within probably seven or eight feet of him, I said, 'My God, man, what are you trying to do here?' "

Defendant then went to the telephone, called the police and upon their arrival directed them to arrest plaintiff for a violation of section 415 of the Penal Code (disturbing the peace), saying to the officers, "I want him arrested and I will file a complaint in your court."

In obedience to the order of defendant Judge Moffatt, the officers took plaintiff into custody and transported him to the City Hall where he was imprisoned in jail for some two hours, when he was released on order of the chief of police of Huntington Park.

Following the filing of a complaint by defendant Judge Moffatt charging plaintiff as aforesaid, a trial was had resulting in the acquittal of plaintiff. Several business men and public officials, including the chief of police of Huntington Park and a deputy in the sheriff's department at said city, all testified they had known plaintiff for some considerable number of years and that his reputation in Huntington Park for "truth, honesty, integrity, and peacefulness was good".

With regard to damages, plaintiff testified he had never before been arrested, that his arrest was extensively publicized in newspapers. That the arrest and consequent publicity "affected me mentally and it affected me physically because I was not well at that time; I had just gotten over a heart attack and there were many times I had to go home and rest on account of things that would come up."

Plaintiff further testified that shortly after his arrest he suffered a recurrence of a heart condition and was compelled to consult a physician who ordered him to bed for more than a week.

It is first contended by appellant that the arrest and imprisonment of respondent were lawful and pursuant to statutory authority conferred upon a magistrate under section 838 of the Penal Code. That therefore, appellant magistrate was clothed with judicial immunity and cannot be held civilly responsible.

The section in question reads: "*Magistrates may order arrest* [for offense in presence]. A magistrate may orally order a peace-officer or private person to arrest anyone committing or attempting to commit a public offense in the presence of such magistrate."

[1] Section 807 of the Penal Code defines a magistrate as an officer empowered to issue a warrant for the arrest of a person charged with a public offense, while section 808 of the same code, in effect at the times here pertinent, expressly provides that all the judicial officers of the state, beginning with the Justices of the Supreme Court and on down to and including judges of city courts, are magistrates. Appellant, as a justice of the peace, was therefore a magistrate.

In their capacity as magistrates, the foregoing judicial officers are required under section 410 of the Penal Code to proceed to any place of unlawful or riotous assembly of which they have notice, and there ex-

ercise the authority with which they are invested for suppressing the same and arresting the offenders. For a failure so to do such magistrate is guilty of a misdemeanor.

The case now engaging our attention presents the question as to whether a magistrate is answerable civilly for damages allegedly resulting from an act done by him pursuant to the foregoing provisions of section 838 of the Penal Code, where, as claimed herein, such magistrate acts upon insufficient evidence and with a desire maliciously to injure the party whose arrest he orders an officer to make. The question is an interesting one, and so far as we are aware has not been decided—at least, not in any case cited to us or in any case we have unearthed in our own research.

A historical approach to the problem as one of the bases upon which to rest the decision, implemented by our own Constitution and the statutes dealing with the subject matter, reveals that in the early days of the common law the lord of the manor appointed in each county in England conservators of the peace who had the power and whose duty it was to personally arrest persons who were engaged in rioting or disturbing the peace. The jurisdiction of such conservators was confined to the county in which they lived. Not only did these conservators have the duty and power to arrest offenders engaged in rioting or disturbing the peace in their presence but they were vested with the additional power of deputizing bystanders to assist them. Section 838 of the Penal Code of this state is of like import. The conservators were in no sense judicial officers. In the reign of Edward I (1308), Parliament passed an act by which the duties and powers of the conservators were lodged in the hands of those who were designated as magistrates. The early magistrates in turn possessed no judicial functions. The office of magistrate, in turn, by act of Parliament became vested in a group known as justices of the peace. Initially the justices likewise possessed no judicial power. It was not until the reign of George III that Parliament enlarged their functions, so as to invest them not only with the power to arrest and cause bystanders to assist them, but to enable them to try and convict the offenders. Their judicial duties or powers went no further. The civil jurisdiction exercised by justices of the peace, as we know it today is, relatively speaking, of a much more recent era.

When Parliament enlarged the powers of justices of the peace so as to grant to them the power to hear and convict offenders which they had personally arrested or had caused bystanders to arrest upon their oral orders at the scene of the disturbances, the justices, nevertheless, were without judicial immunity for any of their acts as the courts of England had ruled that judicial immunity extended only to judges of courts of record. It was not until the decision of Chief Justice Tindal in the case of Baylis v. Strickland, 1840, 1 Man. & Gra. 591, 133 Eng.Rep. 469, that justices of the peace came under the cloak of judicial immunity for their judicial acts.

[2] An unbroken line of authorities including many English cases as well as authorities in our own country from the beginning of our judicial history sustains the principle that judicial officers are not liable for the erroneous exercise of *judicial* powers vested in them.

Equally unanimous is the reasoning contained in these cases that this immunity from liability is based upon considerations of public policy. That to hold judicial officers personally liable for errors of judgment concerning either questions of law or fact would be subversive of both independence and efficiency in the administration of justice.

The leading case in this country is Bradley v. Fisher, 13 Wall. 335, 80 U.S. 335, 20 L.Ed. 646. Practically all subsequent cases rely upon the opinion rendered in the case just cited when dealing with the immunity of judges from actions for damages growing out of their performance of their judicial duties. See Yaselli v. Goff, 2 Cir., 12 F.2d 396, 400, 56 A.L.R. 1239, 1245, affirmed by the Supreme Court of the U. S., 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395; Landseidel v. Culeman, 47 N.D. 275, 181 N.W. 593, 595, 13 A.L.R. 1339; U. S. v. Chaplin, D.C., 54 F.Supp. 926, 928 et seq.

In the case of Yaselli v. Goff, supra, 12 F.2d at page 401, the court said: " 'It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious of corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office, if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him?' "

The doctrine that an action will not lie against a judge for wrongful commitment, or for an erroneous judgment, or for any other act, made or done by him in his judicial capacity is upheld in Platz v. Marion, 35 Cal.App. 241, 248, 169 P. 697, 700, wherein the court said with regard to the principle of judicial immunity: "That it exists in this state in its fullest extent has been repeatedly declared by our own courts". See also Turpen v. Booth, 56 Cal. 65, 67, 68, 69.

[3] The cases clearly hold that where a judicial officer violates a criminal statute, he is held to the same responsibility as any citizen. Craig v. U. S., 9 Cir., 81 F.2d 816; U. S. v. Manton, 2 Cir., 107 F.2d 834.

[4, 5] Under our system of government judicial officers are responsible to the people, or the authorities constituted by the people, for the manner in which they discharge the great trust of their office. If, in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, corruptly, arbitrarily, or oppressively, they may be called to account and tried for misdemeanor in office or for wilful or corrupt conduct in office. Const. Calif. Art. IV, sec. 18; Gov.Code, secs. 3020, 3060; People v. Ward, 85 Cal. 585, 24 P. 785; Baird v. Justice's Court, 11 Cal.App. 439, 105 P. 259. Also, judicial officers are subject to recall and must submit their judicial records to the people at regular elections when they seek to continue in office.

The instant case itself presents an example of the efficacy of this principle, because it is conceded that at an election occurring subsequent to the occasion here in question appellant was defeated for reelection.

We come now to a consideration of whether on the occasion here in question, appellant magistrate, when proceeding under the provisions of section 838 of the Penal Code, was acting within his jurisdiction and performing a judicial act. From what we have hereinbefore said, it is manifest that if he was so acting he is not amenable to any civil action for damages.

[6, 7] It is said generally in the textbooks and decisions that the judicial officer, in order to entitle himself to claim the immunity that belongs to judicial conduct, must restrict his actions within the bounds of his jurisdiction. Jurisdiction has been defined to be "The authority of the law to act officially in the particular matter in hand." Cooley on Torts, 417.

[8] From a review of the cases we are persuaded that the test of immunity from a civil suit for damages on the part of a judicial officer is not whether he committed an error of judgment in acting as he did, but the question of judicial immunity must be determined on the basis of whether the act in question was within the general scope of the officer's judicial powers and whether he acted in an honest belief that he was legally warranted in doing it.

Since, as heretofore pointed out, it is elementary that judicial officers are not liable for the erroneous exercise of the *judicial* powers vested in them, we accordingly, now pass to a consideration of whether the act here involved was or was not a judicial act.

In the consideration of that question we are at once confronted with Article III of our state Constitution which reads: "The powers of the government of the State of

California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this Constitution expressly directed or permitted."

No provision is to be found in the Constitution expressly directing or permitting a magistrate to exercise any functions appertaining to the other departments of the government.

[9] In consonance with the spirit and intent of the foregoing constitutional provision, the courts of this state have uniformly held that the Legislature is without power to confer upon courts jurisdiction that is not given or authorized to be given them by the Constitution, and that the Legislature can impose no duties on the judiciary but such as are of a judicial character. People ex rel. Simmons v. Sanderson, 30 Cal. 160, 166; People v. McKamy, 168 Cal. 531, 532, 143 P. 752; Burgoyne v. Board of Supervisors of S. F. County, 5 Cal. 9; Wulzen v. Board of Supervisors of City and County of S. F., 101 Cal. 15, 35 P. 353; Phelan v. San Francisco, 20 Cal. 39; Epperson v. Jordan, 12 Cal.2d 61, 82 P. 2d 445.

[10–12] No claim is made in the instant case that the delegation of power by the Legislature to magistrates through the medium of section 838 of the Penal Code is unconstitutional as not being judicial in character. Not only for that reason, but because of our own research we are prompted to hold that the delegation of power imposed upon the judiciary by the Legislature as aforesaid is the imposition of a duty with a corresponding power that is to be classed as a judicial act. This we say because in the light of the historical concept of the powers and duties of a magistrate, the authority conferred by section 838 of the Penal Code is manifestly a power to exercise functions incidental to the judicial position of a magistrate. Such a power is no more objectionable than the power to appoint an arbitrator or referee. Tuolumne County v. Stanislaus County, 6 Cal. 440, 442. If a power or duty imposed by the Legislature upon the judiciary partakes of a judicial or *quasi* judicial character it is not subject to constitutional infirmity. For instance, it has been held that the power of appointment of probation officers vested in the superior court in the exercise of its jurisdiction as a juvenile court is not unconstitutional as vesting an executive function in judicial officers. Nicholl v. Koster, 157 Cal. 416, 423, 108 P. 302. That the power to make an arrest is not *per se,* abstractly speaking, an exclusive function of the executive department of the government is made manifest by the provisions of section 837 of the Penal Code which authorizes arrests by private persons.

[13] From the foregoing it follows that when a magistrate acts pursuant to the provisions of section 838 of the Penal Code he is acting within his jurisdiction and in the performance of a judicial act, done in the execution of his office and within the purview of his general authority. When so acting a magistrate is therefore, not amenable to any civil action for damages.

[14] If immunity from civil actions for damages for judicial conduct under the provisions of section 838 of the Penal Code is to be abolished, such abolition must come from the Legislature through amendment or repeal of the applicable Penal Code sections under which it exists.

The foregoing conclusion at which we have arrived renders it unnecessary to consider or decide other issues presented on this appeal.

The judgment is reversed and the cause remanded, with directions to the court below to enter judgment for the defendant.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; CARTER, J., dissenting.

HEFFERNAN v. BENNETT & ARMOUR et al. *

No. 14489.

District Court of Appeal, First District, Division 1, California.

Dec. 28, 1951.

Rehearing Granted Jan. 26, 1952.

Action by F. M. Heffernan against Bennett & Armour, a corporation, and John Lawler, as trustee for benefit of creditors of Bennett & Layton, Inc., to set aside transfer of certain real estate and payment of certain money to defendant Bennett & Armour on ground that same was in fraud of creditors. The Superior Court, City & County of San Francisco, Herbert C. Kaufman, J., entered judgment for plaintiff and defendant Bennett & Armour appealed. The District Court of Appeal, Wood, J., held that evidence sustained findings that transfer had been made and money paid with actual intent to defraud existing and future creditors, but that judgment requiring property fraudulently conveyed to be transferred to debtor's assignee for benefit of creditors was improper in that transfer in fraud of creditors is valid as to grantor and all persons claiming under him, and as to all persons, except creditors of grantor, who may question it in proper proceeding.

Judgment reversed with directions.

Prior opinion 230 P.2d 658.

1. Time ⇐10(2)

Under statute requiring any action to be brought to trial within five years from date of filing of action, when period from filing of action until bringing same to trial included holidays appointed by President or Governor, sufficient in number when included in computation of five-year period to extend period beyond time of bringing action to trial, action was not barred by five-year period. Code Civ.Proc. §§ 12a, 583, St.1933, p. 306, § 7.

2. Appeal and Error ⇐931(1)

On determination by appellate court on question whether findings of fact are sustained by evidence, all substantial conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences indulged in to uphold findings if possible.

3. Corporations ⇐547(4)

In action by creditor of dairy corporation to set aside conveyance and payment by dairy corporation to defendant corporation on ground that same were in fraud of creditors, wherein it appeared that dairy corporation had subsequently acquired additional capital by acquisition of poultry company, evidence sustained finding that conveyance by dairy corporation and subsequent acquisition of capital were separate and independent transactions and not exchange of capital.

4. Corporations ⇐547(4)

In action by creditor of dairy corporation to set aside conveyance and payment by dairy corporation to defendant corporation on ground that same were in fraud of creditors, wherein it appeared that payment to defendant corporation had been effectuated by payment of excessive salaries to officers of dairy corporation, and payment by them of portion of such salaries to defendant corporation, evidence sustained finding that conveyance and payment to defendant corporation were without fair, valuable, or any consideration. Civ.Code, § 342.

5. Corporations ⇐547(4)

In action by creditor of dairy corporation to set aside conveyance and payment by such corporation to defendant corporation on ground that same were in fraud of creditors evidence sustained finding that transfer and money payment were made in contemplation of insolvency of dairy corporation at a time when it was engaged in or about to engage in business for which its remaining property was unreasonably small capital, and with intent and belief to incur debts beyond ability to pay as they matured, and with actual intent to hinder, delay, defeat, deceive and defraud its existing and future creditors.

6. Fraudulent Conveyances ⇐271(2)

Actual intent to defraud creditors never arises as matter of law from existence of any given set of facts, but must be proved as any other material fact in issue.

7. Corporations ⇐547(4)

In action by creditor of dairy corporation to set aside conveyance and payment

* Subsequent opinion 243 P.2d 846.

by corporation to defendant corporation on ground that same were in fraud of creditors, evidence sustained finding that incorporator of defendant corporation was in control of dairy corporation at time of conveyance.

8. Corporations ⇐543

Where incorporator of defendant corporation had knowledge of and was in control of dairy corporation at time of conveyance and payment by dairy corporation to defendant in alleged fraud of creditors, defendant corporation was charged with its incorporator's knowledge and intent and was not bona fide purchaser for value.

9. Fraudulent Conveyances ⇐6

Repeal of statute requiring that creditor might avoid act of his debtor for fraud only when fraud obstructed enforcement, by legal process, of his right to take property affected by transfer, was procedural change, and applied retroactively to transfer which occurred prior to repeal. Civ. Code, § 3441; Code Civ.Proc. §§ 338, 343.

10. Corporations ⇐547(4)

In action by assignee of creditor of dairy corporation to set aside conveyance and payment by such corporation to defendant corporation on ground that same were in fraud of creditors, evidence sustained findings that creditor was not put upon inquiry as to circumstances surrounding transfer until approximately two years thereafter, and that action was not barred by laches. Civ.Code, § 3441; Code Civ. Proc. §§ 338, 343.

11. Corporations ⇐547(4)

Where transfer and payment by dairy corporation to defendant corporation were made with actual intent to defraud existing and future creditors, transfer and payment were void as against assignee of creditor of transferor and would be set aside. Civ. Code, § 3439; Pen.Code, §§ 154, 531.

12. Fraudulent Conveyances ⇐58, 74(1), 206(1), 208

A transfer made with actual intent to defraud creditors is void for illegality as to any creditor, and may be attacked by either existing or future creditor regardless of whether transferor retains property ample to pay his creditors or whether transferee gave consideration.

13. Fraudulent Conveyances ⇐237(1), 249

Where property has been transferred with actual intent to defraud existing and future creditors, title to property passes to transferee subject to attack by members of protected class of creditors, each of whom must pursue property in timely and appropriate manner, in order to successfully subject property to his claim.

14. Fraudulent Conveyances ⇐172(1)

A transfer in fraud of creditors is valid as to grantor and all persons claiming under him, and as to all persons, except creditors of grantor, who may question transfer in proper proceeding.

15. Assignments for Benefit of Creditors ⇐179

Assignment for benefit of creditors did not confer upon trustee the title to property which assignor had previously transferred in fraud of creditors, but assignee had only such rights in respect to things in action transferred by assignment, as his assignor had. Civ.Code, § 3460.

16. Assignments for Benefit of Creditors ⇐179

Where a court determined that transfer by debtor was in fraud of creditors, order directing that transferee convey property to debtor's assignee for benefit of creditors was improper, since title to property fraudulently conveyed had passed, valid as to grantor and all persons claiming under him, and subject only to claims of creditors in proper proceeding. Civ.Code, § 3439.09.

17. Fraudulent Conveyances ⇐255(4)

One to whom property has been transferred in alleged fraud of creditors is necessary party in action by creditor to declare transfer void as fraudulent.

18. Constitutional Law ⇐305

Where debtor has allegedly made transfer in fraud of creditors, rights of each creditor are separate and independent from those of other creditors, and due process requires that transferee be given his day in court as to claim of each credi-

tor, with opportunity to require each creditor's claim to be proved over any defense which transferee might have.

19. Costs ⇐172

Award of attorney's fees was unauthorized in action by creditor to set aside conveyance by debtor on ground that same was fraudulent. Code Civ.Proc. § 1021.

20. Corporations ⇐557(4)

Where court determined that transfer by debtor was in fraud of creditors, judgment confirming and continuing order which appointed receiver to take possession of business and assets of debtor and to continue and manage such business as going concern, in absence of facts showing lack of necessity and desirability for appointment of receiver, was proper and not abuse of discretion by court. Code Civ.Proc. §§ 286, 564, subds. 1, 7; Civ.Code, § 3439.11.

21. Trial ⇐21

In action by creditor of dairy corporation to set aside conveyance and cash payment by corporation to defendant corporation on ground that same were in fraud of creditors, wherein defendant contended that certain orders and findings of fact, conclusions of law, and judgment were void because made during period of suspension from practice of its sole attorney in action, and because no notice was given or demand made upon defendant to appoint another attorney, evidence supported implied finding that during period of suspension defendant had and was represented by other attorneys who were not under suspension. Code Civ.Proc. §§ 286, 564, subds. 1, 7; Civ.Code, § 3439.11.

22. Appeal and Error ⇐103

Order permitting amendment to complaint is not appealable.

23. Appeal and Error ⇐113(1)

Order denying motion to vacate order was nonappealable.

Vincent Hallinan, San Francisco, for appellant.

G. D. Schilling, Erskine, Pillsbury & Tulley, San Francisco, for respondent F. M. Heffernan.

Appel, Liebermann & Leonard, San Francisco, for respondent John Lawlor, as trustee for benefit of Creditors.

FRED B. WOOD, Justice.

Defendant, Bennett & Armour, a corporation, appeals from a judgment rendered against it in an action brought by plaintiff F. M. Heffernan (hereinafter called respondent), assignee of Challenge Cream & Butter Association, a corporation, a creditor of Bennett & Layton, Inc., a corporation, to set aside as fraudulent the transfer of certain assets and the payment of $16,000 by Bennett & Layton, Inc., to Bennett & Armour in 1938 and 1939. Defendant also appeals from orders appointing a receiver, permitting amendment of the complaint to conform to the proof and to add a party defendant, and denying a motion to set aside those orders and the judgment, findings of fact and conclusions of law.

[1] Upon the first hearing of this appeal, we concluded that the trial court had lost jurisdiction of the action because not brought to trial within the five-year period required by section 583 of the Code of Civil Procedure, as extended by the period of the pendency of an appeal from an order denying a motion for change of venue. 230 P.2d 658. Respondent petitioned for a rehearing and brought to attention the fact that the period in question included "holidays (other than special holidays) appointed by the President or by the Governor," Code Civ.Proc. § 12a, sufficient in number to extend that period, under section 12a as interpreted and applied by section 7 of chapter 29 of the Statutes of 1933, page 304, at page 306, beyond the day when this action was brought to trial. Accordingly, we granted a rehearing.

Upon this hearing, the principal issues are: The sufficiency of the evidence to support certain of the findings of fact; the correctness of conclusions of law drawn from certain of the facts found; and asserted errors of law committed during the trial.

We will consider, first, the sufficiency of the evidence to support the findings of fact. A summary of certain facts concerning

which there is no conflict in the evidence, will aid the discussion.

In 1923 or 1924, A. N. Bennett purchased a creamery plant in Susanville, California, and engaged in business as a dealer in poultry and dairy products. He incorporated the business under the name of Bennett & Cardinal and, in 1933, then owner of all issued stock of the corporation, sold half of the stock to Walter B. Layton for $50,000, Layton paying $5,000 in cash and giving his note to Bennett for $45,000, secured by a pledge of Layton's stock to Bennett. They changed the name of the corporation to Bennett & Layton, Inc., hereinafter called Bennett & Layton.

Soon thereafter, at the instance of Layton, they enlarged the scope of the business, opening an office in San Francisco. They continued to operate the Susanville plant, through a branch manager. By 1937 differences had arisen between Layton and Bennett, leading to conversations between them concerning a separation of their interests and a parting of the ways, Bennett to take the Susanville properties and Layton to continue on with the remainder of the business. February 24, 1938, Bennett made a written offer to the corporation to exchange his 735 shares of its stock for the real estate, business equipment and current accounts receivable belonging to the corporation in Lassen County, which offer was accepted by the board of directors and the stockholders of the corporation.

Bennett planned to incorporate the Susanville business and for that purpose organized the appellant corporation March 21, 1938, which occurred, as it happened, after some of the instruments of conveyance had been executed. After the incorporation, Bennett transferred to appellant those of the Susanville properties and rights which had been conveyed to him prior to appellant's incorporation.

In effecting this transfer, Bennett & Layton executed and delivered (1) to A. N. Bennett, its bill of sale dated March 1, 1938, conveying all of its Susanville personal property and bills receivable, he to assume all bills payable thereat; (2) to appellant, a deed dated March 15, 1938, conveying the Susanville real estate and improvements; (3) to appellant, an assignment, dated March 23, 1938, of the items listed in its Susanville supply inventory of December 31, 1937, and in its list of accounts receivable of March 2, 1938; and (4) to appellant, its bill of sale dated July 15, 1938, conveying certain automotive equipment, reciting that the transfer thereof had been effected by endorsing the registration cards.

For these properties and rights, appellant issued 1,000 shares of its capital stock, of the par value of $100 each. Of those shares, E. L. Armour purchased half for $50,000, paying Bennett $5,000 and giving Bennett his note for the balance, secured by a pledge of Armour's stock.

In March of 1938, Bennett & Layton acquired the business and assets of General Poultry Company, composed of or owned by Emanuel Compagno and his sons, Louis and Lawrence, engaged in the produce business as wholesalers. The Compagnos received therefor 567.75 shares of the capital stock of Bennett & Layton. Of these, 167.75 shares came from Layton's stock, 400 from the stock which Bennett had turned in for the Susanville properties. As a result, Bennett & Layton then had 1,135.5 shares issued and outstanding, owned in equal amounts by Layton and by the Compagnos.

By March of 1938, Layton's indebtedness to Bennett had increased. He gave Bennett two notes therefor, one for $8,000 the other for $54,148.59, dated March 1, 1938. The larger note was payable at the rate of $500 per month and was secured by a pledge to Bennett (dated March 23, 1938) of Layton's 567.75 shares, a $17,000 note of Emanuel Compagno, and (to the extent of the amount of the latter note) of Compagno's 133.75 shares of Bennett & Layton stock. Layton also gave Bennett a proxy to vote Layton's stock in certain contingencies, until payment of the $54,000 note. As added security, Layton agreed to pay Bennett 90 per cent of all dividends thereafter accruing to him; that he would secure from Compagno an assignment of his dividends; would cause dividends of not less than 50 per cent of net earnings to

be declared whenever such earnings exceeded $5,000 annually; that the number of directors of Bennett & Layton would not exceed three; that W. B. Finnell would be a director and officer of and Bennett's representative in the corporation; that the books would be open to the inspection of, and could be audited by, Bennett at any time; that Layton would not draw a salary exceeding $750 per month, nor permit Compagno to do so, nor permit the payment of salaries of personnel which would impair the capital assets; that, without the approval of Bennett, no increase in the salaries of officers or executives, and no investment in real estate or equipment exceeding $5,000, would be made; and if any payment on the note should be in default for 20 days, Bennett could terminate the agreement, sell the collateral at public or private sale, and be a purchaser at the sale. Finnell had been secretary and treasurer of the corporation since 1933. March 23, 1938, he was confirmed in those offices and elected a director. He continued to serve in each of the three offices until June 1940.

During the period March to July 1939, Bennett & Layton paid appellant various sums of money, a total of $16,000.

In June 1940, Bennett & Layton ceased to do business as a going concern and, on July 16, 1940, executed to one John Lawler, as trustee for the benefit of its creditors, an assignment of its assets for the benefit of creditors. He liquidated those assets, realizing thereon and paying to the creditors 14 cents on the dollar.

[2] We will now consider the findings of fact and the asserted insufficiency of the evidence to support them, guided by "the time honored rule that all substantial conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the findings if possible." Richter v. Walker, 36 Cal.2d 634, 640, 226 P.2d 593, 596.

[3] (1) *Concerning the transfer of the Susanville business and property,* the trial court found:

March 1, 1938, Bennett & Layton transferred to A. N. Bennett, for transfer by him to appellant, a corporation he was about to form, all of the Susanville business and property except the real property and equipment, which latter it conveyed to appellant on or about March 15, 1938; appellant was incorporated March 21, 1938, whereupon Bennett conveyed to it that portion of the business and property theretofore conveyed to him, and appellant issued to Bennett 499 of its shares of stock, par value $100 each, to E. L. Armour 499 shares, and to Kenneth Cain 2 shares, which Cain held, one for Bennett and one for Armour.

At the time of the transfer, the Susanville assets were unencumbered and worth $100,000, subject to current bills and accounts payable in the sum of $11,000, and constituted the principal unencumbered assets of Bennett & Layton.

After the transfer, Bennett & Layton had net current assets of $12,554.96, unsecured liabilities of $79,814.58, and liabilities of $393,519.16, secured mainly by turkeys in storage in San Francisco and eastern cities subject to great and unpredictable changes in price.

Three or four weeks after said transfer, Bennett & Layton secured additional capital in the form of net assets of General Poultry Company, approximately $57,000, but as a distinct and separate transaction.

In respect to these findings, the principal issues are whether or not the withdrawal of Bennett and the coming in of General Poultry Company constituted a single transaction or separate and independent transactions, and, in either case, the resultant financial condition of Bennett & Layton.

That they were separate and independent finds support in the facts, among others, that Bennett's offer of February 24, 1938, was simply to exchange his stock for the Susanville business and properties (not dependent upon any other factor), which offer the directors and stockholders accepted. The motion of the directors to acquire the assets of General Poultry Company recited that it was agreed to offer therefor "400 shares of treasury stock *heretofore* acquired from A. N. Bennett." (Emphasis added.) Bennett testified he

did not like General Poultry Company's way of doing business; thought them unsatisfactory; believed it an unwise move to take them in, and told Layton so; that Layton finally decided to do so but did not tell Bennett that he intended to do so; and that Bennett had nothing to do with the negotiations between Layton and General Poultry. Asked if the Bank of America was a creditor of Compagno Brothers (General Poultry Company), Bennett said he did not know, that he "had nothing to do with Compagno Brothers." Asked if Bennett & Layton assumed the liabilities of Compagno Brothers when they went in, he said, "That was after I stepped out," and that he did not know the condition, that he "had nothing to do with Compagno Brothers." Although there is evidence which would support a contrary finding, it but produces a conflict which it was the function of the trial court to resolve. Whether the court really did resolve it, is cast in doubt by a finding, later discussed herein, that Bennett used the control over Bennett & Layton which his agreement of March 21, 1938, with Layton, and the pledge of the Layton and Compagno stock, gave him, to effect the transfer and to require the payment of the $16,000. Whether the transfer was a complete transaction with or without the acquisition of the General Poultry assets, is not a determinative factor, as will develop.

The finding as to the value of the Susanville assets is supported by the book value thereof on February 28, 1938 (real estate, buildings and equipment, $65,094; cash, accounts receivable, and merchandise, $33,355.51; current liabilities $11,079.22); the fact that appellant acquired these assets and assumed the liabilities in exchange for 1,000 shares of its stock, of the par value $100 each, and, when entering the assets upon its books, included $11,477.35 for the good will of the business; the fact that Armour purchased his half interest in appellant for $50,000; and the fact that Bennett, in a statement which he made to a bank, April 18, 1938, valued the real estate and building at $50,000 and the machinery and equipment at $45,000. Appellant would minimize those values by the fact that the Susanville plant had sustained certain losses during recent years. But those losses had already been written off, reducing the book value of the investment by the amount of those losses, and Bennett, before he withdrew, expressed the belief that if the Susanville plant were properly managed (it had been conducted in recent years by a branch manager) it would be a paying investment.

The findings as to the financial condition of Bennett & Layton after the transfer of the Susanville property and before the acquisition of the assets of General Poultry Company are supported by the books of Bennett & Layton, with some modifying adjustments, according to the testimony of A. G. Strong, certified public accountant, and Fred Watwood, licensed public accountant. The principal adjustment related to a book entry showing a liability of $39,902.93 for accrued salaries of Bennett, Finnell, and Layton, which was written off, as it happened, at the time of the transfer to Bennett & Armour. It never was a real obligation of Bennett & Layton, having been entered for income tax purposes only. Its cancellation had nothing to do with the transfer. Canceling it at the time of the transfer, instead of prior thereto, gave the appearance of an excess of current liabilities over current assets, instead of the opposite, and of a markedly depressed net worth, prior to the transfer.

Appellant claims that the book value of the turkeys in stock on February 28, 1938, was below the then market price and should be adjusted upward, to show the true financial condition of the corporation at and after the transfer. But there was substantial evidence to support the book values. George Makins, engaged in the poultry business for many years, considered the inventory value of the turkeys very fair, said it represented a fair market value in the eastern and domestic markets at the time. Watwood computed the gross market value over book at $34,000, from which he deducted estimated carrying charges of $22,000, making a net increase of $14,000 Strong computed the excess of market price over book value at $22,121.31, from

which he deducted carrying charges of $8,792.39, leaving a net of $13,328.92. Strong further testified that it is not good accounting practice to take into account an increase in price, that it is an axiom of accounting and business practice to value inventories at cost or market, whichever is lower. The book values were based upon cost of the turkeys and other products.

The withdrawal of the Susanville business left unchanged the amount of the corporation's current assets (cash, accounts receivable, and merchandise, principally turkeys), $485,888.70, and current liabilities (loans secured by pledge of merchandise, unsecured loans, and accounts payable), $473,333.74. The transfer reduced other assets from $172,164.17 to $79,529.34. The latter included store and office equipment, $2,906.47, and investment in two buying stations at Corning and Willows, $70,282.65, of which about $40,000 represented advances to turkey growers and the remainder investment in buildings and equipment. Finnell testified that the Corning and Willows assets were more or less frozen. Strong, in 1940, appraised the net worth of these two branches at $12,283.86. Upon liquidation, they brought $11,396. J. B. Grassens, who assisted the trustee in liquidating the assets, testified that the Corning and Willows accounts proved practically uncollectible. Bennett wrote the trustee in July 1940 that among the Corning old accounts there were a lot of "stingers," that some of the old accounts were valueless, others could be collected in part. He did not think any of them could be collected in full. This $70,000 item of overvalued assets, not usable for raising money in case of need, is of special significance when considered in the light of the net worth of the corporation: $184,000 before, $92,000 after, the transfer. The evidence would support a finding that the net worth, after, was $34,000. It was susceptible to a further reduction in the amount of a $3,346.41 charge against Bennett, which Bennett never recognized or paid and which was later written off. There is evidence indicating it was entered upon the books to give the appearance of equal net worth to the business and property withdrawn and that which remained. Without such an offset, the withdrawal of the Susanville plant ($95,981.24) would reduce the net worth to $88,737.89. The principal remaining asset was merchandise, mainly turkeys, valued at $402,000, approximately, pledge for loans amounting to $393,000, with unsecured liabilities of $79,000, accounts receivable of $71,000 and $12,000 in cash, or, net current assets of $12,554.96.

General Poultry Company brought to Bennett & Layton current assets, approximately, of $65,100 (cash, $2,700; accounts receivable $26,900; merchandise, $35,500); current liabilities of $18,700, unsecured. This increased Bennett & Layton's net current assets by $46,400, bringing that item to about $58,954. The only other assets which General Poultry brought to the corporation consisted of equipment, $10,200 and prepaid expenses, $350. The resulting net worth of Bennett & Layton was $149,000. This evidence supports the finding that General Poultry Company brought in assets of $57,000.

[4] (2) *The court found that the transfer was made and the $16,000 was paid without a fair, valuable, or any consideration.* The only consideration for the transfer of the Susanville business and property was the acquisition by the transferor of 735½ shares of its capital stock theretofore owned by Bennett, which the court found was in violation of section 342 of the Civil Code. Although the legality of such acquisition by the corporation may not be subject to direct attack in this action, the corporation by this device stripped itself of a substantial portion of its assets without a tangible return and thereby materially changed its financial position.

The $16,000 was paid by Bennett & Layton directly to appellant, in part by checks payable to appellant, in part by checks to banks in payment of drafts which appellant drew upon Bennett & Layton. The payments were made at the urgent insistence of Bennett, evidenced by a series of letters from him to Layton and to Finnell. There is evidence that during the period of these payments, Bennett & Lay-

ton was losing money. In addition, the corporation paid directly to Bennett $12,000 over a period of about two years, as a credit upon the Layton note. Bennett testified that these payments and the $16,000 payment to appellant were made pursuant to the contract between him and Layton whereby Compagno and Layton were to draw $750 a month each, of which they were to receive $500 in cash, each, and of the remainder, Compagno was to pay $250 to Layton and Layton to pay $500 to Bennett, to apply on the note; and that he received credit for the $16,000 on appellant's books. It was stipulated that Bennett & Layton charged the $16,000, one-half to Layton and one-half to Compagno. It is clear that Bennett & Layton paid and appellant received the $16,000. That this payment was without consideration, is supported by the inference the trial court drew that the excess salary arrangement was but a device to siphon off to Bennett moneys which the corporation did not owe, a reasonable inference under all of the surrounding circumstances.

[5] (3) *Concerning intent and purpose,* the court found that the transfer was made and the $16,000 was paid (a) in contemplation of the insolvency of Bennett & Layton, (b) at a time when Bennett & Layton was engaged in or about to engage in a business for which the remaining property was an unreasonably small capital (after as well as before the acquisition of the assets of General Poultry Company), and intended and believed it would incur debts beyond its ability to pay as they matured, and (c) with actual intent to hinder, delay, defeat, deceive and defraud its existing and future creditors; facts known to the transferee at the time of the transfer and of the payment of the $16,000.

The evidence supports these findings.

The differences concerning business policies developed in 1937 and culminated in the withdrawal of Bennett. Finnell testified that Layton was expanding the business more rapidly than Bennett desired, and made contracts and deals without consulting Bennett; that Bennett did not consider Layton should make deals without consulting him, because his money was in there and it might be lost. Bennett testified that Layton wanted to carry a big volume of goods for a long profit, a speculative profit, whereas Bennett wanted a rapid turnover at a small profit. When Layton persisted in buying large quantities of turkeys, Bennett objected and threatened to cause the business to be liquidated. Bennett then suggested that Layton buy him out, Bennett to take the Susanville business in part payment. Layton, according to Bennett, did not reply but immediately began to try to get someone interested so they could separate, so that Layton could go on with the business and Bennett could resign and get his money, because Layton did not have any credit and did not have the money to carry it on himself; Layton had to acquire added money in order to operate Bennett & Layton, with or without the Susanville business, if Bennett withdrew his support; Bennett was the financial support of Bennett & Layton, with his securities and personal guaranty to the bank for the firm's indebtedness, without which Layton did not have the money to go ahead unless he could acquire outside moneys. The witness Grassens testified that Bennett told him the reason he "pulled out" of Bennett & Layton was that Layton was a gambler, wanted to speculate heavily in long pull deals, to make a "killing," and that Bennett was somewhat concerned in view of the inclination of Layton to gambling,—something might happen to the affairs of the corporation, thereby putting it in a rather precarious financial condition. Finnell said that upon Bennett's leaving it was necessary for Layton to bring new capital into the business if he were to continue the business on the same scale; what was left was not sufficient to carry on the business as they had previously carried it on; his credit was what hurt him more than anything else. Bennett said that after his withdrawal it would be perfectly natural that Layton would get some credits or moneys or guaranties before he could continue.

The evidence showed that the market price of turkeys is subject to rapid fluctuations, relatively large rises and falls.

Strong testified that in view of these fluctuations, such a business was speculative, that net current assets of $12,500 with current liabilities of $473,000, would not be sufficient to properly take care of Bennett & Layton should an adverse situation arise, that a drop of one cent in the market price would have completely offset the working assets. Makins testified that the turkey business is very much a speculative business; that with current assets exceeding current liabilities of $473,000 by $12,500, he would not think the company was in a safe condition, he would think it was "practically broke." He also said that if current assets exceeded current liabilities of $492,000 by $58,000, he would say they were skating on pretty thin ice with that amount of capital. Strong said that with net current assets of $58,000 the corporation would be on the border line of being extended, but its operating position was sounder than before. Its net worth was $184,000 before and $92,000 after Bennett's withdrawal, increasing to $149,000 after acquiring General Poultry. If the Corning and Willows stations were depreciated $58,000, as the evidence would justify, those figures would be $126,000, $34,000, and $91,000, respectively. In contrast, appellant acquired a business that had a net worth of $95,000, which included real estate, building and equipment valued at $65,000, and current assets of $33,000, with total liabilities of but $11,000, —net current assets of $22,000.

These facts support the findings expressed in clauses (a) and (b) of paragraph 3, above, and are corroborated by the fact that Layton continued on the course which had made Bennett apprehensive, inducing him to withdraw. Upon the cessation of business in June 1940, Bennett & Layton had nearly 4,000,000 pounds of turkey on hand, heavily encumbered, with market prices falling. We do not hold that the facts thus found necessarily establish constructive fraud under sections 3439.05 and 3439.06 of the Civil Code, as they were enacted subsequent to the questioned transaction. Such facts are of significance for the bearing they may have upon proof of actual intent to defraud.

These facts, with other facts, and the inferences which reasonably may be drawn therefrom, support the finding of actual intent to defraud creditors.

[6] Such an intent, except as otherwise provided by statute, never arises as a matter of law from the existence of any given set of facts. It must be proved just as any other material fact in issue. Its proof is peculiarly dependent upon the circumstances which surround the questioned transaction, and the inferences which the trier of the facts may reasonably draw therefrom. "From the very nature of the action [to set aside conveyances as having been made in fraud of creditors], direct proof of the fraudulent intent of the parties is an impossibility. For this reason and because the real intent of the parties and the facts of the transactions are peculiarly within the knowledge of those sought to be charged with the fraud, proof indicative of fraud must come by inference from the circumstances surrounding the transaction, the relationship and interests of the parties." Fross v. Wotton, 3 Cal.2d 384, 393, 44 P.2d 350, 354; see, also, Moore v. McDonald, 122 Cal.App. 61, and authorities reviewed at pages 69–70, 9 P.2d 556.

Bennett's own statements concerning the reasons for his withdrawal furnish some support for an inference that he desired to salvage the Susanville business (which he had developed and thought well of) and keep it out of the reach of creditors, should Layton's speculative operations result in financial difficulties.

The heavy indebtedness of Bennett & Layton and the depletion of its working assets to a narrow margin, in view of the speculative character of its business and the need for ready assets, coupled with inadequate consideration for the transfer of the Susanville property and lack of consideration for the payment of the $16,000, furnish some basis for the inference of an intent to delay and defraud creditors.

Departures from the usual business routine or practice in consummating the transfer, also tend to show fraudulent intent. These departures include: unauthorized

acquisition of its own stock as payment for the property conveyed; failure to publish and record the notice called for by section 3440 of the Civil Code; and neglect for more than a year to record the deed to the Susanville real property. It also appears that on April 12, 1938, Bennett took appellant's application for a permit (to issue 1,000 shares of its capital stock at par for cash) to the Sacramento office of the corporation commissioner and told the deputy there that he had surrendered his stock in Bennett & Layton in exchange for certain of its property in Susanville and proposed to transfer that property to a new corporation, and would have to take the application back and revamp it. The deputy raised a question concerning the acquisition of this property in exchange for the stock and informed Bennett if the new corporation should apply to issue stock in exchange for this property it would be necessary to establish that the method of its acquisition was legal, and suggested that Bennett have his attorney prepare a statement to be filed with the application, covering the legality of the transaction, which Bennett said he would do. Bennett did not file the application at Sacramento, nor was any such statement filed. Instead, Bennett filed the application, unchanged, at the San Francisco office of the corporation commissioner, who on April 16, 1938, issued appellant a permit to sell 1,000 shares of its capital stock, for cash, to Bennett, Armour, and Cain. It appears that appellant actually received the Susanville properties, not cash, for its shares. Its books recited the issuing of 1,000 shares to Bennett for cash, but Bennett was debited with $100,000 for the stock and credited with $100,000 as vendor of the properties.

Certain recitals and entries were made in the books of Bennett & Layton that tend to indicate an effort was made to disguise the transaction and give it the appearance of fairness. The minutes of the meetings of the stockholders and of the directors at which Bennett's offer was accepted, contain recitals that the corporation would thereby be released from debts and liabilities of "nearly $80,000.00" and condition the acceptance upon the release by him of all liabilities of the corporation to him. There was no such indebtedness. The corporation did owe him $12,850 for moneys advanced. That debt was not released. It was subsequently paid to Bennett by the corporation.

These same minutes recite it was certified by stockholder Layton that "all current creditors of said corporation had been protected in said transaction and that no loss had, would, or could occur to any creditor of Bennett & Layton, Inc. by virtue of the disposal of said assets in Lassen County." The evidence is conflicting whether the unsecured creditors were paid, and we observe no finding in respect thereto. Bennett said he insisted that all unsecured debts be paid because his then attorney told him that would prevent the transaction from being attacked by any creditors. He said it was not discussed that the deal was of doubtful legality but that if there were no existing creditors it was legal and they could go through with it as they pleased.

The $3,346.41 adjusting entry made on the corporation's books as a charge against Bennett (a charge that was never recognized or paid by him, and was later written off) gave the appearance of an equal division of assets upon the transfer of the Susanville properties.

The writing off, at the time of the transfer, of the $39,900 of salaries which had been entered for tax purposes and were never intended to be paid, gave the appearance of a transaction less disadvantageous to the transferor than it really was.

[7] The facts which we have narrated support also the specific finding of the trial court that the transferor and transferee corporations were under Bennett's control by reason of his agreement with Layton which gave Bennett a representative upon the board of directors of Bennett & Layton, the pledge of the Layton and Compagno stock, the proxy to vote Layton's stock, and the power to approve or disapprove certain types of corporate transactions, coupled with Bennett's ownership of one-half of appellant's stock and pledge of the other half; that he exercised this

control to effect the transfer of the Susanville property for the purpose of getting it back free of the claims of creditors, and to require Bennett & Layton to pay Layton's indebtedness to him through the device of paying excess salaries to Layton and to Compagno, all with intent to defraud existing and future creditors of Bennett & Layton. Bennett claimed he had no knowledge of Bennett & Layton's business activities or of its financial condition after the transfer, until its cessation of business in June 1940. But his representative, Finnell, had full knowledge, and reported to Bennett about once a month and Bennett conferred with Finnell whenever he came to San Francisco, which occurred about once a month. In July 1939, Layton wrote Bennett that the corporation operated at a loss in March, April and May of that year and would be called upon to take a loss on frozen turkeys, and concurrently Finnell wrote Bennett a letter confirming Layton's statement, adding, "I have been watching out for your interests here and want you to get your money in full as soon as you can, and think you have done pretty well so far." Yet, Bennett continued to demand payment. Bennett admitted that in May or April of 1940 Finnell told him "If the turkey market don't go up we are broke," and that in March or April 1940, he asked Finnell regarding moneys due him, and Finnell said he did not see how Layton or Bennett & Layton could pay, that "Bennett & Layton are broke, but the bank don't know it." Although Bennett & Layton made no payments to Bennett & Armour after July 1939, it continued to make payments directly to Bennett through the bank with whom he had lodged the Layton note for collection. These payments averaged about $500 a month. The first was made April 4, 1938, and the last on May 2, 1940, showing a payment of accrued interest and reduction of the principal to $45,686.92. We cannot say as a matter of law that the court was not justified in inferring that Bennett had and exercised control over both corporations as found, and to the end and with the intent found. As a question of fact, this was peculiarly within the province of the trier of the facts. He had an opportunity to observe the witnesses, including Bennett, who, the record indicates, was quite evasive, by his frequent inability to remember an event or a conversation until confronted with his earlier testimony on the subject, given at the trial or upon deposition or in another action.

[8] Appellant is not a bona fide purchaser for value. Whatever might be said of it as an active participant in the questioned transactions, it is sufficient to observe that appellant is charged with knowledge of Bennett's knowledge and intent. He formed the appellant corporation for the purpose of receiving the Susanville property. He received 1,000 shares of its capital stock for that property and was its president and a director. He acted for and on its behalf.

Armour, who purchased half of appellant's shares from Bennett, disclaimed having had any such knowledge. That claim is not especially significant because his lack of knowledge as a stockholder would have no real bearing upon appellant's knowledge or lack of knowledge as transferee. However, the court did find upon sufficient evidence that Armour knew, at the time, that the transfer was made and the money was paid with actual intent to defraud existing and future creditors. He was in the employ of Bennett & Layton prior to March 1, 1938. Layton sought to interest him in remaining in a proprietary capacity and Bennett invited him to invest in the Susanville project. He investigated and decided in favor of Susanville, buying a half interest in the new corporation. He participated in securing appellant's permit to issue stock. He supervised the keeping of appellant's books. He testified that Bennett talked to him about all the details of the transaction whereby Bennett took over the Susanville plant and Layton took over the San Francisco plant.

(4) The evidence supports the finding that the trustee liquidated the assets of Bennett & Layton in an orderly and businesslike manner, but that finding and the finding that Bennett & Layton failed as a proximate result of the questioned trans-

fer because of the unreasonably small capital remaining in its hands after the transfer, do not appear material.

(5) The evidence supports the finding that respondent's assignor was not a creditor at the time of the questioned transactions, but that subsequently Bennett & Layton became indebted to it in the sum of $24,277.78, no part of which has been paid except $3,398.84. Bennett & Layton and respondent's assignor had business dealings during the period 1936 to 1940, but no indebtedness accrued until early June 1940.

[9] It appears that no judgment has been heretofore sought or obtained upon the assigned claim, but the requirement that a creditor may avoid the act of his debtor for fraud "only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer," former § 3441, Civil Code, repealed in 1939, no longer obtains. As a procedural change, the repeal applies retroactively to a transfer which occurred prior to the repeal. See Heffernan v. Bennett & Armour, 63 Cal.App.2d 178, 183–184, 146 P.2d 482, and Rice v. Schubert, 101 Cal.App.2d 638, 639, 226 P.2d 50.

[10] (6) The findings that respondent's assignor was not put upon inquiry as to the transfer or payment or the circumstances surrounding them and did not acquire knowledge of the fraud until June of 1940, and that this action is not barred by laches or by sections 338 or 343 of the Code of Civil Procedure, are supported by the evidence.

Appellant directs attention to a banquet given Bennett in March 1938, attended by officers of respondent's assignor, as putting creditors and potential creditors upon inquiry. But the emphasis there was upon Bennett's "retirement" and there is evidence that the impression given was that he was retiring completely from business, returning to his old home in Susanville. Appellant also invokes a report on Bennett & Layton made by Dun & Bradstreet in April 1938, but there is evidence that respondent's assignor did not see any such report until June 1940. It cannot be asserted as a matter of law that these facts would put a person upon notice of the nature of the questioned transfer, particularly a firm that was doing business with Bennett & Layton on a satisfactory current payment basis before and until more that two years after the transfer.

This action was filed December 7, 1942, about two and one-half years after respondent's assignor was put upon inquiry and its cause of action arose.

(7) The court found untrue the allegations of appellant's answer that respondent holds the assigned claim for the Bank of America, that this action was instituted at the instigation of the bank, and that the bank is the real party in interest in this action. Appellant has apparently abandoned any objections it may have had to this finding, and we have discovered in the record no evidence to support the allegations found untrue. This finding renders immaterial and outside the issues a finding that the failure of Bennett & Layton was not caused by the alleged carelessness of the bank in lending credit to the corporation to gamble upon the turkey market, and the finding that through this action the bank does not seek to recoup gambling losses incurred by Bennett & Layton with the bank's knowledge, credit, and assistance.

The Conclusions of Law and the Judgment.

[11, 12] From the finding that the property was transferred and the money was paid with actual intent to defraud existing and future creditors, the trial court correctly concluded and decreed that the transfer and payment were void as against plaintiff as a creditor of the transferor and should be set aside for the benefit of plaintiff, and rendered judgment to that effect. In view of former section 3439 of the Civil Code and sections 154 and 531 of the Penal Code, a transfer made with actual intent to defraud creditors is void, for illegality, as to any creditor and may be attacked by any creditor, whether an existing or a future creditor. Severance v. Knight-Counihan Co., 29 Cal.2d 561, 177 P.2d 4, 172 A.L.R. 1107; Sasaki v. Yana Kai, 56 Cal.App.

2d 406, 133 P.2d 18. It does not matter if the transferor retains property ample to pay his creditors. Adams v. Bell, 5 Cal.2d 697, 700–701, 56 P.2d 208; Security-First Nat. Bank v. Bruder, 44 Cal.App.2d 767, 773, 113 P.2d 3. Nor is it important to ascertain whether or not a finding of no consideration is supported by the evidence. Puccetti v. Girola, 63 Cal.App.2d 240, 251, 146 P.2d 714. In such a case, the fact that the transferee gave consideration is immaterial. Chichester v. Mason, 43 Cal.App.2d 577, 586, 111 P.2d 362.

The next step, logically, would be for the judgment to provide, in some appropriate manner, for the payment of respondent's claim out of the property and money fraudulently transferred. That, this judgment does not do. Instead, it turns all of the property and the money (with the rents, issues, and profits of the property and interest at 7 per cent on the money) over to Lawler, assignee for the benefit of creditors. Starting with the premise that this transfer and payment was void as to all creditors (correct enough in the abstract), it declares that title to these assets never passed to appellant, that title remained in the debtor and passed to Lawler under the debtor's subsequent assignment to him, and thus are assets (the only remaining assets) of the debtor in Lawler's hands for distribution. The judgment then implements this declaration by directing appellant to transfer these assets to Lawler within 10 days; failing which, the transfer will be made on appellant's behalf by a commissioner appointed by the court.

[13, 14] The first error in this line of reasoning is the assumption that title did not pass to appellant. Title did pass, subject to attack only by members of the protected class, each of whom must pursue the property in a timely and appropriate manner, successfully to subject it to his claim. A transfer in fraud of creditors is valid as to the grantor and all persons claiming under him, "and as to all persons except creditors of grantor who may question it in a proper proceeding." Moore v. Schneider, 196 Cal. 380, 385, 238 P. 81; see, also, First National Bank v. Eastman, 144 Cal. 487, 489–490, 77 P. 1043. This is not a case in which by the very terms of the fraudulent transfer the transferee holds the bare legal title and the debtor retains full beneficial interest in the property, as was the case in Alhambra Building & Loan Association v. De Celle, 47 Cal.App.2d 409, 412, 118 P.2d 19.

[15] Lawler, as the debtor's assignee for the benefit of its creditors, has no greater right to the properties and moneys involved in this action than has the debtor. An assignee for the benefit of creditors is not "regarded as a purchaser for value, and has no greater rights than his assignor had, in respect to things in action transferred by the assignment." Civ.Code, § 3460. The assignment does not carry with it to the trustee title to property which the assignor has previously transferred in fraud of creditors. Such an assignee, as distinguished from the assignee in insolvency, may not bring an action to set aside a conveyance as made in fraud of creditors. Smith v. Kirkpatrick, 208 Cal. 417, 419–420, 281 P. 616, and cases cited.

[16] The order for a transfer from appellant to Lawler is equally unfounded in law. Respondent contends that this is a representative action, that in such an action it becomes necessary, upon giving judgment for plaintiff, for the court to determine "a proper method by which the creditors should be 'convened' for the apportionment of the fraudulently conveyed property among them," and that "The simplest and most expeditious way of doing this was through John Lawler, who was already trustee for creditors under the Bennett & Layton assignment." That might be simple and expeditious but it is not legal. Respondent invokes a sound principle, that of doing complete justice by administering and selling the property and distributing the proceeds among those persons who, parties to the proceeding, establish the validity of their claims as creditors. But a conveyance of the property to Lawler is not that. For then the court's jurisdiction and powers of supervision cease. That is taking property from one person and giving it to another without a hearing. What opportunity, in

such a case, would appellant have to challenge the validity or the amount of any creditor's claim, his diligence or laches in pursuing it, and whether barred or not by the statute of limitations?

[17] The transferee, in this case the appellant, is a necessary party in an action to declare a transfer void as fraudulent. Liuzza v. Bell, 40 Cal.App.2d 417, 424, 104 P.2d 1095, and cases cited. The residue, if any, after the claims of creditors are satisfied, goes to him. 40 Cal.App.2d at page 430, 104 P.2d 1095. In Miller v. Kehoe, 107 Cal. 340, 40 P. 485, the court affirmed that portion of a decree (in a creditor's suit) which adjudged the transfer void, declared the amounts due the several creditors (parties to the action), ordered that a receiver appointed for the purpose sell the property and distribute the proceeds among the creditors in accordance with their respective rights, and declared that the residue should go to the transferee. In Wright v. Salzberger, 121 Cal.App. 639, 9 P.2d 860, the court reversed a decree which adjudged that the transfer be canceled and declared the plaintiff creditor owner of the property, and directed the trial court to enter a decree declaring, in part, that the transfer "is void as to the plaintiff so far as necessary to liquidate the latter's claim," 121 Cal.App. at page 646, 9 P.2d at page 863; and, if the trial court deemed it necessary, to provide for a sale of the property under the court's direction. The Uniform Fraudulent Conveyance Act, adopted in 1939, observes this limitation upon the remedial rights of a creditor. It declares that a creditor, when his claim has matured, may, as against a person who is not a bona fide purchaser for value or the successor of such a purchaser, "Have the conveyance set aside * * * to the extent necessary to satisfy his claim." Civ.Code, § 3439.09.

[18] The rights of each creditor are separate and independent from those of each of the others. Due process requires that the transferee have his day in court as to each, an opportunity to require each to prove his claim, and to present every defense he may have to each. The mere fact that the creditors seek to satisfy their claims out of the same piece of property, does not alter the nature of their several rights, does not make it legally possible for one who has been diligent and whose claim is not barred by the statute of limitations, to pursue his action to judgment and then share the fruits of his victory with the other creditors free of challenge by the transferee as to the validity and amounts of the claims of the other creditors against the debtor or the diligence of their pursuit of the property. There might be this question: As of what date should the defense of laches or of the statute of limitations be tested? Should it be the date of intervention or the date of the filing of the action in which intervention occurs? In a mechanics' lien suit, it is the date of intervention. Graham v. Cal. Drilling etc. Co., 49 Cal.App.2d 522, 122 P.2d 88; Tubbs v. Delillo, 19 Cal.App. 612, 127 P. 514. In Mars v. McKay, 14 Cal. 127, under a mechanics' lien statute which required every such lien on the same property to be litigated in one and the same action, the court, finding that a particular lienor intervened in time, said "It must not be understood * * * that if the intervenors had failed to connect themselves with the proceedings in this case until their lien had expired by lapse of time, the pendency of this suit could avail them as against the limitation provided by the statute." 14 Cal. at page 129. In respect to a creditor's suit to set aside a fraudulent conveyance, the rule does not appear to be uniform. See cases collected in the note in L.R.A.1917D, 885. We are not undertaking to determine which date should furnish the test in this action, for no creditors have intervened. Nor do we hold that they may or may not yet intervene. Those are questions best left for determination when and if other creditors seek to join. See Glenn, Fraudulent Conveyances, Rev.Ed.1940, §§ 88, 90, 91, 93, 111–114, and 240–261, discussing various aspects of a creditor's suit to set aside a fraudulent conveyance; and 30 Cal.L.Rev. 350; 35 Cal.L.Rev. 443; 37 Cal.L.Rev. 525; 23 S.C.L. 285; Pomeroy, Code Remedies, 5th ed., §§ 285–298, relative to the representative suit and its res adjudicata effect.

Another factor which requires that the other creditors submit their claims to a

court of competent jurisdiction, in an action to which the transferee is a party, is the possibility that he, by the use of other funds, may have cleared the property from the lien of a just debt, and may have made other expenditures for which he might properly claim a credit, subject, possibly, to an offset for the reasonable value of his use and occupation of the property. See Puccetti v. Girola, supra, 63 Cal.App.2d 240, 249–251, 146 P.2d 714.

The judgment awards respondent $20,000, as the reasonable value of the services of his attorneys in the trial of the action, and directs that this be paid by Lawler, as trustee, "out of any of said real and personal property and moneys recovered and received by him from said Bennett & Armour in pursuance of the terms of this judgment." That means $20,000 in addition to the amount necessary to satisfy respondent's claim.

[19] By what authority was this award made? We have found none. "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys * * * is left to the agreement, express or implied, of the parties * * *." Code Civ.Proc. § 1021. We have found no statutory exception applicable to this proceeding. There is an exception, in equity, that when by his action a plaintiff preserves or recovers a fund in which others are interested, all who benefit should share the expense, including the payment of a reasonable attorney's fee in prosecuting the action, conveniently and properly payable out of the fund. That principle might be applicable here if other creditors had intervened and it appeared, after trial and adjudication, that the just claims of the creditors equaled or exceeded the proceeds of the sale of the assets involved and that appellant had no right to share in any of those proceeds. But that, obviously, is not this case.

In Miller v. Kehoe, 107 Cal. 340, at page 343–345, 40 P. 485, supra, in a creditor's action to set aside a fraudulent transfer, the court held it improper to allow such fees, for if allowed they would come out of the residue. The court distinguished the earlier case of Patrick v. Montader, 13 Cal. 434, in which there was no residue. This principle has been consistently adhered to. See Estate of Marre, 18 Cal.2d 191, 114 P. 2d 591; Los Angeles Trust & Savings Bank v. Ward, 197 Cal. 103, 239 P. 847. In Farmers and Merchants National Bank v. Peterson, 5 Cal.2d 601, 55 P.2d 867, an action for an accounting from trustees under an assignment for the benefit of creditors, when approving an allowance of fees for plaintiff's attorney, out of the fund, the court was careful to observe that such allowance did "not increase the amount of the recovery against the defendants nor subject them to payment of the plaintiff's attorney's fee." 5 Cal.2d at page 607, 55 P.2d at page 870.

[20] The judgment confirms and continues in effect, during the further pendency of the action, an order theretofore made appointing a receiver to take possession of the business and assets of appellant and to continue and manage that business as a going concern. This the court did in the exercise of powers recognized by statute, Code Civ.Proc. § 564, subds. 1, 7; Civ. Code, § 3439.11, powers of a court of equity when, in such a proceeding as this, the court finds it necessary and desirable to appoint a receiver to preserve and conserve the property which is the subject matter of the suit. See cases cited in 12 Cal.Jur. 1031–1032, § 72. Appellant has directed our attention to no factor which tends to indicate that in providing for this receivership the court abused the sound discretion vested in it, nor have we found any such factor in the record.

[21] We next have to consider appellant's claim that certain orders, and the findings of fact, conclusions of law, and judgment, are void because, assertedly, made during the period of the suspension from practice of its sole attorney in the action, and no notice was given nor demand made upon appellant to appoint another attorney, as required by section 286, Code of Civil Procedure. The orders were those of May 12, 1949, appointing the receiver, and of June 14, 1949, permitting an amendment of the complaint to conform with the proof

and to add a party defendent thereto. There is a conflict in the evidence on the question whether or not the suspended attorney was appellant's sole attorney in the action during the period of the suspension. We have examined the record, including affidavits considered upon the hearing, after the expiration of the suspension, of motions by appellant to set aside and strike out those orders, the findings of fact, the conclusions of law, and judgment. A superior court judge other than the judge who made the questioned orders, findings, conclusions and judgment heard those motions and denied them by an order dated August 20, 1949. The evidence supports the implied finding of that judge that during the period of the suspension appellant had and was represented by other attorneys who were not under suspension. Accordingly, we deem the point under discussion not well taken.

From what has been said, it is apparent that the findings of fact, conclusions of law, and judgment, insofar as they find and declare that the questioned transaction was entered into with actual intent to defraud existing and future creditors and is void as to respondent, are correct and amply supported by the evidence and the law, and should be affirmed. This is equally true of those portions of the findings, conclusions of law, and judgment which relate to the appointment of the receiver and the allowance of costs other than attorney's fees. The balance of the judgment is erroneous and must be reversed.

It is therefore ordered that the judgment be reversed, with directions to the trial court to revise the findings of fact and conclusions of law in accordance with the views herein expressed, taking such further steps and proceedings in the action as may be meet and proper, and then to render judgment.

[22, 23] The appeals from the order of June 14, 1949, permitting an amendment to the complaint, and from that portion of the order of August 20, 1949, which denied a motion to vacate the order of June 14, are dismissed, for the reason that they were taken from nonappealable orders.

The remaining portion of the order of August 20, 1949, and the order of May 12, 1949, appointing the receiver, are affirmed.

Each party shall bear his own costs upon this appeal.

PETERS, P. J., and BRAY, J., concur.



108 Cal.App.2d 597

BOGGIO v. CALIFORNIA-WESTERN STATES LIFE INS. CO.

Civ. 18610.

District Court of Appeal, Second District, Division 3, California.

Jan. 9, 1952.

Rehearing Denied Jan. 24, 1952.

Hearing Denied March 6, 1952.

Action on life policy by Eda L. Boggio against California-Western States Life Insurance Company, a California Corporation. The Superior Court of Los Angeles County, James H. Pope, Judge assigned, rendered judgment for plaintiff, and the defendant appealed. The District Court of Appeal, Shinn, P. J., held that, where insurer's agent was friend of family and had handled all its insurance needs and it had faith and confidence in agent, and insured made full disclosure to agent filling out application regarding insured's naval injury and treatment, and insured signed application not disclosing such injury and treatment in good faith believing agent's representation that insurer was not concerned therewith in view of insured's honorable and not medical discharge from Navy, insurer sued on life policy was estopped to assert defense of material misrepresentation.

Judgment affirmed.

1. Insurance ⇐255

Misrepresentation as to material facts will void an insurance contract.

2. Insurance ⇐378(3)

Knowledge of facts by soliciting agent having limited authority will not relieve insured from responsibility from his own omissions or misstatements in application for policy.

3. Insurance ⇐256(2)

When insured has application in his possession he may not plead ignorance of misstatements therein.

4. Insurance ⇐379(5)

Where insured in good faith makes truthful answers to questions contained in application for policy, but his answers, owing to fraud, mistake or negligence of agent filling out application, are incorrectly transcribed, insurer is estopped to assert their falsity as a defense to the policy.

5. Insurance ⇐256(2)

When insured has copy of application in his possession, he is presumed to have read it and to be aware of any misstatements therein even though they were not due to his own fault.

6. Insurance ⇐379(5)

Where insurer's agent was friend of family and had handled all its insurance needs and it had faith and confidence in agent, and insured made full disclosure to agent filling out application regarding insured's naval injury and treatment, and insured signed application not disclosing such injury and treatment in good faith believing agent's representation that insurer was not concerned therewith in view of insured's honorable and not medical discharge from Navy, insurer sued on life policy was estopped to assert defense of material misrepresentation.

Benedict, Bowman & Stewart and Frank M. Benedict, all of Los Angeles, for appellant.

William Katz, Los Angeles, for respondent.

SHINN, Presiding Justice.

Eda L. Boggio brought this action to collect on a life insurance policy issued by defendant on the life of plaintiff's deceased husband. Defendant resisted the claim on the ground of alleged false statements made by the insured concerning his health. After trial to the court judgment was entered in favor of plaintiff for the face amount of the policy ($5,000) and defendant appeals.

On December 7, 1948, Robert Boggio signed an application for a life insurance policy to be issued by defendant. A year's premium was paid and the policy was issued December 17, 1948. Five months later Robert died as the result of a subarachnoid hemorrhage. Upon presentation of a claim by plaintiff, the insurer refused to pay and this action followed. Defendant's position is that the policy is void because of false answers made by the insured in the written application which was made a part of the insurance contract. In that application appears the following question: "Have you now or have you ever had * * * [listing specified diseases and injuries] or any other injury?" The answer given was "none". Like answer was given to another question about consultation with physicians during the ten years prior to the application. These answers were literally false because Robert had suffered a blow on the head resulting in a subarachnoid hemorrhage in 1945 while in naval service and had been hospitalized for several weeks. Defendant claims there was material misrepresentation which voided the policy.

Relation of additional facts as found by the court is essential to explain the judgment. The insurance was sold by Louis P. Angelino who had been an agent of defendant for 25 years. Angelino had known the Boggio family for twelve years, had handled all their insurance needs, and they had faith and confidence in him. As a friend of the family he was fully acquainted with Robert's naval hospitalization. The application was entirely in the handwriting of Angelino—only the signature being written by Robert. When the application was being filled out Robert made full disclosure regarding the prior injury and treatment. Angelino then asked Boggio what kind of a discharge he had and when informed it was honorable, not medical, he said: "Well as long as you do not have a medical discharge they don't care about all this. As long as you have an honorable discharge and not a medical discharge you can sign this application." Boggio signed the application in good faith believing the representation by Angelino.

Defendant does not attack these findings; it claims only that the findings do not support the judgment. The question presented is whether a binding insurance contract arises when the application of the insured contains misstatements of fact occurring because a soliciting agent of the insurer wrongfully represents to the applicant that certain facts (which were fully disclosed to the agent) need not be included in the application and the application is signed in good faith by the applicant who relies on the agent's superior knowledge of insurance matters.

[1–3] In attacking the insurance contract as void, defendant asserts that it was induced to enter into the contract by the representations as to Boggio's prior medical history. Defendant relies upon three well-established propositions: (1) Misrepresentation as to material facts will void an insurance contract; (2) knowledge of the facts by a soliciting agent having limited authority will not relieve the assured from responsibility for his own omissions or misstatements in the application; (3) when the assured has the application in his possession he may not plead ignorance of misstatements therein. These propositions are affirmed in numerous cases cited by defendant but they do not reach the case which is made out by the findings. These were that the insured stated the facts fully to Angelino, and because of the latter's representation, believed he had given in the application answers which for the purposes in hand would be considered complete and truthful. He relied on the agent's superior knowledge of insurance affairs and in good faith signed the application as filled out by the agent. From these findings it appears that the misrepresentation upon which defendant relies occurred through the fraud or negligence of its agent and not through any fault of the insured.

[4–6] To allow the insurer under these circumstances to place the responsibility upon the insured would not only be manifestly unjust but would allow it to profit by its own wrong. In such cases the courts have uniformly held the insurance company to be estopped to assert the defense of material misrepresentation. Hart v. Prudential Ins. Co., 47 Cal.App.2d 298, 301, 117 P.2d 930; Byrd v. Mutual Benefit H. & A. Ass'n, 73 Cal.App.2d 457, 462, 166 P.2d 901; Lyon v. United Moderns, 148 Cal. 470, 475, 83 P. 804, 4 L.R.A.,N.S., 247; 45 C.J.S., Insurance, § 730, p. 739.

The courts have frequently quoted and accepted as the rule of decision the statement of Mr. Cooley: "From an examination of the cases the following propositions may be regarded as established by the weight of authority: Where the insured, in good faith, makes truthful answers to the questions contained in the application, but his answers, owing to the fraud, mistake, or negligence of the agent filling out the application, are incorrectly transcribed, the company is estopped to assert their falsity as a defense to the policy." Cooley's Briefs on Insurance, Vol. 5, p. 4164 (2d Ed.1927). Defendant apparently contends that the rule does not apply where in the application or the policy there is an express limitation of the authority of the agent to bind the company. But that limitation clearly cannot be given the effect of shielding the defendant company from the consequences of the misrepresentation, whether negligent or fraudulent, of Angelino which was, in effect, that the company drew a line, as to ex-service men, between service connected illness or disability which did and that which did not result in medical discharge. The court has found that Boggio believed and relied upon the representation, and this implies that in so doing he acted reasonably. We are bound by these factual conclusions. To deny liability of the insurer in these circumstances would open the door to unrestrained fraud.

Defendant correctly states that when the insured has a copy of the application in his possession he is presumed to have read it and to be aware of any misstatements therein even though they were not due to his own fault, citing Telford v. New York Life Ins. Co., 9 Cal.2d 103, 107, 69 P.2d 835, Layton v. New York Life Ins. Co., 55 Cal.App. 202, 203, 202 P. 958, and other cases. The rule would not apply here to

charge Boggio with knowledge he did not have when he signed the application unless he could have ascertained that his statements were false in the sense that they withheld information sought to be elicited by the questions contained in the application. This was not the case. He relied on Angelino's statement that the questions did not call for information as to the injury received in the service unless it had led to medical discharge. Having had the question interpreted for him in this manner, repeated reading of the questions and answers would not have led him to believe that his service injury was material. He knew at all times that his answers were literally untrue but not that they would be deemed untrue by the company in determining whether he was an insurable risk. On the facts found the case was correctly decided.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.



In re BLOCH'S ESTATE.

GOLDBERG v. BLOCH.*

Civ. 18702.

District Court of Appeal, Second District, Division 1, California.

Jan. 7, 1952.

Hearing Granted March 6, 1952. *

Proceeding in the matter of the estate of Helene I. Bloch, deceased. Sally Goldberg, petitioner, presented two instruments for probate. Superior Court of Los Angeles County, Clark, J., entered a judgment that decedent's name in her own handwriting in the exordium clause constituted an operative signature and Julius J. Bloch, contestant, appealed. The District Court of Appeal, Hanson, J., held that recital of the name of the person in the exordium clause of the document before list of bond values showed ownership of bonds and was not intended as an operative signature.

Judgment reversed with instructions.

1. Wills ⇐400

In contest of alleged holographic will, where no evidence other than two exhibits were offered, the question of whether a name found in the exordium clause on one of the envelopes was intended as an operative signature was a question of law and the appellate court was not bound by the trial court's findings.

2. Wills ⇐133

Where the name of decedent appeared before list of bonds in the exordium clause of an alleged holographic will written on envelope, and another unattached envelope, with additional provisions, contained decedent's signature at end of document, the location of the decedent's signature in the exordium clause was to show ownership of the bonds and was not intended by her to be an operative signature, and, therefore, the first document was not a holographic will.

3. Wills ⇐133

Where two unattached envelopes were presented for probate as holographic will and the second contained signature of decedent at the end, the second could not be incorporated in the first envelope, containing signature in the exordium clause only, because of want of proper legal incorporation.

Frye & Yudelson, North Hollywood, for appellant.

Samuel D. Robbins, Los Angeles, for respondent.

HANSON, Justice pro tem.

The question for decision is whether an instrument which was admitted to probate as the holographic will of the decedent Helene I. Bloch was signed by the decedent or whether her name in her own handwriting found only in the exordium clause of the instrument was used merely to identify property owned by her and not as her signature.

* Subsequent opinion 248 P.2d 21.

In this case two unsealed envelopes, each containing government bonds—one with bonds of the face value of $8,000; the other with bonds of the face value of over $5,000 were found in decedent's safety deposit box. On the outside of each of the envelopes there was language in the handwriting of the decedent. Both envelopes set forth in the handwriting of the decedent identical dates, i. e., "8/24/48," preceding the language written thereon by decedent. The petitioner—respondent herein—a sister of the decedent, presented both envelopes for probate as the last will of the decedent on the theory that the language on the outside of the two documents, taken together, represented a testamentary disposition on the part of the decedent. The court found that the writing endorsed on both of these two envelopes did not represent the last will and testament of decedent, but that the language on the envelope—front and back—known in the record as Exhibit 1 was, in and of itself, a testamentary disposition in that its language was all in the handwriting of the decedent including the date, i. e., 8/24/48, and that the name of the decedent, likewise in the handwriting of decedent, found in Exhibit 1 was the operative signature of decedent, even though it appeared only in the exordium and not at the end of the will. Accordingly, the court admitted Exhibit 1 as the last will and testament of decedent, but found that Exhibit 2 was not a part thereof and that standing alone it did not represent the last will of the decedent in whole or in part. Neither side here challenges the finding of the court as to Exhibit 2, but appellant does contend that Exhibit 1, taken alone, is not the last will and testament of decedent, because, as he contends, there is no operative signature and that the name of the decedent, in the handwriting of decedent, as set forth in Exhibit 1 was used for the purpose merely of identifying the bonds owned by decedent and not as an operative signature of a character to create a testamentary disposition.

Combining the language on each side of the envelope Exhibit 1 we find it reads as follows:

"8/24/48
Bonds belonging solely to
Helene I. Bloch..... 8000.00
5300.00
13300.00
In case of my death these are to be distributed to the following children for their education (divided equally)
Babette Freshman
Carolyn Freshman
Barbara Ann Freshman
Gary Lee Goldberg
Susan Linda Goldberg
Judy Brown
Stephen Brown
Julius J. Bloch shall not receive a dower right or be allowed to contest my wishes in any court in the United States. Julius J. Bloch did over
not give me any part of these monprior
ies Same was saved (before) my marriage and invested likewise. During my marriage Julius J. Bloch did not contribute to my support. I paid my own expenses throughout our marriage. Therefore he is not to receive one cent of my estate. During our marriage Julius J. Bloch, husband, was such only in name When he had funds or made profits he squandered all on his selfish desires gambling—also thruout this marriage I continually aided financially his many adventures & all ending with losses Therefore I fear he does not participate"

[1] Aside from the two exhibits no evidence was offered bearing on the question whether the name "Helene I. Bloch" found in the exordium was or was not intended as an operative or executing signature. Accordingly, we are not bound by the trial court's finding where, as here, it is based solely upon the terms of the written document without the aid of any extrinsic evidence, In re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825. In short merely a question of law is presented.

[2] We think that the name "Helene I. Bloch" in the handwriting of decedent, in

view of its location was used merely to state the total of the bonds she owned and was not intended by her as her operative signature. In re Estate of Manchester, 174 Cal. 417, 163 P. 358, L.R.A.1917D, 629; In re Estate of Hurley, 178 Cal. 713, 174 P. 669; In re Estate of Bernard, 197 Cal. 36, 239 P. 404. If we assume that the language which follows is intended as a testamentary disposition in whole or in part of the estate owned by decedent, there is nevertheless no signature to the will. We are unable to infer from the language of the document taken as a whole that the decedent assumed or contemplated that a signature was unnecessary or that she intended that her name as written should not only identify the extent of her ownership of the bonds but act as well as her operative signature. Moreover, as we view it the document does not represent a completed will, but at most a will partially completed.

[3] It is of some significance that Exhibit 2 which contained a direction that the proceeds of an insurance policy should "be used for burial expenses completely" contained at the end of the document the signature of the decedent. If decedent intended this exhibit as a continuation of Exhibit 1 it is then apparent that she did not intend that her name as found in that exhibit should operate as a signature. We think that such is the inference that must be drawn even though Exhibit 2 may not be incorporated in Exhibit 1 for want of proper legal incorporation.

The views we have expressed are abundantly sustained by the cases. It is unnecessary to do more than refer to one of them.

In Re Estate of Manchester, 174 Cal. 417, 163 P. 358, 359, L.R.A.1917D, 629, the document which the supreme court held had been erroneously admitted as a holographic will for want of an operative signature read as follows: "'I, Matilda Manchester, leave and bequeath all my estate & effects'" (naming the legatees). The document concludes with the words "'Whereunto I hereby set my hand this fourteenth day of January, 1914.'" The name of the decedent appeared nowhere else in the document. The court in the course of its opinion said:

"* * * The name written at another place than the end of the document, and not for the purpose of authenticating it and indicating its completion, but merely to identify the person who is making the will, cannot be deemed to be a name 'signed' to the document, unless that word is given a meaning entirely different from that which it is generally understood to have * * * The Civil Code itself provides that words 'are construed according to the context and the approved usage of the language.' Civ. Code, § 13. *If* this be done, *a document in which the name of the person making it appears only in the beginning thereof, and by way of recital to designate that person as the maker, in the manner above shown, cannot be said to have been signed by the maker.* * * *

* * * * * *

"'For the purpose of determining whether a will has been properly executed, the intention of the testator in executing it is entitled to no consideration. For that purpose the court can consider only the intention of the Legislature as expressed in the language of the statute, and whether the will as presented shows a compliance with the statute.' * * *

"* * * The act of signing is essential. An intention proven by other means will not serve the purpose." (Italics supplied.)

If, as the case above holds, the recital of the name of the person in the document there involved was merely to designate that person as the maker then likewise in the instant case it must be said that the designation of the name of the person was merely to show ownership of the bonds and nothing else.

The jugment is reversed with instructions to the trial court to deny probate to Exhibit 1.

DORAN, Acting P. J., and DRAPEAU, J., concur.

108 Cal.App.2d 358

PEOPLE v. HEWLETT.

Cr. 2721.

District Court of Appeal, First District, Division 1, California.

Dec. 27, 1951.

Rehearing Denied Jan. 11, 1952.

Hearing Denied Jan. 24, 1952.

The defendant was convicted in the Superior Court of the City and County of San Francisco, William T. Sweigert, J., of two counts of grand theft, and from the judgment and from order denying motion for new trial, the defendant appealed. The District Court of Appeal, Peters, P. J., held that evidence was sufficient to sustain conviction.

Judgment and order affirmed.

1. Embezzlement ⇐1
False Pretenses ⇐1
Larceny ⇐1

The statutory offense of grand theft includes the former crimes of larceny, embezzlement and obtaining money by false pretenses. Pen.Code, § 503.

2. Embezzlement ⇐4

The elements of embezzlement, within meaning of grand theft statute, are that accused must be the agent or bailee of the prosecuting witness in holding the allegedly embezzled property, the property must actually belong to the alleged principal, it must be lawfully in possession of accused at time of alleged embezzlement, accused must have been guilty of conversion which statute denounces, and there must be shown an intent on part of accused to deprive owner of his property unlawfully. Pen. Code, § 503.

3. Criminal Law ⇐1144(13)

On appeal in a criminal case, court must assume in favor of verdict, existence of every fact which jury could have reasonably deduced from the evidence and then determine whether guilt of defendant is deducible therefrom.

4. Criminal Law ⇐1159(6)

Where it is claimed that evidence is insufficient to support a verdict, and evidence is entirely circumstantial, question for court to pass on, on appeal, is whether there were facts before jury to justify inference of guilt.

5. Embezzlement ⇐44(1)

Evidence sustained conviction under grand theft statute of one charged with embezzlement. Pen.Code, § 503.

6. Criminal Law ⇐308

The presumption of innocence is not so strong that it compels jury to disregard common sense based on past experience and reasonable probabilities. Code Civ.Proc. § 1959.

7. Criminal Law ⇐308

The presumption of innocence is based on a fact or facts and not on mere surmise or conjecture. Code Civ.Proc. § 1959.

8. Criminal Law ⇐308

Presumption tending to show guilt, when connected with other facts, may outweigh in jury's mind, the presumption of innocence.

9. Criminal Law ⇐324

A presumption is evidence, and the law relating to presumptions is a rule of evidence.

10. Criminal Law ⇐306

Any civil presumption may be used in a criminal case, where facts warrant it, and where application of presumption does not arbitrarily determine case or prevent jury from making an independent investigation of the crucial issues of fact. Civ.Code, § 2235.

11. Criminal Law ⇐323

The presumption of undue influence, arising in a proper case in transactions between a trustee and beneficiary, is rebuttable in a criminal case. Civ.Code, § 2235.

12. Criminal Law ⇐414

The elements of a crime cannot be established by the extrajudicial statements of the defendant, and such statements, alone, cannot supply the corpus delicti.

13. Criminal Law ⇐753(2)

A motion for an advised verdict or a directed verdict of acquittal may properly be denied, if the evidence is sufficient to sustain a conviction.

14. Embezzlement ⇐4

Where a trustee lawfully receives money, the crime of embezzlement, which in-

volves a misappropriation after receipt of the money, does not depend on the time of the acquisition of the funds. Pen.Code, § 503.

15. Criminal Law ⇐1134(6)

Where trial court in grand theft prosecution instructed only on embezzlement and not on larceny, attorney general could not on appeal sustain the conviction on ground of larceny. Pen.Code, § 503.

16. Criminal Law ⇐1186(1)

Where a defendant is convicted on two counts of embezzlement in a grand theft prosecution, and sentences imposed are concurrent, and evidence is insufficient to sustain conviction on one of the counts, the only effect will be a reversal as to one count. Pen.Code, § 503.

17. Embezzlement ⇐11(1)

If one accused of embezzlement makes two separate misappropriations, there are two offenses, even if he had both sums in his possession when he made the first misappropriation. Pen.Code, § 503.

18. Criminal Law ⇐412(3)

When mental condition, intent, or state of mind of deceased, with respect to certain transactions during his lifetime are in issue in criminal prosecution, declarations of the deceased after the transactions are admissible.

George Hewlett, in pro. per.

Edmund G. Brown, Atty. Gen. of State, Clarence A. Linn, Winslow Christian, Deputy Attys. Gen., for respondent.

PETERS, Presiding Justice.

This is an appeal by George Hewlett from a judgment of conviction on two counts of grand theft, and from the order denying his motion for a new trial.

The transactions forming the basis of the criminal charges here involved have twice been before this court in civil actions. In Estate of Kromrey, 98 Cal.App.2d 639, 220 P.2d 805, orders removing Hewlett as administrator of the estates of Fred, August and Agnes Kromrey were affirmed on the grounds that Hewlett had improperly gained control of approximately $45,000 belonging to the three estates and to George Kromrey, and that Hewlett was not a fit or proper person to administer the estates. In McDonald v. Hewlett, 102 Cal.App.2d 680, 228 P.2d 83, the administratrix of the four Kromrey estates (George Kromrey having died) brought an action to recover from Hewlett moneys alleged to belong to those estates and alleged to have been gained by Hewlett through fraud. The trial court held that the moneys had been secured by Hewlett by means of fraud and undue influence, and granted the administratrix a judgment against Hewlett for $40,060. This was affirmed on appeal. In both of these cases the Supreme Court, without a dissenting vote, denied hearings.

Before either of the civil cases had been finally decided Hewlett was indicted, it being charged that, on or about October 30, 1948, he stole $15,000 from George Kromrey, and that on or about November 2, 1948, he unlawfully took $31,460 belonging to George Kromrey. The jury found Hewlett guilty on both counts. After denial of motions for probation and for a new trial Hewlett was sentenced to imprisonment in the state prison, with the sentences to run concurrently.

On this appeal his main contentions are: (1) That the evidence is insufficient to support the verdict on either count for the reason that there is no evidence of felonious intent; (2) that there was prejudicial error in the giving of certain instructions; (3) that the trial court erroneously denied his motion for advised verdicts; (4) that the evidence at most shows but one offense; and (5) that the trial court committed error in admitting certain evidence.

Sufficiency of the Evidence:

The record here is over 1,100 pages in length. The facts on this criminal trial are, with certain minor differences, substantially similar to those produced in the two civil cases. As produced on the present trial, the facts most favorable to the prosecution may be summarized as follows:

Hewlett is an attorney and has been practicing law since 1904, most of the time in San Francisco. Some time between 1940

and 1942 he first met George Kromrey, and the two became friends. In 1943 Hewlett became attorney for George Kromrey, who was then administrator of his brother Fred's estate. This relationship, both personal and as attorney and client, continued down through October and November of 1948, the critical period here involved.

George Kromrey, in 1948, was 54 years of age. For many years he lived in his parents' house in San Francisco with his parents and with his brother Fred. A family named McDonald occupied the lower flat of this house. In 1943 Fred Kromrey died and the parents nominated George Kromrey as administrator of his estate. Hewlett became attorney for George Kromrey as administrator. This estate was still open in 1948 during the periods here involved. In 1947 the parents both died, leaving George Kromrey as the sole survivor of the family and sole heir to all three estates of which George Kromrey was appointed administrator.

Prior to the death of his mother in June of 1947, Kromrey had been neat, dressed well and was alert. He had had spells of illness in 1944, 1945 and 1946, but these were not of long duration. During the last few weeks of his mother's illness he appeared dazed and spoke very slowly. After his mother's death there were marked changes in his behavior and health. The sick spells, described as "blackouts," occurred quite frequently. He shaved infrequently and allowed his hair to grow long. His clothes and rooms became untidy.

After his mother's death Kromrey took most of his meals with Mrs. McDonald, who lived in the lower flat, and frequently visited the McDonald family. Mrs. McDonald had helped to nurse the mother, and also looked after Kromrey. In April, 1948, Kromrey had a very bad sick spell. He locked himself in his room and refused to come out for two or three days. During this period he cried, moaned and screamed. When he finally opened his door he was so weak he had to be led down the stairs and fed. His room was filthy. After such a spell Kromrey could remember nothing of what had occurred during the spell. He was very close with his money, and inclined to be miserly.

After April of 1948 Kromrey's health continued to deteriorate. The sick spells came closer and closer together. Finally, on October 28, 1948, he had a very bad spell, and collapsed. Mrs. McDonald called a doctor. He testified that he found Kromrey apathetic and disheveled and that he would not respond to questioning. This doctor sent Kromrey to the San Francisco Hospital for observation, in an ambulance, accompanied by Mrs. McDonald. She testified that Kromrey was then in a dazed condition.

Up until this time, Mrs. McDonald had never met or heard of Hewlett. Apparently Hewlett had seen Kromrey but very little in 1947 and 1948. While the hospital attendants were questioning Kromrey he mentioned that his attorney was named "Hewitt." Upon returning to her home Mrs. McDonald was unable to find the name "Hewitt" in the telephone directory, but did discover, in Kromrey's flat, a business envelope of George Hewlett. After some difficulty, she got in touch with Hewlett and told him that Kromrey was ill. Hewlett requested Mrs. McDonald to come to his office the next morning, and stated that his secretary, Mrs. Montgomery, would accompany her.

The next morning, accompanied by Mrs. Montgomery, who was a public stenographer and part-time secretary of Hewlett, Mrs. McDonald went to Hewlett's office. She told him that the doctor thought Kromrey was a mental case and had sent him to the psychiatric ward of the hospital. Hewlett, according to Mrs. McDonald, made various disparaging remarks about Kromrey, stating that Kromrey had sponged off his parents all his life, never earned a cent and was "just a common thief." Hewlett seemed surprised to learn that the parents of George Kromrey were dead. When reminded by his secretary that George Kromrey was now the heir of all of the estates, Hewlett told Mrs. McDonald that he or his son should be appointed guardian for George Kromrey. Mrs. McDonald expressed some opposition to this procedure.

Hewlett, in the presence of Mrs. McDonald, then telephoned another attorney and talked the problem over with him. In this conversation Hewlett several times repeated the word "agent." This testimony was contradicted by Hewlett and by Mrs. Montgomery, but this conflict was, of course, for the jury.

After talking with the other lawyer, Hewlett dictated to Mrs. Montgomery, in the presence of Mrs. McDonald, four documents. These four documents were an appointment of Hewlett as general agent for Kromrey, and nominations by Kromrey of Hewlett as administrator in the estates of the parents and brother of George Kromrey.

After these documents had been typed, Hewlett, his son Palmer, and Mrs. McDonald drove out to the hospital to see Kromrey. It should be here mentioned that after Kromrey had entered the hospital he was examined over a period of time, by a group of doctors. They ultimately discovered that he had a tumor of the pituitary gland which had existed for some time and which had grown to such an extent that it pressed on the brain and on the optic nerve, causing a defect of vision. The autopsy, performed in February, 1949, confirmed this diagnosis. One of the doctors who thoroughly examined Kromrey shortly after his entry to the hospital, testified that Kromrey was uncooperative, unable to answer simple questions, was apathetic, his memory was bad, and he was disoriented.

When Hewlett, his son Palmer and Mrs. McDonald arrived at the hospital Hewlett, according to Mrs. McDonald, said to Kromrey: "You know me, I am George Hewlett, and this is my son, Palmer. We have got to take over all your affairs and you won't have a worry in the world. All you have to do is sign these papers here." Kromrey did not answer. Mrs. McDonald also testified that Kromrey was so ill that he had to be helped into a sitting position. Hewlett, according to Mrs. McDonald, who was present at all times here relevant except when she left the room for a moment to get something for Kromrey to write upon, at no time, while she was present, explained to Kromrey the nature of the papers or their effect. Hewlett put the pen in Kromrey's hand and spelled out Kromrey's name while Kromrey signed the four documents. Hewlett did explain to Mrs. McDonald that one of the documents appointed him Kromrey's general agent. This testimony is contradicted by the evidence of Hewlett and his son, but this conflict was for the jury. This all took place on October 29, 1948.

On Saturday, October 30, 1948, Palmer Hewlett and Mrs. Montgomery called on Mrs. McDonald and requested permission to search Kromrey's flat. The appellant did not come into the premises at this time, but was waiting outside. Mrs. McDonald accompanied Palmer and Mrs. Montgomery to the upstairs flat and watched while they searched. She saw Palmer remove a drawer containing personal papers of Kromrey. Mrs. McDonald, upon request, showed Palmer and Mrs. Montgomery where Kromrey kept his money, and several envelopes containing $15,000 in cash were found there. The money was not then counted, but was kept by Palmer and Mrs. Montgomery. No receipt was given Mrs. McDonald for the money or other articles. Palmer and Mrs. Montgomery left the premises with the personal property and the money, and drove away, accompanied by Hewlett.

Several days before going to the hospital Kromrey had turned over to Mrs. McDonald for safekeeping over $31,000 which he asked her to keep in her apartment. After Palmer Hewlett and Mrs. Montgomery had taken the personal belongings of Kromrey and the $15,000, Mrs. McDonald visited Kromrey and told him about the $15,000, and asked what she should do about the other money. Kromrey told her to keep it until he got home. On November 2, 1948, Mrs. McDonald again told Kromrey that Hewlett was demanding the money, and Kromrey told her to deposit the money in the bank and gave her written authority to do so.

In some fashion Hewlett learned that Kromrey had more than the $15,000 already

secured by him. He testified that Kromrey told him of the larger sum. At any rate, he telephoned to Mrs. McDonald several times and asked her about the other money. She denied any knowledge of any further money, but called her attorney, James Brennan, and asked him what to do. Brennan tried to reach Hewlett, and finally did so on November 2, 1948. Hewlett told Brennan that he was the administrator of the estates of the three deceased Kromreys. This was false, inasmuch as the nominations and petitions were not filed until November 3rd and Hewlett was not appointed until November 15th. Brennan, when informed by Hewlett that Hewlett was administrator of the three estates, told Mrs. McDonald to turn the money over to Hewlett. This was the very day she had received the written authority from Kromrey to deposit the money in the bank. Palmer Hewlett and Mrs. Montgomery, this same night, called upon Mrs. McDonald and demanded the money. She refused to give it to them and they left, returning in a few minutes accompanied by appellant. Mrs. McDonald showed Hewlett the authorization she had from Kromrey. Hewlett stated that he was not interested in anything Kromrey had "to say about that money" and that he was "in charge." Hewlett also stated that Kromrey might go to jail because of the way he had handled this money, and that he had told Kromrey that. Finally, Mrs. McDonald produced the money, it was counted, given to Hewlett, and he gave her a receipt for $31,460.

Hewlett deposited the $15,000 in a safe deposit box, which box was in his name and that of his son, Palmer. He rented another safe deposit box in the same bank in his name and that of Palmer, and deposited therein the $31,460 even though the bank employee suggested that the money be deposited in a trust account. Hewlett testified that he marked the envelopes containing the money as the property of Kromrey, and that Kromrey had told him to place the money in a safe deposit box.

Hewlett testified that, on November 4th, Kromrey asked him to prepare a will. On November 5th Hewlett brought to the hospital two wills, one naming Hewlett as executor and providing for a cash bequest to Kromrey's aunt in the sum of blank dollars, and the other simply appointing Hewlett as executor and containing no bequests of any kind. This last will was signed by Kromrey on November 5th, Mrs. Montgomery being one of the two subscribing witnesses.

Hewlett testified that, on November 7th, Kromrey told him that he wanted to make a gift to Hewlett of all of the money and personal property taken from the house, and that he wanted to see the money again. Hewlett also testified that on that same day he brought to the hospital the envelopes containing the money first taken from the house, and some stock, but only brought a receipt for the $31,460, and handed them to Kromrey. According to Hewlett, Kromrey then handed the money, receipt and stock over to Hewlett stating that he wanted to give them to Hewlett, and requested Hewlett to prepare a writing evidencing the gift. Admittedly, no one else except Hewlett and Kromrey was present when these transactions are alleged to have occurred. A son of Hewlett, named George testified that, before the 7th of November, Kromrey had told him that he wanted to make these gifts to Hewlett.

On November 8th Hewlett returned to the hospital accompanied by Palmer and Mrs. Montgomery. Hewlett had prepared a gift instrument. This document, dated November 8th, reads as follows: "I have delivered, and now confirm delivery, to George Hewlett, my good friend, all of my money and personal property, or all to which I am entitled as heir, and I give him the same absolutely, and he has accepted the same."

The document is signed by George A. Kromrey, and Mrs. Montgomery and Palmer signed as witnessses. They all testified that the document was executed voluntarily.

After the document was signed, Hewlett, Palmer and Mrs. Montgomery proceeded to the City Hall where they had it notarized (although Palmer was a notary), and then had it photostated. Hewlett testified that

on November 9th he showed the photostat to Kromrey and that the latter stated that it was just what he wanted.

There was considerable controversy over whether Kromrey could read without the aid of a magnifying glass. Hewlett testified that Kromrey read all of the documents presented to him without artificial aid of any kind. Several other witnesses testified that Kromrey could and did read without artificial help. Mrs. McDonald testified that Kromrey could not read without using a magnifying glass. The medical testimony, including the autopsy, tended to show that Kromrey's vision was impaired.

Some time about the middle of November Kromrey expressed to Mrs. McDonald the desire to go home. Mrs. McDonald conveyed this desire to Hewlett who objected, and who told Mrs. McDonald to quit "interfering." About the 28th of November Kromrey was transferred to the French Hospital. How this was arranged is not clear. Kromrey, at any rate, was not satisfied and wanted to go home. On December 1st Kromrey signed himself out of the hospital and, accompanied by Mrs. McDonald and a friend, he went home. As soon as he arrived he expressed a desire to see Hewlett, and Mrs. McDonald telephoned to Hewlett's office and told Mrs. Montgomery that Kromrey wanted to see Hewlett. Mrs. McDonald further testified that she never heard from Hewlett and that he never did telephone or call. Kromrey, except for the home in which he lived, and the property in the possession of Hewlett, was penniless, and the McDonalds took care of him.

On December 2nd Hewlett, after talking to a Superior Court judge, complained to the district attorney that Kromrey had been kidnapped from the French Hospital. An assistant district attorney, accompanied by Palmer Hewlett, called at Kromrey's home. Kromrey informed the deputy that he had not been kidnapped, and that he had come home of his own accord.

On this same day, Brennan, upon instructions from Kromrey, prepared and Kromrey signed, a revocation of Hewlett's power of attorney, and a copy was mailed to Hewlett. Kromrey, according to Mrs. McDonald, told her that he did not remember signing the document appointing Hewlett his general agent.

On December 6th or 7th, Perlis, an attorney associated with Brennan, called upon Kromrey. He testified that Kromrey then appeared mentally alert. When Perlis told Kromrey that he had signed nominations of Hewlett as administrator of the various Kromrey estates, Kromrey stated that he did not remember anything about signing such nominations. On December 14th or 15th Kromrey, in writing, authorized Brennan and Perlis to act as his attorneys in all business affairs.

On December 15th Perlis wrote to Hewlett informing him of this appointment. He reminded Hewlett that he and Brennan had tried unsuccessfully to get in touch with Hewlett by telephone, that the power of attorney had been revoked, and made a formal demand upon Hewlett to return all of the property taken by him from the home of Kromrey. A request was made that Hewlett get in touch with Perlis.

In spite of these many requests, Hewlett failed to get in touch with Kromrey or his attorneys—in fact, he never saw Kromrey again.

About December 17th Kromrey told Perlis that he had never made a will and desired to do so, and a will was executed leaving the property to Mrs. McDonald.

About December 20th Brennan, after great difficulties, finally reached Hewlett by telephone. Hewlett told Brennan that there was nothing to worry about as all the money was safely in the bank, and Hewlett promised to come to see Kromrey in the immediate future and straighten matters out. He never performed this promise, nor did he then or any other time prior to the death of Kromrey, ever claim that a gift of the moneys had been made.

On January 11, 1949, Perlis filed a petition to remove Hewlett as administrator of the three Kromrey estates. Strenuous efforts were made to serve Hewlett, but he could not be found. Between eighty to one hundred hours were spent by a hired agency trying to serve Hewlett. He was finally served and brought into court on Febru-

ary 15, 1949. George Kromrey had died the night before. At this hearing on the 15th of February, Hewlett for the first time, publicly, claimed that the money belonged to him by way of gift.

[1, 2] Appellant was charged with grand theft. This offense, since the amendments to the Penal Code of 1927, is an all inclusive offense, and includes the former crimes of larceny, embezzlement and obtaining money by false pretenses. But even since these amendments the essential elements of these offenses have in no way been changed. To prove grand theft it is necessary to prove the basic elements of one of these three offenses. People v. Cravens, 79 Cal.App.2d 658, 180 P.2d 453. The trial court limited its instructions to embezzlement. This crime is defined in § 503 of the Penal Code as "the fraudulent appropriation of property by a person to whom it has been entrusted." The elements of an embezzlement are:

(1) The accused must be the agent or bailee of the prosecuting witness in holding the allegedly embezzled property;

(2) the property must actually belong to the alleged principal;

(3) it must be lawfully in the possession of the accused at the time of the alleged embezzlement;

(4) the accused must have been guilty of the conversion which the statute denounces; and

(5) there must be shown an intent on the part of the accused to deprive the owner of his property unlawfully. People v. Cannon, 77 Cal.App.2d 678, 689, 176 P.2d 409.

[3, 4] The appellant argues that no larceny was involved because he received the moneys as attorney or agent for Kromrey so that no trespass was involved, nor does the evidence show a fraudulent intent when he received the money. He then argues that no embezzlement was involved because he made no claim to the money until after the alleged gift had been made. In this connection he urges, as he unsuccessfully did on the civil appeals, that the gift instrument was prima facie evidence that title to the moneys had passed to him, and that the validity of that instrument was not destroyed by the evidence. Therefore, so he claims, he could not be guilty of embezzlement because the funds were his property. He argues that it is not enough to vitiate the gift instrument simply to show that it was acquired by undue influence, or that the donor lacked capacity, but that actual fraud and deceit must be shown. No actual fraud or deceit, according to appellant, was here shown to exist. Appellant also argues that since he was held liable for the money in McDonald v. Hewlett, 102 Cal.App.2d 680, 228 P.2d 83, that case necessarily established that a debtor-creditor relationship existed between him and Kromrey, which necessarily determined that the money belonged to Hewlett. No authorities are or can be cited for these theories. The opinions in the two civil cases discuss most of these contentions and decide them adversely to appellant. What was there said need not be here repeated. Moreover, appellant admits that the money originally belonged to Kromrey. He admits that he got this money and used it for his personal purposes. The basic question was his state of mind when he first got the money and when he converted it to his own use. The evidence amply supports the implied finding of an unlawful intent. The manner and fashion that the agency agreement and nominations were prepared and secured, the securing of the signatures to these documents and to the gift while Kromrey was incompetent, Hewlett's misrepresentations to Brennan about his status as administrator of the estates, all support the implied finding that there were unlawful misappropriations of the money. The evidence also supports the implied finding that the gift was secured by actual fraud. The circumstances under which the gift instrument was secured are sufficient to raise the inference. The fact that the gift, if valid, would render Kromrey, a man who until then had been somewhat miserly with his money, completely destitute of any property except his home at a time when he needed and was receiving medical care, could be considered by the jury on the issue of guilt. The evidence of Hewlett's bad faith in telling Kromrey's attorneys that the money was safely in the

bank, that Kromrey had nothing to worry about, and that he, Hewlett, would call upon Kromrey in the near future (which he failed to do) to straighten matters out, if believed by the jury, as it apparently was, supports the verdicts. This is equally true of the fact that, so far as the evidence shows, Hewlett never claimed this money as a gift until after Kromrey's death. The jury was also entitled to find that, while Kromrey was alive, Hewlett deliberately evaded service of process in the action brought by Kromrey to recover the moneys, and that such was a most suspicious circumstance. As was said in People v. Parchen, 37 Cal.App.2d 215, 222, 98 P.2d 1045, 1049: "On an appeal in a criminal case, the court must assume in favor of the verdict the existence of every fact which the jury could reasonably have deduced from the evidence, and then determine whether the guilt of the defendant is deducible therefrom; and where it is claimed that the evidence is insufficient to support the verdict and the evidence is entirely circumstantial, the question for the court to pass upon is whether there were facts before the jury to justify the inference of guilt."

[5] In our case the evidence is ample and sufficient.

The Instructions:

The instructions in this case are lengthy and detailed. Appellant sets forth in his brief some eighteen pages of instructions. He does not, however, complain of all of these instructions, but sets them forth in order to show a claimed over-emphasis and bias. We have read the charge. It was full, fair and complete.

The only serious question presented about the instructions centers around a series of instructions informing the jury that a presumption of undue influence arises where a trustee obtains an advantage over his beneficiary. It is claimed that this is a presumption in civil cases only, and is not applicable in criminal cases. It is argued that, since the defense to the charge of embezzlement was that a gift had been made, or at least that defendant in good faith believed that a gift had been made, to instruct that a presumption of undue influence arose was to deprive him of the presumption of innocence.

This presents an interesting question. Before discussing the law, reference should be made to the precise instructions involved. The court properly instructed that the burden of proof was on the prosecution to prove all elements of the charge to a moral certainty and beyond a reasonable doubt and that "otherwise the defendant standing and entitled to stand upon the presumption of innocence must be acquitted." The court then instructed on the nature of the charged offense and the elements of the crime of embezzlement. Then, quite properly, elaborate instructions were given to the effect that a trustee who fraudulently appropriates trust property or secretes it with fraudulent intent to appropriate it to his own use is guilty of embezzlement. The court then instructed that if the accused owned the property involved or honestly believed he owned it, he could not be guilty of embezzlement. The court then elaborately discussed the defense of the defendant, namely, that a valid gift to him of the moneys had been made. After instructing on the elements of a gift, the court gave the following instructions: "Where the gift is obtained by a person who at the time has voluntarily assumed a relation of personal confidence with the giver, certain special rules of law are applicable. Under such circumstances the donee is deemed a trustee as to the person who reposes such confidence. Also he is deemed a trustee as to all persons over whose affairs he thus acquires influence which was given to such person in the like confidence or over whose affairs he, by such confidence, obtains any control."

After properly instructing on the duties of a trustee, the court instructed: "In all matters connected with the trust a trustee is bound to act in the highest good faith toward his beneficiary and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat or adverse pressure of any kind."

The court then gave this instruction which is one of the basic ones challenged

by appellant: "Further, all transactions between a trustee and a beneficiary during the existence of a trust, or while the influence acquired by the trustee remains, by which the trustee obtains any advantage from his beneficiary, are presumed to be entered into by the trustee without sufficient consideration and under undue influence."

The court then instructed that it was a question of fact for the jury to determine whether a gift had been made, and if they so found they should acquit the defendant. The court then instructed as follows: "In making your determination of whether the defendant rightfully appropriated money entrusted to him by George Kromrey by virtue of a gift made to him of the money by George Kromrey, you may also consider the rule of law that a transaction between a trustee and his beneficiary during the existence of the trust or while the influence acquired by the trustee remains, by which the trustee obtains any advantage from his beneficiary, is presumed by law to have been entered into by the latter without sufficient consideration and under undue influence."

The court elaborated on this theme at some length. Among other things, it gave the following instruction: "This means that if you find from the evidence to a moral certainty and beyond a reasonable doubt that at the time of the alleged gift transaction the relation of trustee and beneficiary existed between George Kromrey and the defendant in respect to the money in question, or that the influence acquired by the defendant as such trustee then remained, you may presume that the alleged gift was obtained by the defendant through undue influence of the defendant upon George Kromrey."

But the court was most careful to limit these instructions relating to the presumption of undue influence. Among others, it gave the following qualifying instruction: "The presumption of undue influence to which I have referred is not intended to relieve, and it does not relieve, the prosecution of the burden of proving the guilt of the defendant and every element of the offense charged against him to a moral certainty and beyond every reasonable doubt. It is—that is, the presumption is, as I have said, a mere disputable presumption which may be controverted and overcome by other evidence and it is controverted and overcome whenever other evidence in the case, including other presumptions such as the presumption of innocence, creates or leaves in the minds of the jurors a reasonable doubt as to whether the fact was as so presumed."

A clear instruction was given on the presumption of innocence, and proper instructions given on the burden of proof.

The main argument of appellant is that although the quoted instructions on the presumption of fraud and undue influence arising in transactions between trustee and beneficiary state valid and correct rules of law with respect to civil relationships, they should not be given in criminal cases. The argument is that such a presumption in a criminal case takes from the defendant the benefit of the presumption of innocence.

This question as to whether the disputable presumptions contained in the Civil Code and Code of Civil Procedure, where warranted by the evidence, should be given in criminal cases is one, strangely enough, on which there seems to be very little direct case law.

Appellant cites and relies upon the case of People v. Hatch, 13 Cal.App. 521, 109 P. 1097. That case, in some respects, is quite similar to the instant one. There an agent, attorney and trustee was charged with embezzlement of his client's funds. He was convicted. The trial court gave an instruction not on the presumption of fraud and undue influence, but part of which is almost identical with one of the instructions quoted supra referring to the duties existing between trustee and beneficiary. The judgment of conviction was reversed for many reasons, one of which was that *under the state of the evidence there produced* it was prejudicial error to give the instruction. In this connection the court stated 13 Cal.App. at page 533, 109 P. at page 1102: "While the latter part of the instruction was a correct statement of the law governing the relations of an agent,

or attorney, and his principal concerning their respective duties and rights in their civil relations, it was misleading and incorrect as a rule for the guidance of a jury in determining whether or not the agent was guilty of embezzlement. Under the condition of the evidence as above indicated, and in the connection in which the latter part of the instruction was given, it was erroneous, and, we think, clearly prejudicial to the rights of the defendant."

It is to be noted that the court did not hold that it was error in all criminal cases to give such an instruction, but simply held that under the condition of the evidence in the particular case it was error to so instruct the jury. This is made crystal clear by what occurred on the retrial. On the retrial the defendant was again convicted and the case ultimately got to the Supreme Court, People v. Hatch, 163 Cal. 368, 125 P. 907, a case not referred to by either appellant or respondent. On the retrial the district attorney, in his argument to the jury, over objection argued at some length concerning the duties of a trustee to act in the highest good faith towards his beneficiary. It was urged that under the rule above quoted from the appellate court on the first trial this was prejudicial misconduct. The Supreme Court quoted part of the statement appearing in the appellate court opinion and declared that all that the appellate court held was that under the state of the evidence there appearing such an instruction was not proper, but that under the state of the evidence on the second trial it was proper and correct for the district attorney to refer to the applicable rules of law relating to the duties of trustees. The Supreme Court referred particularly to what the evidence showed as to the conduct of defendant after he got the money—circumstances quite similar to those in the instant case. Thus, if anything, the Hatch cases support the rule that, where the evidence warrants it, it is proper to instruct on the duties of a trustee.

The instructions complained of relating to the rebuttable presumption of undue influence arising in a proper case in transactions between a trustee and beneficiary are correct summaries of the rule set forth in section 2235 of the Civil Code. The question remains whether such instructions are so incompatible with the presumption of innocence that giving them is reversible error in a criminal case.

[6, 7] Although we have been referred to no authorities directly in point, reason tells us that the presumption of innocence is not so strong that it compels the jury to disregard common sense based upon past experience and reasonable probabilities. A presumption is defined as "a deduction which the law expressly directs to be made from particular facts." Code Civ.Proc. § 1959. Thus, a presumption is based on a fact or facts and not upon mere surmise or conjecture—and certainly the facts giving rise to the presumption were here shown to exist. Presumptions are legislative determinations of reasonable probabilities. What experience has shown has normally happened in the past, under the same conditions will normally happen again. Simply because a criminal instead of a civil case is involved does not require the jury to disregard, in their reasoning, the reasonable probabilities that the Legislature has determined exist from certain facts.

[8] Of course a presumption of guilt and a presumption of innocence cannot exist at the same time. But a presumption tending to show guilt when connected with other facts, may outweigh in the jury's mind, the presumption of innocence. If properly limited, it seems quite clear that any of the disputable presumptions set forth by law, where warranted by the evidence, may be considered by the jury in weighing the presumption of innocence and in determining whether the prosecution has sustained the burden of showing that the defendant is guilty to a moral certainty and beyond a reasonable doubt. In the last instruction above quoted the trial court carefully and correctly defined the weight to be given to the presumption of undue influence. The trial court told the jury that this presumption did not relieve the prosecution of the burden of proving every element of the offense charged; that it was

a mere rebuttable presumption which could be overcome by other evidence and is "overcome whenever other evidence in the case, including other presumptions such as the presumption of innocence, creates or leaves in the minds of the jurors a reasonable doubt as to whether the fact was as so presumed."

The attorney general advances an argument on this phase of the case that seems to us sound. He first points out that in several specific instances the Legislature has provided that presumptions adverse to the defendant in a criminal case shall exist. Thus, Penal Code section 250 presumes malice in a criminal libel prosecution where "no justifiable motive for making it is shown." This presumption applies although it throws on the defendant the burden of proof as to one element of the crime. Davis v. Hearst, 160 Cal. 143, 116 P. 530; People v. Pryal, 25 Cal.App. 779, 147 P. 114, 115.

Penal Code section 270e provides that proof of non-support of a wife or children shall constitute prima facie (or presumptive) evidence that the abandonment was wilful. See, People v. Wallach, 62 Cal. App. 385, 217 P. 81; People v. Martin, 100 Cal.App. 435, 280 P. 151.

Penal Code section 496 provides that purchase of goods from a minor under eighteen shall, under some circumstances, constitute presumptive evidence that the goods were stolen. See People v. Seerman, 43 Cal.App.2d 506, 111 P.2d 457. Undoubtedly, there are other instances in the Penal Code of presumptions adverse to the defendant.

Thus, having established that the Legislature can and has, in several specific instances, made presumptions adverse to the defendant applicable in criminal cases, the attorney general argues that the Legislature has made all disputable presumptions where relevant, applicable to criminal cases. This has been accomplished, according to the argument, by section 1102 of the Penal Code which provides that "[t]he rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code." There is no other provision of the Penal Code making so-called civil presumptions inapplicable in criminal cases.

[9] Of course, a presumption in this state is evidence, and the law relating to presumptions is a "rule of evidence."

There are cases that broadly indicate that so-called civil presumptions, where applicable, may properly be used in criminal cases. Thus, in People v. Le Doux, 155 Cal. 535, 553, 102 P. 517, 524, it is stated: "As to the instructions actually propounded, the court was justified in its refusal to give them, for they go further than is warranted by the law. The instructions declare that the presumption of innocence is the only presumption allowable in a criminal case, that it is not overcome by any other presumption, but does overcome all other presumptions of whatsoever kind or nature. Such, however, is not the law. All presumptions are evidence. Conclusive presumptions (Code Civ.Proc. §§ 1961, 1962) are not overcome by the presumption of innocence, nor are many disputable presumptions so overcome." See, also, People v. Agnew, 16 Cal.2d 655, 107 P.2d 601; People v. Minter, 73 Cal.App.2d Supp. 994, 167 P.2d 11; People v. Stolzoff, 71 Cal.App.2d Supp. 849, 162 P.2d 743; People v. Layman, 117 Cal.App. 476, 4 P.2d 244.

[10, 11] Thus on logic, reason and authority it seems clear that any so-called civil presumption may be used in a criminal case where the facts warrant it, and where the application of the presumption does not arbitrarily determine the case or prevent the jury from making an independent investigation of the crucial issues of fact. The presumption of undue influence is rebuttable. As already pointed out, the court clearly and concisely, in other instructions, informed the jury that the effect of the presumption was not to relieve the prosecution of its burden of proof. In our opinion, there was no error in the giving of these instructions.

The arguments in reference to the other instructions need not be specifically noted. Most of the claimed errors are highly technical and all of them are of such a nature that even if erroneous they could not possibly be prejudicial.

Denial of Motion for an Advised Verdict.

[12, 13] Under this separate heading appellant argues once again the sufficiency of the evidence. He claims that at the close of the prosecution's case there was no evidence of an embezzlement or that he had committed the offense charged except for certain claimed extrajudicial statements of defendant. It is true that the elements of a crime cannot be established by the extrajudicial statements of the defendant, and that such statements cannot supply, alone, the *corpus delicti*. 8 Cal.Jur. p. 167, § 248; 8 Cal.Jur. p. 284, § 343; but see People v. Haflinger, 91 Cal.App. 50, 52, 266 P. 561. Of course, the motion for an advised verdict or directed verdict of acquittal was properly denied if the evidence was sufficient to sustain a conviction. People v. Grossman, 28 Cal.App.2d 193, 82 P.2d 76; see cases collected 8 Cal.Jur. p. 284, § 343. The evidence has already been reviewed. Such summary demonstrates to a certainty that, independently of any extrajudicial statements of defendant, the evidence, at the close of the prosecution's case, was ample to sustain the two charges of embezzlement. For this reason the motion was properly denied.

One or Two Offenses?

[14] Appellant was charged with and convicted of two separate charges of grand theft, sentences to run concurrently. It is his contention that if he appropriated the funds at all the evidence shows that he did so under one impulse after he had got both sums in his possession. He contends that, although the evidence shows that he received two separate sums of money at different times, the evidence shows at most that he formed the requisite wrongful intent after both sums were in his possession. This being so, there was but one misappropriation, and, therefore, at most, but one offense. It is undoubtedly the law that, where a trustee lawfully receives money, the crime of embezzlement, which involves a misappropriation after receipt of the money, does not depend upon the time of the acquisition of the funds. People v. Bratton, 125 Cal.App. 337, 14 P.2d 125.

[15] The attorney general's reply to this argument is not very satisfactory. He first seems to treat the offenses as two larcenies and not as two embezzlements. This he may not do. The trial court instructed only on embezzlement. While the evidence may warrant the theory that defendant had the requisite unlawful intent at the very time he received each sum of money, and therefore would have warranted instructions on larceny, the jury was not so instructed. The attorney general may not, therefore, sustain the conviction on charges not submitted to the jury.

[16] The only other argument offered by the attorney general on this point is that even though there was but one offense here and not two, since the sentences are concurrent, the only effect would be a reversal as to one count. That is undoubtedly the law. See People v. Selk, 46 Cal.App.2d 140, 115 P.2d 607; People v. Knowles, 35 Cal.2d 175, 217 P.2d 1.

It is probably true that the evidence can be interpreted as showing but one embezzlement. Certainly it would have been a reasonable interpretation of the evidence to have found that after appellant received the $15,000 on October 30, 1948, and the $31,460 on November 2nd, he then formed the unlawful intent to misappropriate both sums. Had the jury so found, there would have been but one embezzlement.

[17] But that is not the only reasonable interpretation of the evidence. The jury's finding that there were two separate embezzlements is supported. When the evidence is read as a whole it is a possible and a reasonable interpretation of that evidence that appellant received the $15,000 as agent of Kromrey and then formed the unlawful intent to misappropriate it, and then received, also as agent, the second sum, and then formed the unlawful intent to misappropriate that sum. Thus, the problem turns upon just when appellant appropriated the money to his own use. This turns upon his state of mind—a question of fact based upon reasonable inferences. If he made two separate misappropriations it would be two offenses, and this would be

true even if he had both sums in his possession when he made the first misappropriation. People v. Stanford, 16 Cal.2d 247, 105 P.2d 969. The jury was justified in finding two embezzlements.

Hearsay Evidence.

Appellant objects to the admission into evidence of certain statements made by Kromrey to various witnesses as to his lack of intent to make a gift. It is urged that such statements were hearsay, inadmissible, and prejudicial.

The first instance of the admission of such testimony was when attorney Brennan was asked if on December 14th he had had a conversation with Kromrey about his having transferred any personal property or cash to Hewlett. After objection on the ground of hearsay, the prosecutor asked that the conversation be admitted solely to show Kromrey's state of mind on December 14th as it reflected his intention in October and November. The trial court, before permitting the question to be answered, gave a complete cautionary instruction, informing the jury that such statements were admitted solely on the question of Kromrey's state of mind. Brennan was then permitted to answer that Kromrey had never told him that he had made any gifts to Hewlett, that Kromrey stated he still owned the money, and that he did not remember signing any papers at the hospital.

Mrs. McDonald also was permitted to testify as to similar statements made by Kromrey. There are other instances of the admission of similar testimony in the record.

In the instructions given to the jury at the conclusion of the trial the court again gave several cautionary instructions. Among other things, after referring to the testimony in reference to the statements claimed to have been made by Kromrey after the date of the gift instrument, the jury was carefully told that, if they found that such statements were made, they were to consider them only for the limited purpose of shedding light upon the mental condition and intention of Kromrey at the time of the alleged gift transactions. The jury was carefully told that "you must not consider such declarations of Kromrey, if made, as proof of the truth of the matters narrated in such declarations, but solely for such bearing as the fact of making such statements may have upon a showing of the state of mind or intention of George Kromrey at the time of the alleged gift transaction."

[18] When mental condition, intent, or state of mind are in issue, declarations of the decedent made subsequently to the transaction are admissible on such issues. Hansen v. Bear Film Company, Inc., 28 Cal.2d 154, 168 P.2d 946; Dinneen v. Younger, 57 Cal.App.2d 200, 134 P.2d 323; Horsman v. Maden, 48 Cal.App.2d 635, 120 P.2d 92.

In the instant case there were in issue, very definitely, Kromrey's mental capacity and intent at the time that the alleged gift was made. The challenged evidence was admitted for the limited purpose of showing such factors, and limiting and cautionary instructions were given to the effect that the evidence should only be considered in relation to such factors. Under such circumstances it was not error to admit the evidence.

After reading this lengthy record we are convinced that the evidence supports the verdicts. We are further convinced that appellant had a fair trial, and that the jury was fully, fairly, and properly instructed.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

108 Cal.App.2d 719

PEOPLE v. ARNOLD.

Cr. 2750.

District Court of Appeal, First District, Division 2, California.

Jan. 16, 1952.

Hearing Denied Feb. 14, 1952.

Sherman E. Arnold was convicted in the Superior Court, City and County of San Francisco, William T. Sweigert, J., of murder in the second degree and of murder in the first degree and defendant appealed. The District Court of Appeal, Nourse, P. J., held that the evidence was sufficient to sustain the convictions.

Judgment affirmed.

1. Homicide ⇐253(1), 254

Evidence was sufficient to sustain convictions of murder in the second degree and murder in first degree.

2. Homicide ⇐308(3)

In murder prosecution, where defendant shot one person and then shot another person to dispose of eyewitness and took money from one victim, it was reasonable inference that defendant, who was without funds and needed money, shot his victims to obtain money and, as robbery and murder were one continuous transaction, instruction stating that murder committed in attempt to commit robbery is murder in first degree, was proper.

3. Criminal Law ⇐823(4)

In murder prosecution, instruction that, under state law, narcotic addict is guilty of felony if he carries firearm on his person, did not abridge self-defense plea of defendant, who was narcotic addict, in view of fact that jury was fully instructed on self-defense issue.

4. Homicide ⇐340(2)

In murder prosecution, instructions on plea of self-defense were not prejudicial as plea was not supported by any credible evidence.

5. Criminal Law ⇐1172(6)

In murder prosecution, though no evidence justified portion of instructions relating to defendant's pursuit of his adversaries, jury was not misled by such instructions as it was aware of its duty to decide case on evidence.

6. Criminal Law ⇐783(2)

In murder prosecution, where defendant admitted he had been convicted of felony and had been placed on probation and confined in hospital, instruction that fact of such conviction could be used only for purpose of judging his credibility as witness, was proper.

7. Criminal Law ⇐406(1), 781(1)

In murder prosecution, defendant's extra judicial statement of his reason for shooting one of two victims was admission not confession, and admission of statement in evidence required no special instruction from court.

Alfred J. Hennessy, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. of California, David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant was tried to a jury on an indictment in two counts charging murder in the second degree for the killing of one Cavness and in the first degree for the killing of one Greenway. Conviction was had on both counts, the jury recommending a life sentence on the second. He appeals from the judgment and the order denying his motion for a new trial.

Appellant does not comply with the rule requiring a statement of the grounds relied on but we may glean from his opening brief that after attacking twelve instructions given or refused, he contends that the evidence is insufficient and that the two verdicts are irreconcilable. On the question of the evidence our statement of the facts herein is sufficient answer. On the question of the difference in the verdicts the undisputed evidence coming from the defendant's own statement is that, after he had shot Cavness in the back of the head, he realized that Greenway would be a material witness against him and thereupon shot the latter to close his lips. Further treatment of

this incident will appear in our discussion of the instructions covering the degrees of murder.

[1] The facts are not in material dispute, a large part of the material evidence coming from defendant's statements. It is a sordid story. The defendant was a young man of twenty-six years, married, and the father of three children. These he abandoned, sold his home, and pledged the personal belongings of the family to get money to buy narcotics. The victims of the homicide were two Negroes who were engaged in a profitable business of selling narcotics. Defendant was a constant customer of the deceased and a short time before the homicides he was in debt to them in the sum of $114, to secure which he had pledged some of the family assets. At the time of the homicides he had left his family home and was rooming with another party in San Francisco. Prior to the homicides he tried to procure more dope from his victims, but they insisted upon payment of what was then due. He told them he expected his mother to give him a loan and persuaded them to drive him to his new abode to get the expected check. There he went into the house, found no check had come from his mother, procured a forty-five automatic pistol from the landlady, slipped one cartridge into the chamber, and placed the gun in his belt. He then went out to the street where the two colored boys were waiting in their Cadillac sedan and told them the money had not arrived. They ordered him to get into the car "as they wanted to talk the matter over." Cavness drove, Greenway sat in the front seat to his right, defendant sat in the rear. They drove to an unlighted area in Duncan Heights where they stopped the car and made repeated demands on defendant for payment, and, according to defendant's testimony, accompanied these demands with threats. The defendant drew his gun, shot Cavness in the back of the head, and then as Greenway turned to look at him, the defendant sensed that he would be a witness to the murder and shot him through the head. Defendant turned off the car lights, took $250 in cash from the pocket of Cavness, and returned to his rooming house where he gave his landlady $40 for the gun he had borrowed from her. He was arrested a few days later sitting in a closed motor vehicle in an unfrequented highway out of Redwood City where he had attempted to commit suicide with the use of a rubber hose attached to the exhaust pipe. With the aid and direction of the defendant the police officers found the gun used in these homicides several yards from the decedents' car partly buried in the ground. There is no contradiction of any of these facts meriting consideration. Its sufficiency to support the charges in the indictment can not be questioned.

[2] Appellant complains of the instruction stating that a murder committed in an attempt to commit robbery is murder in the first degree. The instruction was clearly appropriate and in accord with the admitted facts. Appellant shot Greenway in order to dispose of an eyewitness and thereupon took from the pocket of Cavness a wallet containing $250. It is a reasonable inference that the appellant, being without funds and in need of another supply of narcotics shot his victims to obtain money for that purpose. In any event the robbery and the murder were one continuous transaction. People v. Miller, 121 Cal. 343, 53 P. 816; People v. Chavez, 37 Cal.2d 656, 234 P.2d 632.

[3] He complains of the instruction telling the jury that, under our state law, a narcotic addict is guilty of a felony if he carries a firearm on his person. His argument is that since the gun "was only casually related to the encounter" the instruction tended to abridge his plea of self-defense. How this could be we are not informed since the jury was fully instructed on the self-defense issue.

[4] Criticism is made of two instructions relating to the plea of self-defense. Both instructions might well have been omitted since there was no evidence that, prior to the shooting, defendant had sought a quarrel with either of the deceased with a design to force a deadly issue. However neither instruction was prejudicial since the plea of self-defense was not supported by any credible evidence. The defendant

was seated in the automobile behind both of his victims. He was armed with an automatic pistol with one cartridge in the chamber. His victims were not armed. He shot them in the back though he had ample opportunity to escape if he feared a beating. Other instructions on the same plea were nonprejudicial. But we do not approve of the common practice of copying long and complicated instructions in the charge to the jury just to make the case look big.

[5] There was no evidence justifying the portion of the instructions relating to the defendant's pursuit of his adversaries. But we can not conceive that the jury was mislead by it since the jury was aware of its duty to decide the case on the evidence, and not upon pedantic dissertations on abstract questions of law.

[6] Appellant admitted he had been convicted of a felony in the federal court (sale of narcotics). He had been placed on probation and confined in a hospital in Fort Worth, Texas. He complains now of the portion of an instruction that the fact of such conviction may be used only for the purpose of judging his credibility as a witness. The instruction was proper.

[7] Complaint is made of the failure of the trial court to give an instruction "sua sponte" on the subject of confessions. Evidence was given that soon after his arrest appellant told the police that he shot Greenway "because he saw me shoot Cavness." This implied that he shot to dispose of a material witness. Appellant testified in open court that he shot both Cavness and Greenway. His extra judicial statement of his reason for shooting Greenway was an admission, not a confession, and required no special instruction. People v. Castello, 194 Cal. 595, 601, 229 P. 855; People v. Cryder, 90 Cal.App.2d 194, 203, 202 P.2d 765.

The suggestion that the trial court erred in failing to instruct "sua sponte" on the subject of the corpus delicti does not merit discussion.

The asserted inconsistencies in the verdict (murder in the second degree in the first count, and murder in the first degree on the second count) do not add to the comments heretofore made on the same subject, and do not merit further consideration.

The judgment and the order are affirmed.

GOODELL, J., and PATTERSON, J. pro tem., concur.



108 Cal.App.2d 730

ALLES et al. v. HIPP.

Civ. 18724.

District Court of Appeal, Second District, Division 3, California.

Jan. 16, 1952.

Rehearing Denied Feb. 7, 1952.

Hearing Denied March 13, 1952.

Wayne Alles, doing business as Wayne Alles Company, sued John B. Hipp, for value of plaintiff's services as a real estate appraiser and valuation witness. Defendant filed a counterclaim. The Superior Court of Los Angeles County, John J. Ford, J., entered judgment for plaintiff for $300 and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained finding that plaintiff fulfilled his contract and that finding that valuation of defendant's realty arrived at in condemnation proceeding or any damage suffered by defendant was not due to incompetence of plaintiff as alleged real estate expert, was sufficient to dispose of the issues.

Judgment affirmed.

1. Contracts ⇐322(3)

Witnesses ⇐34

In action to recover for value of plaintiff's services as a real estate appraiser and as a valuation witness for defendant in a condemnation proceeding, evidence sustained finding of trial court that plaintiff fulfilled his contract and employed knowledge, skill and ability which was required.

2. Appeal and Error ⇐931(1)

If reasonably possible, findings should be construed so as to support conclusions and judgment.

3. Witnesses ⇐34

In action to recover for value of plaintiff's services as real estate appraiser and as a valuation witness for defendant in condemnation proceeding, finding that valuation of defendant's property arrived at by jury or any damage suffered by defendant was not due to incompetence of plaintiff as alleged expert on real estate values was sufficient finding that plaintiff was not responsible for any lack of success of defendant in establishing a higher value for his property.

4. Appeal and Error ⇐219(2), 293

Losing party should not be permitted to criticize findings as ambiguous when he has made no objections, either before they were signed or later on motion for a new trial.

Myron W. Silverton, Los Angeles, for appellant.

No appearance for respondent.

SHINN, Presiding Justice.

Defendant appeals from a judgment of $300 awarded plaintiff for his services as a real estate appraiser and valuation witness. His contentions are that the evidence does not support the findings and that the findings do not dispose of all the issues.

Defendant was the owner of property on Beaudry Avenue in Los Angeles, which was being acquired by the State through condemnation. He employed plaintiff to make a report as to the value of his property for $300, and to testify in court as to its value at $100 per day. Plaintiff made a written report and was paid therefor $300. He was on the witness stand three days, a major portion of which time was consumed in cross-examination by the attorney for the State. He was refused compensation for his attendance upon court, and brought the present action in the Municipal Court. Defendant filed a counterclaim for large damages alleged to have been suffered by reason of plaintiff's incompetence as a witness, and the case was transferred to the Superior Court. By his answer defendant alleged that although plaintiff represented himself to be well qualified, his services were incompetently rendered, worthless and detrimental; that to induce his employment plaintiff represented that defendant would receive not less than $37,000 for his property and that his, plaintiff's, services would not require more than one day in court. It was alleged, as purely evidentiary matter, that as a witness plaintiff became "rattled, nervous, confused and inconsistent"; that he was ridiculed by the attorney for the State as a "chaser" and a "liar"; that the trail judge in his instructions intimated that he has been untruthful, and, in general, that plaintiff's efforts to establish a value of $39,500 for the property were so futile, and so altogether pitiful, that they influenced the jury against defendant, with the result that he was awarded but $29,000 for his property, whereas it was worth not less than $37,000. Defendant sought $8,000 as damages.

[1] The claim of insufficiency of the evidence to prove that plaintiff fulfilled his contract is presented as a discussion of the weight of the evidence and inferences therefrom. According to plaintiff's testimony he was a highly qualified expert and his services as such were competently rendered. According to the testimony of the defendant, which had some corroboration, plaintiff put forth a miserable effort to establish a value for the property of $39,500. Defendant lived on his property and for twenty-five years had been a real estate broker. He had ample opportunity to judge of plaintiff's qualifications before he used him as a witness, as did his attorney. The question in the present action was whether plaintiff, as an expert witness, had employed the knowledge, skill and ability which was required for fulfillment of his contract. The entire matter was gone into at length and there is ample evidence in the record to sustain the conclusion of the trial court.

The remaining question has to do with the sufficiency of the findings. These were drafted by counsel without comprehension of the simple factual questions which the court was required to decide. The draft was a confused mixture of facts admitted by the pleadings, evidentiary facts pleaded in the complaint, the answer and the coun-

terclaim, and facts not relevant to the issues. The trial judge made many extensive deletions, corrections and additions, but it would have been impossible to put the findings into satisfactory form without rewriting them entirely. It is a situation to which we are well accustomed and which occasions no surprise. A proper set of findings is a rarity in our experience.

After finding that plaintiff was employed as alleged (and as admitted by the answer), the court found that plaintiff did not represent that he would be in court not more than one day, or that the value of defendant's property was $37,000, or that if he testified defendant would receive not less than $37,000 for his property. The only finding that was at all relevant to the ultimate questions of fact reads as follows: "That it is not true that by reason of said incompetence of said Alles as an alleged expert on real estate values, his methods of conducting his business, the said instruction of the trial judge that a witness false in one particular could be disbelieved by them in all particulars, and said references by the states attorney to Alles as a 'chaser' and 'liar', or by reason of any of said matters, the jury was proximately caused to become and did become, so influenced against defendant in said condemnation action, that it allowed said defendant only the sum of $29,000.00 for his property, to his damage in the sum of $8,000.00 or any other sum."

This finding, and others which were crossed out by the trial judge, are products of the mistaken belief that there must be a finding as to each allegation and each denial of every pleading in the case. It is a common practice to have findings upon allegations of the complaint which are admitted by the answer, upon evidentiary matters, upon probative facts and upon immaterial facts. A frequent result is that the findings as a whole are contradictory, confusing, and when related to entire paragraphs of the complaint or answer partially or wholly contrary to the admitted facts. It is seldom that we encounter findings on the ultimate issues and upon those alone. More often we have to grope for the essential findings, as we now proceed to do.

The employment and the rendition of services being admitted, the only matter in issue was whether plaintiff's services were rendered in a competent manner or, in other words, whether he had fulfilled his contract. There was no direct finding on it, one way or the other, although there should have been. It is therefore necessary to determine whether the quoted finding serves the purpose.

[2, 3] It is a familiar rule that, if reasonably possible, findings should be construed so as to support the conclusions and judgment. 24 Cal.Jur. p. 1009; 23 McKinney's Calif.Digest, p. 624. Under a liberal application of this rule the above finding means that the valuation of $29,000 arrived at by the jury or any damage suffered by defendant was not due to "said incompetence of said Alles as an alleged expert on real estate values," or to any of the other matters mentioned. (We must reject the construction that incompetence of plaintiff, and that he was only an "alleged" expert, and that defendant suffered damage, were assumed to be facts.) Therefore the finding also means, under a liberal interpretation, that defendant was not damaged in any sum by reason of the incompetence of plaintiff, which is a circuitous way of saying that even if defendant suffered damage it was not due to plaintiff's failure to fulfill his contract. We hold the finding in question to be sufficient. But we reach this conclusion only because the trial judge must have understood it as a finding that plaintiff was not responsible for any lack of success of defendant in establishing a higher value for his property; otherwise plaintiff would not have been given judgment.

[4] The court did not fail to find on a material issue. The point is that it is difficult to ascertain what the court did find. It does not appear that defendant objected to the form of the finding above quoted, and it does appear from the clerk's transcript that he made no motion for a new trial. Had it been pointed out to the trial court that the finding made multiple use of the negative pregnant, with implications that plaintiff was only an "alleged" expert and incompetent, etc., and that defendant

had suffered damage but that the damage did not result from plaintiff's incompetence, etc., a proper correction would no doubt have been made. The losing party should not be permitted to criticize the findings as ambiguous when he has made no objection to them, either before they were signed, or later on motion for a new trial. Matlin v. Crescent Commercial Corp., 93 Cal.App.2d 8, 12, 207 P.2d 873; Del Ruth v. Del Ruth, 75 Cal.App.2d 638, 171 P.2d 34.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



108 Cal.App.2d 743

TAYLOR v. COACHELLA VALLEY COUNTY WATER DIST. et al.

COACHELLA VALLEY COUNTY WATER DIST. v. TAYLOR et al.

Civ. 4430, 4431.

District Court of Appeal, Fourth District, California.

Jan. 17, 1952.

William M. Taylor brought an action against Coachella Valley County Water District, and others, to quiet title to realty, and Coachella Valley County Water District brought an action against William M. Taylor, and others, to quiet title to realty. The actions were tried at the same time. The Superior Court of Riverside County, John A. Gabbert, J., rendered a judgment in each action adverse to William M. Taylor and he appealed from both judgments. The District Court of Appeal, Mussell, J., held that evidence sustained findings that the District was owner of the parcels of realty involved and was entitled to possession thereof.

Judgments affirmed.

1. Estoppel ⇐39

Quitclaim deeds to realty only operated to transfer such interest as grantors therein had and did not carry any after-acquired title.

2. Quieting Title ⇐10(1)

In action to quiet title to realty plaintiff may recover only upon strength of his own title and not upon weakness of defendant's title.

3. Quieting Title ⇐10(2)

Where plaintiff in action to quiet title to realty relies upon paper title alone plaintiff must trace his title to the government or a grantor in possession at time of conveyance to plaintiff, or to a source common to chains of title of plaintiff and defendant.

4. Waters and Water Courses ⇐183½

In action to quiet title to three parcels of realty, brought against a water district by plaintiff who claimed title under deeds from various grantors, wherein district presented evidence in support of its title to one parcel showing unpaid district taxes, collector's deeds showing title in district, and judgment quieting title in district, and wherein district introduced evidence of its title to another parcel by collector's deeds showing title in district, and wherein district's title to remaining parcel was shown by evidence of unpaid district taxes, by collector's deed, by deed from state, and by judgment quieting in district, evidence sustained findings that district was owner of parcels involved and was entitled to possession thereof.

William M. Taylor, Coachella, in pro. per.

Earl Redwine, Riverside, for respondent Coachella Valley County Water Dist.

MUSSELL, Justice.

In the first of these quiet title actions, plaintiff, William M. Taylor, seeks to quiet title to three parcels of real property in Riverside county. In the second action, plaintiff, Coachella Valley County Water District, seeks to quiet title to real property included in that described as Parcel No. 1 in the First Amended Complaint in the first action. These actions were tried at the same time and there is one reporter's transcript. The trial court rendered a judgment in each action quieting title in

the Coachella Valley County Water District and Taylor appeals from both judgments.

William M. Taylor, as plaintiff, claims title to Parcel No. 1 by three quitclaim deeds, one from Mrs. F. L. Walters, dated February 4, 1946; one from Buena Vista Smith, dated January 18, 1946; and one from W. B. Thayer, dated June 25, 1946. Taylor claims title to Parcel No. 2 by a grant deed from A. C. Helvey, dated February 4, 1946, and claims title to Parcel No. 3 by a deed from Walter Flockton, dated January 15, 1947. No evidence was introduced showing that any of the grantors named in any of these various deeds were ever in possession of the property involved and there was no proof offered as to the antecedent title of any of the grantors.

Plaintiff Taylor also relied upon what he claimed to be deeds from the State of California, which were in fact Riverside County Treasurer's receipts and certificates of redemption. No attempt was made by appellant Taylor to show that title could be or was conveyed to him by reason of these documents.

[1] The Coachella Valley County Water District presented evidence in support of its title to Parcel No. 1 showing unpaid district taxes thereon since prior to 1935; 12 collector's deeds dated from September 6, 1939, to September 5, 1944, showing title in the district; and a judgment of the Superior Court in and for the County of Riverside, dated June 2, 1950, quieting title in the name of the district to this property. The Taylor quitclaim deeds are all subsequent to the time when this land was deeded to the district by the 12 collector's deeds. The quitclaim deeds only operated to transfer such interest as the grantors therein had and did not carry any after-acquired title. Buller v. Buller, 62 Cal. App.2d 694, 699, 145 P.2d 653; Lombardi v. Sinanides, 71 Cal.App. 272, 277, 235 P. 455. The district introduced evidence of its title to Parcel No. 2 by 30 collector's deeds bearing dates from September 6, 1939, to September 5, 1942, showing title in the district. The last of these collector's deeds was executed, delivered and recorded almost four years before Taylor received a deed from Helvey to Parcel No. 2. The district's title to Parcel No. 3 was shown by evidence of unpaid district taxes since prior to 1935; by a collector's deed dated September 6, 1939; by a deed from the State of California, dated September 25, 1946, and by a judgment of the Superior Court in and for the County of Riverside in an action designated Coachella Valley County Water District v. Walter Flockton and Ethel Flockton, No. 42427, quieting title in the respondent district to this parcel.

Appellant Taylor argues that the taxes levied by the district were void because the parcels involved received no benefits by being included in the water district and that it was not shown that the district had the power to levy taxes. Both of these contentions were answered adversely to appellant Taylor in Helvey v. Sax, 38 Cal. 2d 21, 237 P.2d 269, where it was held that the tax deeds were prima facie evidence that the property was assessed as required by law and that since the plaintiff's predecessors in interest failed to challenge the tax in the manner required by statute, plaintiff was precluded from making a collateral attack on the tax proceedings.

[2–4] It is well settled that in a suit to quiet title the plaintiff may recover only upon the strength of his own title and not upon the weakness of that of the defendant and that where, as here, the plaintiff relies upon paper title alone, he must trace his title (1) to the government; or (2) to a grantor in possession at the time of the conveyance to the plaintiff; or (3) to a source common to the chains of title of plaintiff and defendant. Helvey v. Sax, 38 Cal.2d 21, 237 P.2d 269. Taylor failed to establish his title to the property involved and the evidence was sufficient to sustain the trial court's findings that the district is the owner and entitled to the possession thereof.

The judgments are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

108 Cal.App.2d 701

BETTS v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 14768.

District Court of Appeal, First District, Division 2, California.

Jan. 16, 1952.

Rehearing Denied Feb. 15, 1952.

Hearing Denied March 13, 1952.

Action by Elmer W. Betts against the City and County of San Francisco to recover damages for death of plaintiff's seven year old son by drowning in an artificial reservoir maintained by defendant in playground area of a park. The Superior Court, City and County of San Francisco, John B. Molinari, J., entered judgment on a verdict in favor of plaintiff, and defendant appealed. The District Court of Appeal, Nourse, P. J., held that attractive nuisance doctrine was not applicable since reservoir was surrounded by substantial picket fence and concrete spillway from which boy slipped into reservoir was an open and obvious source of danger.

Judgment reversed.

1. Evidence ⇐7

It is a matter of common knowledge among children and adults that wet concrete is slippery and that, when on a slanting incline, it does not provide a safe footing.

2. Negligence ⇐39

In action against city and county for death of seven year old boy when he climbed four and one-half or five foot picket fence surrounding artificial reservoir maintained by defendant in playground area of park in order to obtain a drink from pipe through which water was pumped into reservoir and slipped on steep concrete spillway and was drowned, "attractive nuisance" doctrine was not applicable, since fence surrounding reservoir gave sufficient notice that it was not a place of public recreation or one which the public could use for drinking water, and concrete spillway, when used as a foot path, was an open and obvious source of danger and not a hidden danger.

See publication Words and Phrases, for other judicial constructions and definitions of "Attractive Nuisance".

3. Municipal Corporations ⇐756, 847

Liability of municipalities under Public Utility Act for damages resulting from defective streets, works, or property is limited to damages suffered in the ordinary, usual and customary use of such streets, works or property. Government Code, § 53051.

4. Municipal Corporations ⇐851

Statute fixing liability of municipalities for damages resulting from defective streets, works or property was not applicable in action against city and county for death of seven year old boy by drowning when he climbed substantial picket fence surrounding reservoir and attempted to obtain a drink from pipe from which water was pumped into artificial reservoir maintained by defendant in a public park for the purpose of producing an artificial waterfall and for irrigation purposes. Government Code, § 53051.

Dion R. Holm, City Atty. of City & County of San Francisco, William F. Bourne, Deputy City Atty., San Francisco, for appellant.

Partridge & O'Connell, Robert G. Partridge, John Whitney, San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff had a verdict for $8,500 in damages for the death by drowning of his son in an artificial reservoir maintained by the City and County in the playground area of Golden Gate Park. This reservoir was located on Strawberry Hill which is an island-like body of land in the middle of Stow Lake. It was designed to provide an artificial waterfall for the pleasure of the public on Sundays and holidays and also for purposes of irrigating some of the lower areas. It was completely surrounded by a four and one-half or five foot picket fence in good condition. At one end two pipes or cement openings were maintained —one for pumping water into the reservoir and one for drawing it out. From the pipe or hood through which the water was spilled into the reservoir ran a cement spill-

way at a steep slant into the body of the reservoir. On the day of the accident this spillway had become slippery from moss and water.

Plaintiff's son was seven years old. He was playing about the reservoir with another boy of about the same age. When they decided to get a drink of water out of the pipe where the water was thrown upon the spillway they climbed over the picket fence and descended the side of the reservoir. The deceased went first and, while trying to drink out of the pipe, lost his footing and slipped into the water. His companion tried to rescue him but he also slipped on the mossy spillway and both boys were drowned.

Over defendant's objection the plaintiff was permitted to show that an eight year old boy was drowned in the same reservoir about one year previous to this incident. The defendant objected to this evidence on the ground that the Public Utility Act of 1923 (now section 53051 of the Government Code) was not involved. Objection is now made to the admission of this evidence and to the instruction applying the statute. Plaintiff put his case mainly on the attractive nuisance doctrine and the trial court submitted that issue to the jury on instructions tendered by plaintiff. The defendant on this appeal makes the contention that the attractive nuisance doctrine was not applicable under the facts as a matter of law.

A clear statement of appellant's position is found in Peters v. Bowman, 115 Cal. 345, 350, 47 P. 113, 114, where the court said: "A body of water—either standing, as in ponds and lakes; or running, as in rivers and creeks; or ebbing and flowing, as on the shores of seas and bays—is a natural object, incident to all countries which are not deserts. Such a body of water may be found in or close to nearly every city or town in the land; the danger of drowning in it is an apparent open danger, the knowledge of which is common to all; and there is no just view, consistent with recognized rights of property owners, which would compel one owning land upon which such water, or part of it, stands or flows, to fill it up, or surround it with an impenetrable wall."

In accord are Polk v. Laurel Hill Cemetery Ass'n, 37 Cal.App. 624, 634, 174 P. 414, 418, where an eight year old boy was drowned in an open and unfenced reservoir. A demurrer to the complaint was sustained on the ground that the doctrine was not applicable, the court concluding that "a pond of water, whether natural or artificial, is not to be included in the same class with turntables and other complicated machinery, the inherent dangers of which are not obvious to a child." Reardon v. Spring Valley Water Co., 68 Cal.App. 13, 228 P. 406 follows the Peters and Polk cases. There a fence surrounding a reservoir of water was out of repair. A boy crawled through an opening, boarded a rowboat and was drowned. The court affirmed an order sustaining a demurrer on the authority of the Peters and Polk cases. Beeson v. Los Angeles, 115 Cal.App. 122, 300 P. 993 followed the same rule. Then came Sanchez v. East Contra Costa Irr. Co., 205 Cal. 515, 271 P. 1060, where the irrigation district maintained a hidden and unguarded siphon at the bottom of its ditch through which the water rushed at great speed. This was held to be a hidden danger and judgment went for the plaintiff whose son was sucked into this siphon and drowned. This case was discussed at length in Melendez v. City of Los Angeles, 8 Cal.2d 741, 68 P.2d 971, where two boys were drowned while playing in an open drain sewer. The court affirmed the order sustaining a demurrer without leave to amend. The Supreme Court approved the Peters, Polk and Beeson cases and distinguished the Sanchez case on the ground that there the dangerous siphon was hidden, unprotected, and unguarded. Demmer v. City of Eureka, 78 Cal.App.2d 708, 178 P.2d 472 follows the above authorities.

[1, 2] Respondent's effort to distinguish these cases on the basis of the "hidden or concealed" danger theory is not effective. It is a matter of common knowledge among children and adults that wet concrete is slippery and that, when on a slanting incline as is so prevalent on the streets and

sidewalks of San Francisco, it does not provide a safe footing. In surrounding the reservoir by a substantial fence the City gave to all persons young and old sufficient notice that this reservoir was not a place of public recreation and that it was certainly not a place which the public could use for drinking water. The so-called hidden danger in the concrete intake was to the contrary a natural contrivance for carrying the water into the lake, and, when used as a foot-path, was an open and obvious source of danger.

Appellant also contends that it was error to submit to the jury the question of the liability of the City under the Public Liability Act. A persuasive argument is made that such act applies only when the injured party was using the public property, or facility, in the ordinary and usual manner for which the property was maintained. Respondent relies on the opinion of the Supreme Court in Gibson v. County of Mendocino, 16 Cal.2d 80, 105 P.2d 105, which casts considerable doubt on the distinction between an invitee and a licensee in such cases.

[3, 4] The applicable rule is well stated in Beeson v. City of Los Angeles, 115 Cal.App. 122, 132, 300 P. 993, 997, where the court said: "In all of the cases thus far decided the injured party was using the street in which he was injured, or the property which caused the injury, in the usual and ordinary manner in which it was contemplated that the street or property would be used. We are of the opinion that in passing and adopting section two of the act approved June 13, 1923, the Legislature intended to limit the liability of the city for damages resulting from defective streets, works, or property to damages suffered in the ordinary, usual, and customary use thereof." Other cases in accord are cited in 9 Cal.Jur. 10 Yr.Supp. 697–698. The Gibson case can be readily distinguished. There the plaintiff was injured in opening a door of the county court house on her way to take a short cut through the building and to make an exit through another door. It was held that the doors and corridors were maintained for public transit, and that, though the plaintiff had no official business to transact in the court house she was nevertheless a licensee and not a trespasser.

A different question arises when public property is being used by a trespasser for a forbidden private purpose. Thus, if an adult finds a reservoir completely surrounded by a protecting fence as a warning to all to keep out but he, in disregard of the warning, scales the fence and enters the reservoir to take a swim, or to try for fish, he is making use of the reservoir for a use for which it was not maintained by the public. In such a case it would seem clear that he would not come under the terms of the Public Liability Act.

Judgment reversed.

GOODELL, J., and PATTERSON, J. pro tem., concur.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.



108 Cal.App.2d 588

HELLMAN v. HELLMAN.

Civ. 14724.

District Court of Appeal, First District, Division 1, California.

Jan. 9, 1952.

Action by Thelma Hellman against Henry Hellman for divorce on ground of extreme cruelty. Herman Hellman filed cross-complaint for divorce. The Superior Court in and for the County of San Mateo, A. R. Cotton, J., entered interlocutory decree which granted plaintiff a divorce, divided community property, and awarded plaintiff alimony and counsel fees, and defendant Henry Hellman appealed. The District Court of Appeal, Fred B. Wood, J., held that it could not be said as matter of law that there was not sufficient evidence corroborative of wife's testimony as to acts of extreme cruelty and consequent effects on her health.

Judgment affirmed.

1. Divorce ⇐127(4)

In action by wife against husband for divorce on grounds of extreme cruelty,

wherein neighbor of parties testified that she had noticed apparent unhappiness of parties for past year and that it made wife nervous and tense, it could not be said as matter of law that there was not sufficient corroborative evidence of wife's testimony as to course of conduct of husband amounting to cruelty and tension and nervousness which resulted therefrom.

2. Divorce ⇐127(4)

The principal object of rule requiring corroboration in divorce case is to prevent collusion between parties, and when it is clear from evidence in a contested action that there is no collusion, court is justified in granting decree upon evidence which is only slightly corroborated, if the court is otherwise satisfied that prevailing party is entitled to decree.

3. Evidence ⇐568(1)

It is function of court in divorce action to determine ultimate facts, and opinions and conclusions of witness, even though admitted in evidence, cannot bind or control court in making its findings.

4. Divorce ⇐235

In divorce action in which it appeared that wife was suffering from hernia which would thereafter preclude her from doing heavy or arduous labor, and that wife was incapable of adequately performing functions of secretary by reason of her long inactivity in such work and that home awarded to wife in property division was not income producing and was encumbered in amount of $5,000 with monthly payments of $60, award of alimony of $125 per month was not an abuse of discretion, even though such award would consume nearly half of earnings of husband.

5. Divorce ⇐235, 286

The allowance of alimony rests within discretion of trial court, and appellate courts will interfere only when there is an abuse of discretion.

6. Divorce ⇐249(6)

Where wife procured divorce from husband on grounds of extreme cruelty, and major asset of parties was family home which was community property, award to wife of family home, furniture, furnishings and equipment therein, was not an abuse of discretion, even though such award gave wife virtually all of community property, since court was bound to award something more than half of community property to party who suffered wrong. Civ.Code, §§ 146, 148.

7. Divorce ⇐252

Statute requiring court which grants divorce to party on ground of extreme cruelty to assign community property to respective parties in such proportions as court, from all facts of the case, and condition of parties, may deem just, is construed as meaning that court must award more than one-half to party who has suffered wrong, with determination as to how much more than one-half is to be awarded, resting in sound discretion of trial court. Civ.Code, §§ 146, 148.

8. Divorce ⇐286

Every intendment is in favor of award of community property made by court in favor of successful party in divorce action on ground of extreme cruelty.

9. Divorce ⇐228

Order reciting that award of counsel fees of $200 in addition to any sum heretofore paid, when read in light of original request by wife in her complaint and court's order in response to that request, entered a year prior to trial and filing of husband's answer and directing husband to pay wife forthwith the sum of $200 on account of counsel fees, could not be characterized as award for past services even though made at conclusion of trial.

Norman S. Menifee, Redwood City, for appellant.

Francis N. Foley, San Mateo, for respondent.

FRED B. WOOD, Justice.

Defendant appeals from an interlocutory decree which granted plaintiff a divorce on the ground of extreme cruelty, divided the community property, and awarded plaintiff alimony and counsel fees.

Appellant bases his appeal upon asserted (1) lack of corroboration of respondent's testimony concerning the alleged acts of cruelty; (2) erroneous award of support and maintenance to respondent; (3) erroneous award of all the community property to respondent; and (4) award of counsel fees for services already rendered.

(1) As to proof of acts of cruelty, respondent testified that for about five years prior to the separation appellant's attitude was extremely critical; he seemed to be unreasonable; he could not be pleased; he criticized everything she did and made her life at home unbearable in every way; he objected to her knitting; he did not make friends easily and did not seem to like anyone with whom respondent associated, and made things uncomfortable in the home for anyone who came there. This attitude and these expressions on his part were constant during those five years. At various times he talked about someone else he was interested in; he told respondent on several occasions that if she was not satisfied with the way he was, there was some woman who would be. Asked about the effect of this course of conduct on her health, she said there was tension in the home all the time and she found it better if she spent as much time as possible away from home. She joined a couple of garden clubs. She could not get appellant interested in any outside interests, although he did attend a couple of Christmas parties. He never offered to take her any place. There was an entire lack of cordiality and feeling on his part toward her. As to the separation, respondent testified: One morning appellant came into her room and told her he was leaving and taking the car; that this was a separation—he would not be back; that he had seen a lawyer in San Francisco; that he was leaving so she could get a divorce. She asked him for some money, because he had not given her any for a week before that, and he told her there was $10 on the dresser and the telephone number of his attorney in San Francisco and for her to get in touch with the attorney. That is all the money he left her. He took the automobile with him.

[1, 2] The corroborating witness lived next door to the parties for two years prior to the separation. She testified that she was often in their home; that she always felt that they were very ill-suited to each other; that they did not have much in common at all. Asked if appellant was morose and quiet, she said, "Yes, he always seemed quiet." She never knew of appellant ever taking respondent to places of amusement or places of that nature. She did not think they cared very much for the same thing. She had noticed that situation existing for about a year. Asked if she observed any effect on respondent with regard to that treatment, she said, "I think they were unhappy," and that it made respondent nervous and tense. Here, there is corroboration of some of the material facts related by the respondent. We cannot say as a matter of law that it is insufficient. "The principal object of the corroboration rule is to prevent collusion between the parties, and where it is clear from the evidence in a contested action that there is no collusion the court is justified in granting the decree upon evidence which is only slightly corroborated if otherwise the court is satisfied that the prevailing party is entitled to a decree." Tompkins v. Tompkins, 83 Cal. App.2d 71, 76, 187 P.2d 840, 843, corroboration of one of a series of acts, in a contested case; see, also, Keener v. Keener, 18 Cal.2d 445, 449, 116 P.2d 1; Krull v. Krull, Cal.App., 233 P.2d 13; La Vigne v. La Vigne, 96 Cal.App.2d 531, 534, 216 P.2d 75; Cairo v. Cairo, 87 Cal.App.2d 558, 561–562, 197 P.2d 203; McGann v. McGann, 82 Cal. App.2d 382, 386–387, 186 P.2d 424; Serns v. Serns, 70 Cal.App.2d 527, 529, 161 P.2d 417; Ungemach v. Ungemach, 61 Cal.App. 2d 29, 34, 36–39, 142 P.2d 99. Unlike Truax v. Truax, 62 Cal.App.2d 441, 145 P.2d 88, upon which appellant relies, this corroborating testimony does relate to conduct narrated by the respondent. We have examined the other cases which appellant invokes but find them inapplicable. In Farrand v. Farrand, 77 Cal.App.2d 840, 176 P. 2d 773, there was corroboration but the reviewing court concluded that the acts proven were not acts of cruelty which

caused grievous mental suffering. In Dean v. Dean, 97 Cal.App.2d 455, 218 P.2d 54, there was no corroboration at all by a third party, as we read the decision. Gleason v. Gleason, 13 Cal.App.2d 231, 56 P.2d 973, was decided upon the basis of corroboration of inconsequential points only. In Del Ruth v. Del Ruth, 75 Cal.App.2d 638, 171 P.2d 34, there was corroboration which the reviewing court deemed sufficient to support the judgment. The cause was remanded for a new trial because the losing party had been arbitrarily and unreasonably limited in the presentation of her case. In Negley v. Negley, 82 Cal.App.2d 355, 186 P.2d 151, the judgment was reversed for insufficient evidence of grievous mental suffering, not for insufficient corroboration of the respondent's testimony even though the reviewing court described the corroboration as meager.

[3] Appellant stresses the following testimony of the corroborating witness, given upon cross-examination: "Mr. Menifee [attorney for appellant]: All you observed, they did not seem to be happy, is that right? A. Yes.

"Q. You don't know any reason for it, do you? A. No, it did seem like two people were living together who should not be together.

"Q. You did not blame any particular one? A. That would be difficult to do"; and the following, upon redirect examination:

"Mr. Foley [attorney for respondent]: Q. Did you notice any conduct by Mr. Hellman towards Mrs. Hellman that you felt was not proper or could be objected to? A. No.

"Mr. Menifee: Q. Or vice versa? A. No."

Insofar as this pertained to probative facts, it tended to produce inconsistencies and uncertainties in the testimony of the witness, which it was the function of the trial court to resolve. Most of it pertained to ultimate facts which it was the function of the court, not the witness, to determine. Such opinions and conclusions of the witness, even though admitted in evidence, could not bind or control the court in making its findings. See cases cited in 10 Cal. Jur. 948, § 211.

[4] *(2) The award of alimony,* $125 per month, appellant claims is unreasonable because it will consume nearly half of his earnings and because respondent worked prior to the marriage and was working part of the time during the marriage. He also urges that the award of the home and furnishings to respondent lends emphasis to the asserted unreasonableness of the alimony award.

[5] This claim overlooks the evidence that respondent is unable to do any heavy or arduous labor because of a hernia which needs attention; she had been previously employed, despite the hernia, because that work was mostly "mental"; the work she has been able to find she would be unable to carry on unless the hernia is repaired; she has inquired of two doctors and finds the operation for hernia, and the convalescing, would be quite expensive, about $500; she has not done anything about it because of the expense; she would try secretarial work but has not done any for many years and her typing is very slow and not correct; since the separation, she has had dental work done, and medical care for a growth on her eyes, and has not been able to pay for it. The family home, awarded to her, does not produce an income. She rented some space in it for a time. The last people moved out five months before the trial and she has been unable to get anybody since. The home is encumbered for approximately $5,000, payable at the rate of $60 a month. As an incident of the award of the home to her, it will be her obligation, as between her and appellant, to make those payments. The facts support the award. "The allowance of alimony rests within the discretion of the trial court, and the appellate courts will interfere only where there is an abuse of discretion. [Citations.]" Melny v. Melny, 90 Cal.App.2d 672, 679, 203 P.2d 588, 593. We find no abuse of discretion in the award of alimony. It is, of course, subject to modification if conditions change.

[6] *(3) As to the apportionment of the community property,* it appears that the

court awarded respondent the family home and the furniture, furnishings and equipment therein; to appellant, an automobile and an insurance policy on his life.

Appellant testified that prior to the trial he sold the automobile for $660 and expended $400 thereof in payment of various obligations, and paid $200 to his attorney. We do not find any evidence in the record on the question whether or not the automobile was community property. Respondent alleged that it was, and appellant denied that allegation.

Nor do we find in the record any reference to the insurance policy. In the clerk's transcript there is a copy of a memorandum concerning the award of community property, presented by respondent's attorney to the trial court after the trial and before findings were prepared, which states that an examination of canceled checks (not in evidence) disclosed the existence of a policy on the life of appellant. There is nothing to indicate the amount of that policy or whether it had any surrender value.

It appears, therefore, that the court awarded respondent virtually all of the community property. The home was valued at $15,000 or $16,000, subject to an encumbrance of about $5,000, payable at the rate of $60 per month. There is no evidence of the value of the furniture. Both parties testified they did not know its value.

The parties stipulated that the home was community property. In support of his claim that the decree makes an unjust apportionment of the community property, appellant directs attention to the fact that payments upon the home, as well as for all other expenses, were made from a joint checking account into which they deposited his earnings and hers and also about $9,900 which he inherited; that a considerable portion of the purchase price of the home must have been paid with his separate funds; and it is, therefore, unjust to award her the entire interest in the home, and none to him. Respondent testified that of appellant's inheritance $3,000 went into the house in different ways; there were several loans they had made in building the house and buying equipment for the house; but that there was a $1,400 insurance settlement on her which also went into the checking account and was used to pay for the home. She directs attention, also, to the $5,000 encumbrance, which as an incident of the award it was her obligation to pay.

[7, 8] The fact that the home is community property is of greater significance than how it became such, whether derived wholly from the community funds, or the separate funds of either or both parties, or in part from each of those sources. In granting a divorce to one of the parties on the ground of the extreme cruelty of the other, it became the duty of the trial court to assign the community property to the respective parties "in such proportions as the court, from all the facts of the case, and the condition of the parties may deem just." Civ.Code, § 146. This is construed as meaning that the court must award more than one-half to the party who has suffered the wrong. How much more than half, rests in the sound discretion of the trial court, subject to the power of revision vested in an appellate court by the provisions of section 148 of the code. Every intendment is in favor of what the trial court did, even though it awarded all to the innocent party. See Barham v. Barham, 33 Cal.2d 416, 431, 202 P.2d 289; Nelson v. Nelson, 100 Cal.App.2d 348, 350, 223 P.2d 636; Jackson v. Jackson, 93 Cal.App.2d 101, 107, 203 P.2d 997; Cairo v. Cairo, supra, 87 Cal.App.2d 558, 562–563, 197 P.2d 208; Hill v. Hill, 82 Cal.App.2d 682, 696–697, 187 P.2d 28; and Arnold v. Arnold, 76 Cal.App.2d 877, 883–885, 174 P.2d 674, reviewing earlier cases. The facts which we have summarized under this and other topics indicate no abuse of discretion by the trial court in the assignment of the community property.

[9] *(4) The award of counsel fees,* $200, "in addition to any sum heretofore paid," should be read in the light of respondent's original request therefor, made in her complaint, and the court's order in response to that request, entered a year before the trial and prior to the filing of appellant's answer, in which order the court directed appellant to pay respondent's at-

torney forthwith the sum of $200 "on account of counsel fees."

By that order the court granted the application in part and reserved for later determination the question whether a larger sum should be awarded. The fact that such determination was made at the conclusion of the trial does not characterize it as an award for past services. See De Vall v. De Vall, 102 Cal.App.2d 53, 57–59, 226 P.2d 605; Nelson v. Nelson, supra, 100 Cal.App.2d 348, 351–352, 223 P.2d 636; Fallon v. Fallon, 83 Cal.App.2d 798, 806, 189 P.2d 766.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.



108 Cal.App.2d 601

VICKTER et al. v. PAN PACIFIC SALES CORP.

Civ. 18616.

District Court of Appeal, Second District, Division 3, California.

Jan. 9, 1952.

David Vickter and Hyman Vickter, doing business under the fictitious firm name of Giant Penny Stores, a registered fictitious firm name, brought an action against Pan Pacific Sales Corporation, a California corporation, to recover money deposited by plaintiff on account of merchandise bought from defendant, and damages for failure of defendant to deliver merchandise within specified time. The Superior Court of Los Angeles County, Raymond McIntosh, Judge Assigned, rendered a judgment adverse to the defendant, and the defendant appealed. The District Court of Appeal, Shinn, P. J., held that one of the plaintiffs who bought other merchandise because of defendant's failure to deliver, and who had personal knowledge paid for such other merchandise, could testify as to sums paid by plaintiffs for such other merchandise, and that the best evidence rule was not applicable to preclude such testimony on defendant's objection that plaintiffs' books of account were best evidence as to price paid, by plaintiffs for other merchandise.

Judgment affirmed with addition of $100 as damages.

1. Evidence ⇐158(28)

In action to recover money deposited by plaintiff on account of merchandise bought from defendant, and for damages for failure of defendant to deliver merchandise within specified time, a plaintiff who bought other merchandise because of defendant's failure to deliver, and who had personal knowledge of price paid for such other merchandise, could testify as to sums paid by plaintiffs for such other merchandise, and best evidence rule was not applicable to preclude such testimony on defendant's objection that plaintiffs' books of account were best evidence as to price paid by plaintiffs for other merchandise.

2. Courts ⇐104

Reviewing courts are required to state in writing the reasons for their decisions.

3. Courts ⇐104

The right to petition Supreme Court for hearing renders it necessary that opinions of District Courts of Appeal state case fully and fairly as to controlling facts and pertinent rules of law.

4. Costs ⇐260(1)

District Court of Appeal has duty in extreme situations to discourage the taking of appeals in civil cases upon frivolous grounds, or solely for delay. Rules on Appeal, rule 26(a).

5. Costs ⇐260(6½)

Since where appeal in civil case is taken upon frivolous grounds or solely for delay, it is usually unknown to District Court of Appeal whether appeal was inspired by insincere or negligent advice given by attorney or insistence of stubborn client, penalty should usually be imposed upon the party and matter of responsibility be left to private adjustment. Rules on Appeal, rule 26(a).

6. Costs ⇐260(1)

The purpose of imposing a penalty where appeal in civil case is taken upon frivolous ground or solely for delay is to

discourage a practice which hampers administration of justice, and not merely to chastise an individual litigant. Rules on Appeal, rule 26(a).

7. Costs ⇐260(4), 263

Where appeal from judgment for plaintiffs in action to recover money deposited by plaintiffs on account of merchandise bought from defendant, and for damages for failure of defendant to deliver merchandise, was taken solely on frivolous ground that plaintiffs' books of account were best evidence as to sums paid by plaintiffs for merchandise which plaintiffs bought when defendant failed to deliver merchandise to plaintiffs within specified time, and that permitting a plaintiff to testify over defendant's objection as to sums paid by plaintiffs for such other merchandise was error prejudicial to defendant, judgment for plaintiffs for $1,035 would be affirmed with addition of $100 as damages. Rules on Appeal, rule 26(a).

Nathan Newby, Jr., Los Angeles, for appellant.

Borah & Borah and Peter T. Rice, all of Los Angeles, for respondents.

SHINN, Presiding Justice.

David Vickter and Hyman Vickter, doing business as Giant Penny Stores, recovered judgment against Pan Pacific Sales Corporation for $1,035. Of this amount $500 represented a deposit made by plaintiffs on account of merchandise purchased from defendant, and $535 damages for failure to deliver the goods. Defendant appeals.

The facts are set forth in a settled statement and in material respects are as follows: Plaintiffs ordered of defendant and defendant agreed to supply certain merchandise, consisting of Christmas decorations, for the sum of $2,675; plaintiffs made an advance payment of $500; the merchandise was to be shipped from Japan on October 31, 1948; dock workers were on strike at the harbors of San Pedro, Wilmington and Long Beach; on November 10th the merchandise was in transit, and anticipating that it could not be unloaded at the Los Angeles harbors it was agreed that it would be diverted to Seattle and transported to Los Angeles by motor truck; plaintiffs agreed to pay $200 toward the extra cost of delivery, and in consideration thereof defendant agreed that delivery would be made to plaintiffs' business premises in Los Angeles not later than November 30, 1948; defendant was unable to make delivery but offered delivery when it received the merchandise, December 13, 1948; there was evidence that in the meantime plaintiffs had purchased identical merchandise at the lowest obtainable price in the Los Angeles area for $4,175. The settled statement reads: "The damages were computed at $535.00, the difference between the contract price and the price paid by respondents on the open market." The findings state, "that plaintiffs' damages in respect to monetary loss by reason of necessity to purchase similar Christmas merchandise in the open market was in the sum of $535.00 and no further sum by reason thereof." In their complaint plaintiffs alleged their damage to be the sum of $535, and prayed for the recovery of that sum in addition to the amount paid on account.

David Vickter, one of the plaintiffs, testified that he paid various sums for identical merchandise in the total amount of $4,175, and that the prices paid were the lowest for which the merchandise was obtainable in the Los Angeles area. He gave the names of some parties from whom some of the merchandise was purchased, stated that he could not remember offhand where other purchases were made, that books and records of the business were kept under his direction, that they would show the complete transactions and were available at the offices of plaintiffs. Defendant objected to the testimony of Mr. Vickter upon the ground that it was not the best evidence, and interrogated the witness on *voir dire*. The objection was overruled and the testimony of Mr. Vickter was received. There was no other evidence as to the sums paid by plaintiffs for the merchandise. Defendant did not subpoena any of plaintiffs' records, did not make any claim of surprise

because the records were not in court, and did not request a continuance for production of the records.

The sole ground of the appeal is that plaintiffs' books of account were the best evidence as to the sums paid by plaintiffs for the merchandise and that it was prejudicial error for the court to receive the testimony of Mr. Vickter over defendant's objection. The objection was properly overruled and the claim of error is frivolous.

[1] From the recitals as to the facts testified to by Mr. Vickter, as set out in the settled statement, it appears, and defendant does not dispute, that the witness purchased the merchandise and had personal knowledge of the amounts paid for it. No effort was made to procure the presence of the books of account for the purpose of cross-examination. The best evidence rule has no application whatever. The witness was testifying to facts within his knowledge, and not as to the contents of the books of account nor as to any knowledge or information gained therefrom. The only cases cited by defendant dealt with situations in which the contents of certain writings was the subject of inquiry and it was sought to prove them by parol evidence. Here, no testimony was sought to be elicited with respect to the items that had been entered upon and were reflected in the books of account.

[2, 3] A considerable part of our time is taken up with the disposition of civil appeals which are obviously without merit. The present appeal is one of them. If modern practice permitted, a considerable number would be disposed of as Justice Baldwin, with the concurrence of Chief Justice Terry, disposed of the appeal in Pinkham v. Wemple, 12 Cal. 449, reading: "The various questions made by the record have either been repeatedly settled by this Court, or are decided by reference to plain elementary principles. There is no single point taken, which, in our judgment, justifies this appeal, and it would be a waste of time to notice the points in detail. The judgment is affirmed, with five per cent damages." But reviewing courts are required to state in writing the reasons for their decisions. And the right to petition the Supreme Court for hearing renders it necessary that the opinions of the District Courts of Appeal state the case fully and fairly as to the controlling facts and the pertinent rules of law. Memorandum decisions, however desirable, would not meet the requirements of the present system.

The volume of appellate work in the Second District is extremely heavy, requiring at times the assistance of pro tempore judges. The courts have the constant problem of balancing the prompt dispatch of business with unhurried consideration of the merits of each appeal. When an appeal is taken for the purpose of delay it not only works an injustice upon the respondent in withholding from him the benefits of his judgment, but also upon those who have pending meritorious appeals and who must wait their turn.

[4–7] Rule 26(a), Rules on Appeal, recognizes the power and implies the duty of reviewing courts to impose penalties for frivolous appeals. It is a power which is seldom used, although the occasions for its use appear to be on the increase. We deem it to be our duty in extreme situations to discourage the taking of appeals in civil cases upon frivolous grounds, or solely for delay. While a penalty may be imposed either upon the party or his attorney, it will usually be unknown to the court whether the appeal was inspired by insincere or negligent advice given by the attorney or the insistence of a stubborn client. Therefore, the penalty should usually be imposed upon the party, and the matter of responsibility be left to private adjustment. The purpose of the imposition of penalties in such cases is to discourage a practice which hampers the administration of justice, and not merely to chastise an individual litigant. We have concluded that the present appeal was taken upon manifestly insufficient grounds and solely for delay.

The judgment is affirmed with the addition of $100 as damages.

WOOD and VALLÉE, JJ., concur.

108 Cal.App.2d 696

PEOPLE v. SMITH.

Cr. 2771.

District Court of Appeal, First District, Division 1, California.

Jan. 16, 1952.

Hearing Denied Feb. 14, 1952.

Harry Dwight Smith was charged with burglary, pleaded guilty and was thereupon sentenced to imprisonment. Approximately seven years later, he filed a petition for a writ of error coram nobis. The Superior Court, County of Alameda, Charles Wade Snook, J., denied the application and Smith appealed. The District Court of Appeal, Peters, P. J., held that since the petition did not plead facts on which petitioner relied which were not known to him and could not, in exercise of due diligence have been discovered by him earlier than date on which writ was filed petition failed to state a cause of action and as petitioner waited nearly seven years after conviction before filing proceeding and no excuse for the delay was set forth, the petition failed to state a cause of action.

Order affirmed.

1. Criminal Law ⇐997

The writ of error coram nobis is not a writ that is intended to correct all errors occurring at trial but is a writ of limited scope available to vacate a judgment where, at time of entry, facts existed which were unknown to court and to defendant, and which, if known, would have precluded conviction.

2. Criminal Law ⇐997

The applicant for a writ of error coram nobis must plead and prove that facts on which he relies were not known to him and could not, in exercise of due diligence, have been discovered by him earlier than date on which writ was filed.

3. Criminal Law ⇐997

Where every alleged fact set forth in application for writ of error coram nobis as ground for vacating judgment of conviction must have been known to the applicant when he appeared in Police and Superior Courts and petition did not allege that those facts were then brought to attention of those courts, nor that an appeal was taken, nor that facts were not then known to the petitioner, petition failed to state a cause of action.

4. Criminal Law ⇐997

Points that could have been raised in the trial court or on an appeal cannot be considered on a writ of error coram nobis.

5. Criminal Law ⇐997

Where petitioner waited nearly seven years after his conviction before filing application for writ of error coram nobis and no excuse for delay was set forth, without explanation of the long delay the petition failed to state a cause of action.

6. Convicts ⇐6

The production of prisoners from the state prisons to testify is generally within the sound discretion of the court and that discretion should and must be exercised so that no substantial right of imprisoned person is adversely affected, and if contested question of fact is involved prisoner has right to be represented either in person or by counsel at hearing, but prisoners are not entitled as a matter of law to be brought from state prison to local courts simply because they have filed a petition if that petition shows on its face that it is without merit. Pen.Code, §§ 1567, 2620.

7. Criminal Law ⇐997

Where petition for writ of error coram nobis showed on its face that it was without merit, refusal of trial court to produce defendant at hearing on petition or to appoint counsel for petitioner was not an abuse of discretion. Pen.Code, §§ 1567, 2620.

Edward R. Plotner, and Kroninger & Zogrophon, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Winslow Christian, Deputy Attys. Gen., for respondent.

PETERS, Presiding Justice.

In 1944 Harry Dwight Smith was charged with burglary. He pleaded guilty

before the then existing Police Court of Oakland. Upon his arraignment in the Superior Court he again admitted the charge, and the degree of the crime was fixed at burglary in the first degree. He was thereupon sentenced to imprisonment for the term prescribed by law. No appeal was taken. In May of 1951, approximately seven years later, he filed a petition for a writ of error *coram nobis* in the Superior Court. The trial court, without appearance on the part of Smith, denied the application. Smith appeals.

The petition filed in the lower court alleges, in very general terms, that the information did not charge burglary in the first degree with the required particularity; that Smith was deprived of the right of counsel; that he had not been advised of his constitutional rights; that the guilty plea was secured by duress, and that the trial court deprived him of the right to appeal. The petition, so far as its allegations are concerned, simply consists of a series of conclusions of law unsupported by the required averments of fact. No particulars in reference to any of the charges are there alleged. Connected with the petition is a so-called statement of facts which, if true, would tend to show that the admittedly stolen property found in his room—two revolvers—were placed there without his consent. In general language he then sets forth that, after his arrest, he was slapped and threatened by the police officers and thus induced to plead guilty in the Police and Superior Courts. He contends that he was not informed of his rights in the Police Court, and not afforded the right of counsel. After being sentenced in the Superior Court he states that he told the court he desired to appeal and was told that this would be discussed later. No other explanation for his failure to appeal appears.

When this petition for a writ of error *coram nobis* came before the trial court Smith was not present, no order for his presence having been made. The deputy district attorney informed the court that the record in the case showed that a deputy public defender represented Smith in the Police Court and in the Superior Court; that in the Superior Court Smith stated that he knew the goods were stolen and that someone else was involved with him, and that he was entering a plea of guilty. These were all matters of record in the trial court of which the trial judge could take judicial notice. The trial court denied the petition.

[1, 2] There is no merit to this appeal. The petition does not state a cause of action. The writ of error *coram nobis* is not a writ that is intended to correct all errors occurring at the trial. It is a writ of limited scope. Fundamentally, it is available to vacate a judgment where, at the time of entry, facts existed which were unknown to the court and to the defendant, and which, if known, would have precluded conviction. People v. Adamson, 34 Cal. 2d 320, 210 P.2d 13; People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657; People v. Hoffman, 103 Cal.App.2d 315, 229 P.2d 486; People v. Chapman, 96 Cal.App.2d 668, 216 P.2d 112. The applicant must plead and prove that the facts upon which he relies were not known to him and could not, in the exercise of due diligence, have been discovered by him earlier than the date upon which the writ was filed. People v. Shorts, 32 Cal.2d 502, 197 P.2d 330; People v. Hoffman, 103 Cal.App.2d 315, 229 P.2d 486.

[3, 4] The present petition fails to comply with these requirements. Every alleged fact set forth therein as a ground for vacating the judgment must have been known to appellant in 1944 when he appeared in the Police and Superior Courts. The petition does not allege that these facts were then brought to the attention of those courts, nor that an appeal was taken, nor that these facts were not then known to appellant. Points that could have been raised in the trial court or on an appeal cannot be considered on a writ of error *coram nobis*. People v. James, 99 Cal.App. 2d 476, 222 P.2d 117; People v. Ellis, 99 Cal.App.2d 188, 221 P.2d 258; People v. Hoffman, 103 Cal.App.2d 315, 229 P.2d 486.

[5] Moreover, appellant waited nearly seven years after his conviction before

filing the present proceeding. No excuse for the delay is set forth. Without explanation of this long delay the petition fails to state a cause of action. People v. Coates, 95 Cal.App.2d 78, 212 P.2d 263; People v. Chapman, Cal.App., 234 P.2d 716; People v. Martinez, 88 Cal.App.2d 767, 199 P.2d 375; People v. Lumbley, 8 Cal.2d 752, 68 P.2d 354; People v. Baker, 92 Cal.App.2d 623, 207 P.2d 58.

Several appeals presenting points substantially similar to those here involved have been dismissed as frivolous by some appellate courts. Edwards v. People, 99 Cal.App.2d 216, 221 P.2d 336; People v. Schuman, 98 Cal.App.2d 140, 219 P.2d 36; People v. Chapman, 96 Cal.App.2d 668, 216 P.2d 112; People v. Malone, 96 Cal.App. 2d 270, 215 P.2d 109.

Court appointed counsel do not challenge the above principles, but base their argument on the following point: In connection with his petition appellant requested an order from the trial court under sections 1567 and 2620 of the Penal Code requiring the prison officials at Folsom to produce appellant at the hearing so that he might testify. No such order was made, nor was counsel appointed to represent appellant at that hearing. It is urged that this denied appellant the right to present his case.

[6, 7] The production of prisoners from the state prisons to testify is generally within the sound discretion of the court, and the sections of the Penal Code involved in effect so provide.[1] Of course, this discretion should and must be exercised so that no substantial right of the imprisoned person is adversely affected. Certainly, if a contested question of fact is involved, the prisoner has a right to be represented either in person or by counsel at the hearing. But prisoners are not entitled as a matter of law to be brought from the State prison to local courts simply because they have filed a petition, if that petition shows on its face that it is without merit. That is this case. The trial court did not abuse its discretion in refusing to produce appellant, or in failing to appoint counsel.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

1. § 1567, Penal Code: "*When it is necessary* to have a person imprisoned in the State prison brought before any court, * * * an order for that purpose *may* be made * * *." (Italics added.)

§ 2620, Penal Code: "*When it is necessary* to have a person imprisoned in the State prison brought before any court * * * for the purpose of hearing a motion or other proceeding, * * * an order for his temporary removal from said prison, and for his production before such court, * * * must be made by the superior court * * *." (Italics added.)



108 Cal.App.2d 617

GALBRAITH v. THOMPSON.

Civ. 14813.

District Court of Appeal, First District, Division 2, California.

Jan. 11, 1952.

Action by Floreine Galbraith against Ray Thompson for the wrongful death of her son. The Superior Court, City & County of San Francisco, Thomas M. Foley, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Nourse, P. J., held that there was sufficient evidence to support verdict on ground of negligence and that it was not error to give instruction on last clear chance doctrine.

Judgment affirmed.

1. Automobiles ⇐244(7)

In mother's action for wrongful death of her son who ran into street in pursuit of a ball and was killed when struck by automobile of defendant, who was allegedly speeding and allegedly did not sound his horn, evidence was sufficient to sustain verdict on ground of simple negligence. Code Civ.Proc. § 2055.

2. Automobiles ⇐245(74)

In mother's action for wrongful death of son who was killed in a collision with defendant's automobile when son ran into the street in pursuit of a ball, even if child's action was in violation of statute providing that pedestrian should yield right of way to vehicles when crossing outside crosswalk, whether child's conduct should be considered negligence per se was for the jury. Vehicle Code, § 562.

3. Negligence ⇐136(29)

Rule that a child is only held to care in accordance with its age and circumstances to be judged by jury must prevail over rule that violation of statute is negligence per se.

4. Death ⇐103(3)

In mother's action for wrongful death of her son who was killed in collision with defendant's automobile when son ran into street in pursuit of a ball, whether the mother was negligent in letting child play in street was for the jury.

5. Trial ⇐109

Plaintiff's attorney's mentioning of theory of last clear chance in his opening statement was not an admission of contributory negligence.

6. Appeal and Error ⇐1066
Trial ⇐252(7)

Giving an instruction to jury upon last clear chance doctrine when there is no substantial evidence to support doctrine is reversible error.

7. Negligence ⇐83.10

Continuing negligence of plaintiff does not bar recovery from person who has last clear chance to avoid accident.

8. Automobiles ⇐245(91)

In mother's action for wrongful death of her seven year old son who was killed in a collision with defendant's automobile when son ran into the street in pursuit of a ball, where it could be found by jury that son was totally unaware of danger, it was proper to submit last clear chance doctrine to jury.

9. Trial ⇐127

In mother's action for wrongful death of son, where mother testified that defendant told her that he had plenty of insurance and that she did not need to worry, that he had insurance to take care of everything, reference to insurance was connected up with admission of liability and plaintiff's attorney was not guilty of misconduct when he argued that defendant's expression was admission of liability.

Healy & Walcom, San Francisco, for appellant.

John F. Moran, San Francisco, James A. Himmel, San Francisco, of counsel, for respondent.

NOURSE, Presiding Justice.

Defendant Thompson appeals from a judgment on a verdict of $7,300 in a wrongful death case. Respondent Floreine Galbraith brought the suit for damages for the death of her son Dennis Hermes of whom she had custody under a divorce decree. He was killed in a collision with appellant's car when he ran into the street in pursuit of a ball. Over and above a general denial defendant pleaded contributory negligence both of the child and the plaintiff mother and unavoidable accident. Defendant's motion for a new trial was denied by failure of the court to act on it.

Appellant primarily relies on insufficiency of the evidence, but also states: "the only issue (except for misconduct of counsel hereinafter cited) before this court is whether it was improper to submit the last clear chance doctrine to the jury." Appellant's position seems to be that the only theory under which he could possibly be held liable was the last clear chance doctrine, that this was also the theory on which the case was tried, and that there was no evidence supporting the application of said doctrine so that the giving of an instruction on it was error; but respondent argues that no negligence of mother or child necessarily contributed to the proximate cause of the injury

so that, although there was a possible evidentiary basis for application of the last clear chance theory, the verdict could also be upheld on the theory of simple negligence.

The accident happened on August 4, 1948 about 6:40 in the evening. The weather was fair and it was still light. At that time Dennis was less than seven years old. He and his mother lived with her parents, Mr. and Mrs. Greenlee, at 3651 22nd Street, just east of Sanchez street. His mother had gone visiting and had left him in the care of his grandmother. After he had had dinner with her at 5:30 he left alone saying he was going to play in the next block. The block in which they lived had a very steep grade and therefore the children played in the next block which was flat. The apartment house in which they lived had no back yard. He was a bright little boy who for two years had been accustomed to go to school by himself. That evening he went to play with Beatrice Dozier, who lived in the next block and who then was not yet eleven. She testified that they went to a garage in the middle of the block on the north side to play ball. Some little children on top of the garage would throw Beatrice's tennis ball down. Beatrice and Dennis on the sidewalk in front would try to catch it and throw it back up. They had played so for half an hour when they missed a ball, which then bounced from the sidewalk into the street. They turned to look for it. After Dennis had hesitated, looking where the ball was, he started to run after it. Beatrice then saw a car, seven houses down from where they were. The houses had 25 foot frontage. She yelled for Dennis to come back. He was running out, not fast, deviating somewhat in the direction of Noe street. She saw the car again at 3756 22nd street. She was then starting to run after Dennis and she barely missed grabbing his T shirt, when the car hit him and she jumped back. She saw the front part of the car hit him; probably the right front fender. The witness Irene Kane was slowly driving east in the block in question when she saw a ball bounce into the street, a child on the sidewalk running at an angle, southwest, after it, and a car coming up the street at least three car lengths away from the ball. There were very heavy black skid marks. The skid of each wheel measured averaged 34 feet, 6 inches. Defendant stated to the investigating officer that he was going approximately 25 miles an hour when the boy ran into the side of his car and the impact occurred.

Appellant, who was called by the plaintiff under Code Civ.Proc. § 2055, who testified also in his own behalf, and had his deposition read into evidence, testified that after driving north on Sanchez he made a left turn into 22nd street. At the north side of 22nd several cars were parked. He was looking west, knowing that many small children lived in the neighborhood and were at times playing in that street. He saw a ball bouncing into the street and immediately threw on his brakes. He looked to the right because he expected a child to follow it. He testified that the ball was 18 to 20 feet away when he first saw it, but in his deposition he said he imagined it was then 5 or 6 feet to the front and 3 feet to the right side of his car. He did not sound his horn; he was driving fairly close to the center of the street. After one big bounce the ball hit his radiator. A flash after the ball hit the radiator he saw the top of the boy's head out of the window of the right front door 4 or 5 feet away, just opposite the door, coming towards it. From the time he first put on his brakes until he came to a stop was about 18 or 20 feet. Some part of the right side, probably the right front door hit the boy. Thompson stopped and got out of the car because he thought he had hit him but he did not feel the impact. The child had run out between parked cars jammed close together. The distance of the cars he came out between was only 2 or 3 feet. But he had originally drawn the cars 12 feet apart on the map and both Beatrice and the police officers testified that they were at opposite sides of the driveway of the garage some

10 to 12 feet apart. Defendant testified that the skid marks were 17 to 18 feet long behind the car (but they were measured at 34 feet, 6 inches). His car was 17 feet long. With respect to the speed with which he had been driving he testified that he told the police officer that he was going 20–25 miles. At the time of the impact it was only between 10 and 25. However Officer Conroy testified that Thompson told him he was going approximately 25 at the time of the impact. The officer gave him a ticket for speeding but it was dismissed in court.

[1–5] It would seem that the above evidence was sufficient to support a verdict on the ground of simple negligence. On the basis of the testimony of Beatrice Dozier and Irene Kane the jury could conclude that when appellant saw the ball it was further away than he testified, that he didn't sound his horn and that he was going too fast, his speed being still approximately 25 miles after he had braked and was skidding. Whether the boy of not yet seven was negligent in running after the ball without looking was a matter for the jury. 2 Cal.Jur.Supp. 442; 19 Cal.Jur. 605; Graham v. Consolidated M. T. Co., 112 Cal.App. 648, 652, 297 P. 617; Annotations 107 A.L.R. 4; 174 A.L.R. 1080. Even if the child's action was in violation of sec. 562, Vehicle Code (pedestrian to yield right of way to vehicles when crossing outside crosswalk) the question whether this should be considered negligence per se in this child was for the jury. The rule that a child is only held to care in accordance with its age and circumstances to be judged by the jury must prevail over the rule that violation of statute is negligence per se, Annotation 174 A.L.R. 1170; 1181 et seq.; Mecchi v. Lyon Van & Storage Co., 38 Cal.App.2d 674, 685, 102 P.2d 422, 104 P.2d 26; Locklin v. Fisher, 264 App.Div. 452, 36 N.Y.S.2d 162. Whether the mother was negligent in letting the child play in the street was also clearly a question of fact for the jury. Although the attorney of respondent in his opening statement mentioned the theory of last clear chance contributory negligence should not be considered as admitted.

[6] There remains however the question whether it was reversible error to give an instruction on last clear chance. (The formulation of the instruction is not attacked.) Charging the jury upon that doctrine when there is no substantial evidence to support the theory is reversible error. Dalley v. Williams, 73 Cal. App.2d 427, 432, 166 P.2d 595. Nevertheless it would seem that if there is any evidence which might support a verdict on that theory there is less danger in giving the instruction than in omitting it. If it is omitted the contributory negligence doctrine absolutely prevents an award if any contributory negligence is proved, if it is given it only opens the possibility that notwithstanding contributory negligence an award could be granted if a last clear chance for defendant to avoid the accident is found but it does not necessitate it.

[7] Appellant argues that the evidence was insufficient to hold that Dennis was because of his own negligence in a position of danger from which he could not escape by the exercise of ordinary care, because until the impact he could at any time be expected to stop and that his negligence continued concurrently with that of appellant until the very time of the accident. However the inability to escape can also be caused by total unawareness of danger, and such unawareness can certainly be found by the jury with respect to a child of less than seven running after a ball. Since Girdner v. Union Oil Co., 216 Cal. 197, 203, 13 P.2d 915, and Center v. Yellow Cab Co., 216 Cal. 205, 208, 13 P.2d 918, the question how long the negligence of the plaintiff continued seems to have lost importance and the decisive question seems to be whether the defendant had the clear opportunity to avoid the accident. The most recent decisions of the Supreme Court with respect to last clear chance, Peterson v. Burkhalter, 38 Cal.2d 107, 237 P.2d 977 and Selinsky v. Olsen, 38 Cal.2d

102, 237 P.2d 645, show that the development of the law in that direction continues and that no technical distinctions will be permitted to keep the doctrine from the jury where the jury could find that defendant did not act as a prudent man after discovering the victim's peril. In the Peterson case, supra, it is said in 38 Cal.2d at page 111, 237 P.2d at page 979: "The continuing negligence of a plaintiff does not bar him from obtaining a judgment against the person who had the last clear chance to avoid the accident."

[8] Appellant urges that there was no evidence that appellant was actually aware of the child's danger in time to avert it and that he had time to appreciate the situation and to determine on a course of conduct and follow it. It must be conceded that in that respect the evidence is weak. However appellant himself testified that he was thinking of the possibility that children were playing in the street and that immediately when he saw the ball he thought a child might run after it. From the evidence of Beatrice Dozier and Irene Kane it can be derived that he saw the ball when he was more than three car lengths and possibly 175 feet away. According to the skid marks he did not need more than 35 feet to come to a stop. Under these circumstances it does not seem wholly impossible that the last clear chance doctrine might be applicable and since it was a substantial part of plaintiff's case the question was properly left with the jury.

[9] The alleged misconduct of plaintiff's attorney relates to his allegedly bringing out and arguing the testimony of Mrs. Greenlee that defendant told her that he had plenty of insurance and that she did not need to worry, that he had insurance to take care of everything. It is respondent's position which was upheld by the trial judge, that the reference to insurance is here connected up with admission of liability and that it may be referred to and argued for that purpose, Freeman v. Nickerson, 77 Cal.App.2d 40, 58, 174 P.2d 688; McPhee v. Lavin, 183 Cal. 264, 269, 191 P. 23. Appellant does not give any good reason why the expression used by defendant could not be considered as admission of liability.

Judgment affirmed.

GOODELL, J., and JONES, J. pro tem., concur.



108 Cal.App.2d 575

WALSH v. WALSH.

No. 14745.

District Court of Appeal, First District, Division 1, California.

Jan. 8, 1952.

Melba Walsh sued her husband, John Dennis Walsh, for divorce. From an order of the Superior Court, City & County of San Francisco, Daniel R. Shoemaker, J., denying plaintiff's application for alimony, counsel fees and costs pending the action, she appealed. The District Court of Appeal, Fred B. Wood, J., held that the evidence supported the trial court's implied finding that no reconciliation, abrogating the parties' property settlement agreement, was effected after their separation and execution of agreement, and that the order was proper, in view of evidence that plaintiff did not need money for her maintenance, costs or counsel fees.

Order affirmed.

1. Appeal and Error ⇐659(1)

A reviewing court, desiring further knowledge on any point, owes duty to augment the record before proceeding with its decision. Rules on Appeal, rules 5(f), 12 (a, c), 52.

2. Appeal and Error ⇐648

The trial court has power to correct a transcript of record and make it speak truth, though appeal from such court's judgment is pending.

3. Divorce ⇐285

A property settlement agreement, considered by Superior Court at hearing on

order to show cause why husband should not be required to pay wife costs, counsel fees and support money pending her divorce suit, and introduced as evidence, on augmentation of record, in District Court of Appeal, was properly before such court for consideration on wife's appeal from order denying her application for alimony, counsel fees and costs pending suit. Rules on Appeal, rules 5(f), 12(a, c), 52.

4. Divorce ⇐214(4), 226, 282

Where husband produced spouses' property settlement agreement and handed it to trial judge for consideration at hearing on order to show cause why husband should not be required to pay wife costs, counsel fees and support money pending her divorce action, and wife's counsel interrogated her concerning circumstances of execution of agreement and spouses' subsequent conduct as bearing on its implied cancellation, court properly considered it as evidence, though it was not formally introduced in evidence and marked as exhibit, and wife's objection to consideration thereof came too late on her appeal from order denying her application for alimony, counsel fees and costs pending action.

5. Divorce ⇐213, 225

A property settlement agreement, declaring that spouses finally settled and determined all their property rights and wife's rights to alimony and support, that she accepted specified sum in full settlement of any claim against husband for alimony or support, her interest in community property, and claims for attorneys' fees and court costs, and that husband agreed to pay wife such sum on execution of agreement, supported superior court's order denying wife's application for alimony, counsel fees and costs pending her divorce action.

6. Husband and Wife ⇐279(3)

Spouses' lack of fixed joint domicile will not, under all circumstances, prevent existence of marital cohabitation, but is factor to be considered in determining whether their property settlement agreement, supporting superior court's order denying wife's application for alimony, counsel fees and costs pending her divorce action, was abrogated by spouses' reconciliation and resumption of marital relations.

7. Divorce ⇐214(3), 226

Evidence of spouses' mere copulation without occupying same habitation and dwelling as husband and wife is insufficient to sustain conclusion that their property settlement contract, relied on by husband to defeat wife's application for alimony, counsel fees and costs pending her divorce action, was set aside.

8. Divorce ⇐213, 225
Husband and Wife ⇐279(3)

Circumstances of spouses' reconciliation, after their separation and execution of property settlement agreement, must show that they intended to reunite as husband and wife to establish abrogation of such agreement and entitle wife to alimony, counsel fees and costs pending her subsequent divorce action, and occasional cohabitation does not alone establish reconciliation.

9. Divorce ⇐286

Whether parties to wife's divorce action intended and effected reconciliation, abrogating their property settlement agreement, set up by husband to defeat wife's application for alimony, counsel fees and costs pending action, was fact question for determination by trial judge.

10. Divorce ⇐214(3), 226

Evidence on hearing of order to show cause why husband should not be required to pay wife costs, counsel fees and support money pending her divorce action supported superior court's implied finding that no reconciliation, abrogating parties' property settlement agreement, produced and offered for trial judge's consideration by husband's counsel, was effected by parties after their separation and execution of such agreement.

11. Divorce ⇐214(3), 226

While superior court may disregard spouses' property settlement agreement, neither approved nor annulled by court, it may give due consideration to provisions of such agreement in passing on merits of wife's application for alimony, counsel fees and costs pending her divorce action.

12. Divorce ⇐211, 223

In divorce action, court has discretion to award wife only money necessary for her support or prosecution or defense of action. Civ.Code, § 137.

13. Appeal and Error ⇐931(3)

Every intendment is in favor of judgment or order appealed from, and every fact or inference essential to support thereof and warranted by evidence is presumed to have been found by trial court, in absence of express findings thereby.

14. Divorce ⇐203, 213, 214(3), 225, 226

The Superior Court properly denied wife's application for alimony, counsel fees and costs pending her divorce action, in view of evidence that parties had been married for only short time and had no children, wife's testimony that she worked all the time she was married, absence of any allegation of her need of money for maintenance or such costs and fees in her original complaint, and parties' property settlement agreement.

Phil F. Garvey, San Francisco, (James A Himmel, San Francisco, of counsel), for appellant.

James A. Toner, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff appeals from an order denying her application for alimony, counsel fees, and costs, pending her action for divorce.

The question is whether or not the trial court abused its discretion in denying the application. Our review of the evidence convinces us it did not.

In her complaint, filed January 24, 1950, appellant stated that the parties were married February 9, 1948, and separated November 24, 1949, and that there was no community property. She did not therein ask for alimony, counsel fees, or costs pending the action. August 2, 1950, she filed an amended complaint in which she stated that the parties separated July 22, 1950; that there was community property of a nature and value unknown to her; that she was without sufficient means to maintain the action; that respondent received an income of $300 a month, and was able to pay her $350 for her attorney's fees, $50 a month for her support, and $50 for costs of suit, which she alleged were reasonable sums therefor.

It appears from the reporter's transcript that upon the hearing of an order to show cause why respondent should not be required to pay appellant costs, counsel fees and support pending the action, respondent's counsel produced a document which he described as a property settlement agreement executed by the parties in January, 1950, and offered it to the judge for his consideration. Counsel for appellant stated he would show that the purported agreement was executed by appellant without independent legal advice and that the cohabitation of the parties subsequent to the filing of the original complaint had vacated the agreement. In furtherance of those purposes, he then asked appellant a series of questions concerning the circumstances under which she signed the agreement and concerning the asserted subsequent cohabitation. Questions along both lines were asked upon cross and redirect examination. Upon cross-examination she testified that she read the agreement before she signed it, and received the $404 (which the agreement provided that she was to receive). At the conclusion of the hearing, these questions were asked by the court and answers given by appellant:

"Q. Did you read this before you signed it? A. I didn't know I was signing everything away.

"Q. Is that your signature (indicating)? A. Yes."

The reporter's transcript does not include a copy of the agreement, nor does it indicate that the agreement was formally offered in evidence or marked as an exhibit.

In their briefs upon this appeal, the parties discussed the agreement and its legal effect, and whether or not it was abrogated by a reconciliation. Appellant in her opening brief said, "The trial court asked the appellant if she read the agreement"; and that "the trial court erred in basing its order on the *alleged property settlement*

agreement," for the asserted reason, among others, that the agreement "was not properly in evidence." In her closing brief, she said, "The appellant has a right to assume that the trial Court erred in basing its order of [on] the non-existent property settlement agreement, and the record justified this reason; true, it is meager, but it is the sole evidence that the trial judge erred upon * * *." Respondent then moved this court for augmentation of the record. Upon the hearing of that motion, respondent produced a property settlement agreement dated January 16, 1950, between Melba Walsh and John D. Walsh, husband and wife, bearing penned signatures, "Melba Walsh" and "John D. Walsh," and certified by the judge who presided at the hearing of the order to show cause, as the property settlement agreement which he read, referred to and considered as a part of said hearing. Respondent's counsel was sworn as a witness and testified that during the hearing below he presented a property settlement agreement for the consideration of the trial court and that the agreement just described is the document which he so presented, though he did not offer it in evidence. That document was introduced in evidence herein and the motion to augment granted, this court declaring that the document will be considered by the court upon this appeal.

[1–3] It clearly appears that the property settlement agreement was considered by the court below. This brings it within the scope of rule 12 of the Rules on Appeal. Subdivision (a) of rule 12 declares that "the reviewing court * * * may order that the original * * * of a paper * * * used on the * * * hearing below and on file in or lodged with the superior court be transmitted to it * * * and when so transmitted * * * shall be deemed part of the record on appeal." Subdivision (c) of rule 12 authorizes the reviewing court to "submit to the superior court for settlement any differences of the parties with respect to alleged omissions or errors in the record, and the superior court shall make the record conform to the truth." The purpose of augmentation is emphasized by the concluding recital in rule 5(f), "whenever it is necessary to prevent a miscarriage of justice", and by the presumption declared in rule 52 that, in the absence of proceedings for augmentation, the record "includes all matters material to a determination of the points on appeal." It is the duty of the reviewing court, "when it desires further knowledge upon any point, to augment the record before proceeding with its decision." Kuhn v. Ferry & Hensler, 87 Cal.App.2d 812, 815, 197 P.2d 792, 794. The power to correct a transcript and make it "speak the truth still rests in the trial court even though an appeal from the judgment is pending. [Citations.]" Stevenson v. Fleming, 43 Cal.App.2d 641, 643, 111 P.2d 420, 421. The document in question is properly before us for consideration upon this appeal.

[4] Appellant objects to its consideration because it was not formally introduced in evidence and marked as an exhibit; i. e., that it was not "evidence" available for the consideration of the trial court. This point is without merit. Respondent produced the document and handed it to the trial judge for his consideration at the hearing. Counsel for appellant interrogated his client concerning the circumstances of its execution and the subsequent conduct of the parties as bearing upon its implied cancellation. The court did consider it. Thus, it is clear that the offering party and the court understood it was in evidence, and that appellant treated it as if it were in evidence. Under such circumstances, the fact that the offer was not made in words expressly characterizing the offer as a formal tender of evidence does not deprive the document of its true character as evidence. The objection comes too late upon appeal. See Mann v. Mann, 76 Cal.App.2d 32, 41–42, 172 P.2d 369, and authorities cited.

[5] The property settlement agreement, now a part of the record upon this appeal, declares that the parties thereto, the appellant and the respondent herein, "do hereby finally settle, adjust and determine their property rights of every nature and description and all the rights of said Melba Walsh, party of the first part [appellant], to alimony and support," and that "Party of the

first part agrees to and does hereby accept the sum of $404.50 as settlement in full of any claim she has, has had or may have against party of the second part [respondent] for alimony or support and as settlement in full for her interest in and to the community property belonging to the parties hereto; and claims for attorney fees and court costs. Party of the second part does hereby agree to pay to party of the first part said sum of $404.50 upon the execution of this agreement." Appellant testified that she read and signed this agreement, and received the $404.

That agreement, if still in effect, amply supported the order appealed from.

[6–10] Appellant claims the agreement had been abrogated by reconciliation and resumption of marital relations by the parties. The evidence thereof is not convincing, certainly not sufficient for a reviewing court to conclude as a matter of law that such a reconciliation and resumption of marital relations did occur subsequent to the execution of the agreement. Appellant testified that after November 4, 1949, when they first separated, she cohabited with her husband; that that continued until July 14, 1950, when they last lived together; that they were separated at the time of the agreement, when she was living with her sister, at California and Fillmore Streets; that she now (August 8, 1950) lives at the same place, in her own apartment, which she has had since July 6; before that she was living with her other sister at a different place; that she and her husband were meeting at her sister's house and at appellant's other apartment on Bush Street; that she saw him once at her Bush Street apartment, on St. Patrick's Day, and once at her apartment on California Street, on a Friday after he came back from Catalina; that she had been with him on numerous occasions, and stayed overnight and had sexual intercourse with him on a number of occasions since November, 1949, at various places in San Francisco; and that her husband has been living with his mother on Balboa Street, has been staying there ever since the parties separated in November, 1949.

These facts do not compel the conclusion that appellant and respondent intended to and did effect a reconciliation and resumption of marital relations. As said by the Supreme Court in Re Estate of Boeson, 201 Cal. 36, at page 45, 255 P. 800, at page 803: "Giving the fullest effect possible to the facts testified to by appellant, it appears from her testimony that she and decedent had not established a matrimonial domicile at the residence owned by her or at any other place. The fact that decedent on occasions spent the night with appellant at said residence and upon occasions ate meals with her there and assisted her in making minor repairs about the premises does not establish said residence as the matrimonial domicile of the parties. In the course of her testimony, appellant stated that decedent went to 'his house' and to 'his place,' thus showing that she did not regard her residence as a matrimonial domicile. While the lack of a fixed joint domicile will not under all circumstances prevent the existence of a state of marital cohabitation, it is a factor to be considered." "Mere copulation without occupying the same habitation and dwelling there as husband and wife is by no means sufficient to sustain such a conclusion [that the contract had been set aside]." In re Estate of Martin, 166 Cal. 399, 402, 137 P. 2, 4. "The circumstances of reconciliation, however, must show that the parties intended to reunite as husband and wife; occasional cohabitation does not alone establish a reconciliation. Keller v. Keller, 122 Cal.App. 712, 715, 10 P.2d 541; Ruggles v. Bailey, 15 Cal.App.2d 555, 556, 59 P.2d 837." In re Estate of Abila, 32 Cal.2d 559, 561, 197 P.2d 10, 11. Whether the parties in the instant case harbored such an intent and effected a reconciliation was a question of fact for the determination of the trial judge. The record, as we view it, supports an implied finding that no reconciliation was effected.

[11] Appellant's counsel in his brief directs attention to the fact that at the hearing appellant testified that the agreement was made in the office of respondent's attorney; that at that time appellant was not represented by counsel and had no in-

dependent advice, was not advised as to her legal rights, and when she signed did not know that she was signing everything away. However, counsel does not claim that the agreement was invalid or ineffective for any of those or similar reasons. Instead, he contends that "any property settlement agreement made by these parties in the particular case was terminated and annulled by their action and conduct in resuming marital status." Nor did appellant by any pleading or motion, or otherwise, tender in the court below any issue concerning the validity or fairness of the agreement based upon alleged fraud, undue influence, or other violation by respondent of the fiduciary relationship in the making of the agreement. Under such circumstances, while it is true that a court may disregard an agreement of the parties which has been neither approved nor annulled by the court, Steinmetz v. Steinmetz, 67 Cal.App. 195, 227 P. 713, cited with approval in Patton v. Patton, 32 Cal.2d 520, 523, 196 P.2d 909, it is equally true that the court may give due consideration to the provisions of the agreement when passing upon the merits of an application for alimony, counsel fees and costs.

[12–14] The order appealed from is sustainable upon another ground. In an action for divorce, it is only money "necessary" for the support of a spouse, or for prosecution or defense of the action, which the court has discretion to award. Civ. Code, § 137. Although appellant's testimony that she had no money for her own maintenance, or for counsel fees or costs, would support a finding of need therefor, she furnished evidence from which an inference of lack of need could be drawn. The parties had been married but a short time. There were no children. She testified that she "worked all the time we were married." She did not say she was not now working (they were still married) or that gainful employment was not available, or that she was unable to work. Her original complaint contained no allegation of need of money for maintenance, costs or counsel fees. Her agreement of January 16, 1950, regardless of its effect or lack of effect as a waiver, furnished some indication that moneys for these purposes were not necessary. In the absence of express findings "every intendment is in favor of the judgment or order appealed from and it is presumed that every fact or inference essential to the support of the order and warranted by the evidence was found by the court." In re Estate of Rule, 25 Cal. 2d 1, 10, 152 P.2d 1003, 1007, 155 A.L.R. 1319.

We conclude that the trial judge exercised his judgment rightly and fairly, and committed no abuse of discretion.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.



108 Cal.App.2d 632

INDUSTRIAL INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8116.

District Court of Appeal, Third District, California.

Jan. 14, 1952.

Hearing Denied March 13, 1952.

Proceedings for writ of review by Industrial Indemnity Company against Industrial Accident Commission of State of California, and another to annul award of Industrial Accident Commission to minor daughter of deceased employee. The District Court of Appeal, Van Dyke, J., held that evidence sustained finding that death of employee, a mechanic paid on hourly basis, who was authorized by employer to obtain needed repair parts in another city for employer's truck and who was killed when automobile driven by employee's wife overturned on return trip, arose out of and in course of employee's employment although employee made trip without taking employer's copartner along as directed by employer.

Affirmed.

1. Workmen's Compensation ⇐1719

Whether an employee's injury occurred in course of his employment is a question of

fact to be determined in light of circumstances of the particular case.

2. Workmen's Compensation ⇐1939

The findings of the Industrial Accident Commission will not be disturbed on appeal where they are supported by substantial evidence, or by inferences which may fairly be drawn from the evidence.

3. Workmen's Compensation ⇐1578

In proceeding to annul an award of the Industrial Accident Commission, evidence sustained finding that death of employee, a mechanic, who was authorized by employer to obtain needed repair parts in another city for employer's truck and who was killed when automobile driven by employee's wife overturned on return trip, arose out of and in course of his employment although employee made trip without taking employer's copartner along as directed by employer.

4. Workmen's Compensation ⇐1371

Defense that death of employee was caused by his intoxication was an affirmative one and burden was on employer's insurance carrier to establish it before Industrial Accident Commission. Labor Code, § 3600(d).

5. Workmen's Compensation ⇐1604

In proceeding to annul award of Industrial Accident Commission to deceased employee, evidence sustained finding of Commission that death of employee was not caused by his intoxication. Labor Code, § 3600(d).

Leonard, Hanna & Brophy, San Francisco, for appellant.

M. O. Edison, Charles C. Boynton, Ira S. Solomon, San Francisco, for respondent.

Edmund J. Thomas, Jr., T. Groezinger and Robert Ball, San Francisco, for Industrial Accident Commission.

VAN DYKE, Justice.

This is a proceeding through writ of review whereby it is sought to annul an award of the respondent Industrial Accident Commission. The facts may be summarized as follows: Beaster & Cooper Logging Company was engaged in logging operations in Reeves Canyon, 12 to 15 miles south and west of Willits in Mendocino County. Roland Soward had been in its employ a number of months. He was a mechanic and because he was given to drinking sprees which disabled him from working he was employed and paid on an hourly basis from time to time as he was in condition to work and his help was needed. He and Mary Soward lived at an auto court at Willits. On May 12, 1949, responsive to a request of Cooper, field manager of Beaster & Cooper Logging Company, that he repair a Dodge power wagon being used in the company's work, Roland and Mary Soward traveled from their home to Reeves Canyon. He and another mechanic removed the broken unit from the power wagon and loaded it into Roland's automobile. It was Mary's birthday and Cooper agreed that Roland could take the rest of the day off to celebrate the event with Mary. On many occasions Roland had been told to obtain needed spare parts for repair of the employer's equipment and Cooper on this day told him to go to Ukiah and see if the necessary parts to repair the power wagon could be obtained there. Roland and Mary proceeded to Ukiah and unsuccessfully sought the needed parts, then returned to Willits where Roland made further inquiries. Being unsuccessful, he, with Mary, went back to their home. Later in the afternoon they went to Calpella, which is south of Willits, had dinner, drank and danced, and then came back to Willits and did additional drinking at a bar close to their home. There Cooper met Roland between 12 midnight and 1 a. m. on the morning of May 13th. Roland told Cooper he thought the needed parts could be obtained at Laytonville and proposed that he go to Laytonville the next day to get them if they were to be had. He tried to borrow $10 from Cooper to pay for the parts if found and Cooper refused to advance the money, but he did say, "If you want to go to work you pick up my father-in-law [a partner in the business] and go up and get the parts tomorrow, if you want to go to work." Cooper testified that he spoke as

he did because there was nothing to be gained by giving Roland money to buy parts when he was on a drinking bout as he would spend the money to further his drinking. He testified that he would not pay Roland $2.50 an hour to go about looking for parts. Cooper's reason for telling Roland to take Cooper's father-in-law, Beaster, along was so that Beaster could pay for the parts if obtained. Cooper further said to Roland: "If you know where there is a part, tomorrow, any time you get around to it, pick up my father-in-law and take him up there and get it, and there is no use just going any place unless you take him with you in the shape you are in to get the part." Roland answered, "Well, as soon as I get organized around a little bit, I will come back to work, and come and get that part, and get it fixed for you." Cooper testified that Roland was intoxicated at that time. He further testified that Roland said "I will be all right in the morning. I will be out to work and get the stuff." Cooper replied "Well, if you feel all right, and you think you can make it, you pick him up and get me the part. Be sure to pick him up because you will have to get the money to get it." The next morning around eight o'clock Roland and Mary, without contacting Beaster, went to Laytonville, where Roland inquired at a garage for the parts, which he did not succeed in getting. They then started back to Willits. Mary was driving, and on an S curve about two miles north of Willits the car left the road and Roland was killed. He left a minor daughter, not Mary's child, by a marriage that had been terminated by divorce and it was this minor who applied for an award under the act and to whom there was granted the award hereby sought to be annulled.

[1–3] Petitioner contends, first, that the death of Roland did not arise out of and in the course of his employment. It is argued that an employer may so limit the scope of an employee's duties that if he steps outside the scope of those duties and undertakes to perform work he is not employed to do he is not acting within the scope of his employment. Auto Lite Battery Corp. v. Industrial Acc. Comm., 77 Cal.App.2d 629, 631, 176 P.2d 62; Industrial Indemnity Exch. v. Industrial Acc. Comm., 86 Cal.App. 2d 202, 194 P.2d 552. Petitioner contends that in this case the evidence shows without conflict that when he went to Laytonville without taking Beaster along, as directed by Cooper, deceased went outside the scope of his employment in violation of a condition attached to that employment. In support of this the nature of deceased's employment, as being often interrupted and on a basis of pay for actual hours worked, is urged as supporting petitioner's views. We think petitioner's contentions cannot be sustained. "Whether an employee's injury occurred in the course of his employment is a question of fact to be determined in light of the circumstances of the particular case." Industrial Indemnity Exchange v. Industrial Acc. Comm., 26 Cal.2d 130, 136, 156 P.2d 926, 929. "The findings of the commission will not be disturbed upon appeal where they are supported by substantial evidence, or by inferences which may fairly be drawn from the evidence." Phoenix Indemnity Co. v. Industrial Acc. Comm., 31 Cal.2d 856, 859, 193 P.2d 745, 747. One of the duties sometimes assigned to deceased was that of locating needed parts for repair of the employer's equipment and it appeared from the evidence, in addition to what we have heretofore stated, that deceased was useful in securing them by reason of his acquaintance with persons about the country who might have such parts. Cooper, when deceased proposed that he go to Laytonville to secure needed parts, told him to do so if he felt up to it on the following morning, thus leaving it to deceased to determine his ability to go on the errand. True, he told him to pick up Beaster, but he did not expressly make it a condition precedent to the authorization to make the trip. In view of all this we think that the commission could fairly infer from the evidence that Cooper had authorized the trip to Laytonville; that deceased had made the trip pursuant to that authorization and that his failure to take Beaster was not such a violation of orders as to put him outside the scope of his employment while doing so. Notwithstanding Cooper's stated purpose in requiring Beaster to go

along was that money would be available to purchase the parts if they were found, it cannot be said that the employer's business on which deceased went to Laytonville could not have been and was not being furthered or that the violation of Cooper's direction as to taking Beaster along took deceased out of the sphere or scope of his employment. We think if Cooper had really intended to make the violated order a condition precedent to the authorization of the deceased to go to Laytonville he would have plainly said so when he authorized the trip.

[4, 5] Petitioner further contends that the death of Roland was caused by his intoxication. This defense was an affirmative one and the burden was on petitioner to establish it in the proceedings before the commission. On the subject of intoxication there seems no doubt from the record that both Mary and Roland had done considerable drinking during the birthday celebration and up to the time Cooper talked with Roland at Willits concerning the prospective trip to Laytonville. Mary testified that the two stopped drinking around 2 to 2:30 a. m. that night, went home and to bed and that so far as she knew deceased had no drinks thereafter until the accident at about 10:30 the next morning and that she, Mary, had only one drink. As opposed to this, the laboratory technician at the hospital to which the injured pair had been taken took blood samples and analyzed the alcoholic content thereof. He testified as to the percentage of alcohol in the blood of both Mary and deceased and from his testimony and that of other experts, based on his quantitative analysis, it appeared that Mary would be considered sufficiently under the influence of liquor to incapacitate her as a safe driver. One witness went so far in respect of Roland's condition as to say that it amounted to what in lay language would be termed "dead drunk" or "gutter drunk" and that he must have been no better than semi-conscious. There were no witnesses to the accident save Mary. She was severely injured about the head and said that she had no memory as to the actual happening of the accident. Labor Code Section 3600(d) establishes as one of the conditions of compensable injury that it must not have been caused by the intoxication of the injured employee and so the question here is whether or not Roland was intoxicated at the time of the injury and whether or not such intoxication, if it existed, was the cause of his injury. There is apparent conflict between the testimony of Mary and that of the analyst and the other expert witnesses. As to this, petitioner argues that the conflict is apparent only and in reality the testimony contrary to Mary's is credible and factual to a point rendering her testimony incredible. Certainly it is extremely difficult to credit Mary's testimony without also believing that the analyst's work was improperly and inaccurately done or that the conclusions drawn by the expert witnesses from the presence of alcohol which he found in the blood of Mary and Roland were inaccurate to a point approaching deliberate falsehood. But, even so, the conflict is real, not merely apparent, and we cannot say that the trier of fact has not properly resolved the same. Further than this, the question of causation was, as it generally is, a question of fact. The burden was upon petitioner to establish that the death of Roland was caused by *his* intoxication and we think that the commission's finding that this was not so is substantially supported. It was not testified that Mary could not have properly driven the car, and it is not made to appear as a matter of law that she did not properly drive the car. Therefore, the finding of the commission is sustained.

Petitioner suggests that by amendment to Section 5952 of the Labor Code, enacted in 1951, the scope of review has been broadened. The amendment, as added to the existing section, provides that the review may extend to determining from the whole certified record that the award was not supported by substantial evidence. Assuming that a change was thus made in the existing decisional rule, we think the record meets the substantial evidence test so provided.

The award is affirmed.

ADAMS, P. J., and PEEK, J., concur.

108 Cal.App.2d 655

CURL v. PACIFIC HOME.

Civ. 18416.

District Court of Appeal Second District, Division 3, California.

Jan. 15, 1952.

Mary M. Curl sued the Pacific Home, a corporation, for declaration of the rights and duties under a written contract which gave plaintiff a life membership in defendant's home for elderly people, and for injunctions enjoining termination of the contract and defendant's proceeding with unlawful detainer action brought in Municipal Court. The Superior Court, Los Angeles County, Arnold Praeger, J., entered an order directing the issuance of a preliminary injunction, and defendant appealed. The District Court of Appeal, Vickers, J. Pro Tem., held, inter alia, that plaintiff was entitled to declaratory relief and that, pending such action, she was entitled to have the situation created by the contract remain unchanged, and therefore the injunction was proper.

Affirmed.

1. Declaratory Judgment ⇐316

Complaint alleging written contract whereby plaintiff was given life membership in corporate home for elderly people, which contract provided that plaintiff would be provided with room, board, laundry and medical care for life, and that the Board of Directors of the home reserved the right to dismiss any member for just cause and that such action by the board should be final and conclusive, and that defendant had attempted to terminate plaintiff's membership without just cause, stated a cause of action for declaratory relief. Code Civ.Proc. § 1060.

2. Declaratory Judgment ⇐143

Availability of another remedy for alleged wrongful attempt to terminate life membership in home for elderly people did not prevent life member from seeking declaration of rights under written contract which created the life membership. Code Civ.Proc. § 1060.

3. Declaratory Judgment ⇐143

Damages would not be adequate or capable of compensating life member of home for elderly people for being driven from her home and deprived of the benefits under the contract which created the life membership, and therefore life member was entitled to declaration of rights under the contract when supervisor of the home allegedly wrongfully attempted to terminate the life membership. Code Civ.Proc. § 1060.

4. Asylums ⇐5

Where written contract gave elderly woman life membership in home for elderly people and contract provided that Board of Directors could dismiss the member for any just cause, elderly woman was entitled to notice of hearing and to fair hearing by the Board before being dismissed from the home, although contract provided that action of Board should be final and conclusive. Code Civ.Proc. § 1060.

5. Asylums ⇐5

Even in absence of provision of contract, which created life membership in home for elderly people, that just cause was required for dismissal of the member, the member would be entitled to notice of hearing and to fair hearing by the Board of Directors before being dismissed from the home. Code. Civ.Proc. § 1060.

6. Declaratory Judgment ⇐258

Where life member of home for elderly people was entitled to declaration of rights and duties of parties under contract which created life membership, and fair hearing, after due notice, before being dismissed from the home, pending such declaration and determination as to whether life member had been given such notice and hearing, life member was entitled to have situation created by contract unchanged and to enjoy her home and the other benefits granted by the contract, and therefore issuance of preliminary injunction was proper. Code Civ. Proc. §§ 526, subds. 1, 3–6, 1060.

7. Declaratory Judgment ⇐258

Issuance of temporary injunction enjoining further proceeding with unlawful detainer action in municipal court, which action was brought by home for elderly people to evict life member, until declara-

tion of rights under contract which created life membership and determination of whether life member had been given due notice and fair hearing by Board of Directors of the home prior to attempted cancellation of life membership, was proper where Superior Court obtained jurisdiction through service of process before Municipal Court and where life member sought equitable relief which was in excess of jurisdiction of Municipal Court. Code Civ.Proc. §§ 416, 526, subds. 1, 3–6, 1060.

Newby, Holder & Newby, Los Angeles, for appellant.

Edward L. Butterworth, Bruce H. Thomas, Los Angeles, for respondent.

VICKERS, Justice pro tem.

The defendant corporation maintains the Pacific Home as a home for elderly people. In 1941 the parties hereto entered into a written contract whereby plaintiff paid defendant $6,050 and defendant accepted her as a life member of the Home and agreed to provide her with "room 201 over the dining hall" and with board, laundry and medical care. Plaintiff, who at the time was 65 years of age, thereupon entered the home and continued to reside therein and receive the specified benefits until June 7, 1950. On that day she was informed by the superintendent that her life membership and the benefits thereof to her had been cancelled by the board of directors and that she must leave the Home immediately. Plaintiff refused to recognize the attempted cancellation and defendant filed an action in unlawful detainer in the municipal court. Prior to service of process in that action plaintiff filed this action and secured a temporary order restraining the defendant, pending the hearing of an order to show cause, from prosecuting that action. The order required the defendant to show cause why it should not be enjoined, pending the action, from interfering with defendant in the enjoyment of her room and the board, laundry and other services to which she was entitled under the contract and from proceeding further with the unlawful detainer action. Plaintiff filed supporting affidavits and defendant filed a demurrer and counter affidavits. After a hearing the court overruled the demurrer and ordered a preliminary injunction issued in the language of the order to show cause.

Appellant attacks the order on various grounds. Its principal contentions are that the complaint fails to state a cause of action for declaratory relief and that neither it nor the supporting affidavits state facts sufficient to justify the issuance of a preliminary injunction. By her complaint, in addition to the facts set forth above, plaintiff made the following allegations: That during the early part of 1950 many of the members of the conference of the Methodist Church, who were members of defendant corporation, became dissatisfied with the administration of the Home by the superintendent and instituted an investigation; that during the course thereof plaintiff, at the request of such members, advised them of facts that were unfavorable to the superintendent; that he became cognizant thereof and adopted a malicious and fraudulent scheme to have plaintiff and others who had given similar information expelled from the institution; that in pursuance of such scheme the superintendent caused certain false charges to be lodged against her with the board of directors and on May 24, 1950, without any notice to her, caused her to be called from her lunch, brought before himself and two others, where for the first and only time she was informed of the charges against her, and asked to immediately state her case; that the superintendent caused this to be done so that she would be taken by surprise and be so confused and shocked that she would not be able to defend herself; that no witnesses against her were called and she had no opportunity to prepare her case or to call her witnesses; that she was wholly unprepared and was surprised and shocked by the proceeding and could not properly defend herself; that she denied the charges and was dismissed and that the superintendent in pursuance of his fraudulent scheme told her that if she spoke to anyone regarding the incidents she would jeopardize her position; that on June 7, 1950, she received a letter, signed by the superintendent, stat-

ing that the board of directors at a meeting held June 6, 1950, had purported to cancel her life membership in the Home; that the superintendent told her she must leave at once and that no part of the $6,050 paid by her would be refunded; that she has faithfully abided by the rules, regulations and bylaws of the Home, that no just cause for dismissal has arisen, and that the attempt by defendant to oust her and to terminate her membership was and is unlawful and void; that under the contract she could not be dismissed unless she was given sufficient notice to enable her to prepare for a hearing before the board of directors, and an opportunity to there present her witnesses and her defense to the charges; that plaintiff is without funds to maintain herself away from the Home and that if the attempt to dismiss her is successful she will be irreparably injured and become partially destitute and a possible charge upon the public.

Plaintiff prayed for a declaration of the rights, duties and obligations of the parties under the contract and for a preliminary injunction, pending final judgment, preventing defendant from evicting her from the Home, from attempting to terminate the contract and from proceeding with the unlawful detainer action. She also prayed for a permanent injunction to the same effect.

The portion of the contract upon which the respondent relies provides that she agrees to the rules and regulations of the Home and that "the Board of Directors of the Home reserves the right to dismiss any member of the Home for any just cause and that * * * [such action] shall be final and conclusive." The contract also provides that the board of directors shall have the right to retain from the money theretofore paid by a dismissed member, a sum not to exceed $100 per month while the member enjoyed the benefits of the home.

[1–3] It appears to us that plaintiff has clearly stated a cause of action for declaratory relief and that an action for damages, as appellant suggests, would not lie under the allegations of the complaint and that such relief would not be adequate. Appellant misconceives respondent's action as one resulting from the termination of the contract. On the contrary the action is on a contract that is still in full force and effect because it was not terminated for "just cause" as provided therein and the purported termination was done in a manner contrary to the law of this State. There being a controversy as to the meaning of the terms of an existing contract respondent is entitled to a declaration of the right and duties of the parties as provided for in Code of Civil Procedure, section 1060. The fact that an other remedy may be available does not prevent respondent from seeking such a declaration. In the case of Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, at page 732, 146 P.2d 673, at page 680, 151 A. L.R. 1062, the Supreme Court said: "* * all [authorities] agree that before a court may properly exercise its discretion to refuse relief on that ground [existence of other remedies], it must clearly appear that the asserted alternative remedies are available to the plaintiff and that they are speedy and adequate or as well suited to the plaintiff's needs as declaratory relief. [Citing cases]." It can hardly be argued that damages would be adequate or capable of compensating respondent for being driven from her home and deprived of the benefits thereof, to which she was entitled under the contract, for the balance of her life.

[4, 5] Appellant contends that since the contract provides that the action of the Board in dismissing a member "shall be final and conclusive", respondent's rights under the contract have been concluded. However appellant fails to give due consideration to that part of the contract, immediately preceding such provision, which states that a member may be dismissed "for any just cause." According to the complaint not only is it alleged that there was no truth to the charges but that the action of the Board was the result of the fraudulent scheme of the superintendent to deprive plaintiff of her membership. Even though there was no "just cause" provision respondent would be entitled to notice of hearing and an opportunity to be heard at a fair trial. This rule of law is well set

forth in the case of Taboada v. Sociedad Espanola etc., 191 Cal. 187, 215 P. 673, 27 A.L.R. 1508. In that case the plaintiffs were members of a fraternal mutual benefit society and an attempt had been made to deprive them of their memberships. The bylaws of the society required notice of the accusation and a trial thereon before expulsion. The members of the society attempted to avoid this requirement by suspending the bylaws and then by viva voce vote expelling the plaintiffs. In granting a writ of mandate to reinstate the plaintiffs the court in 191 Cal. at page 191, 215 P. at page 674, said: "This right to a fair and impartial trial, contemplated and seemingly guaranteed by these sections, is not a mere pretense or shadow, but a real substantial, enforceable right. It is a fundamental principle of justice that no man may be condemned or prejudiced in his rights without an opportunity to make his defense. This rule is not confined alone to courts of justice and strictly legal tribunals, but is applicable to every tribunal which has the power and authority to adjudicate questions involving legal consequences. And a society acting upon the expulsion of a member is a *quasi* judicial body, and its hearing is a *quasi* judicial hearing. Otto v. [Journeymen] Tailors' P. & B. Union, 75 Cal. 308, 17 P. 217, 7 Am.St.Rep. 156. The proceedings of the society, in order to be regular and legal, in effect, must therefore provide for notice to the accused and afford him an opportunity to be heard. Fay v. Supreme Tent, Knights of the Maccabees of the World, 38 Misc.Rep. 427, 77 N.Y. Supp. 994, 996.

"Indeed, it has been held that even though the by-laws expressly provide for the expulsion of a member without a trial such a provision is void, and an expulsion in pursuance of such a by-law is not binding. Ludowiski v. [Polish Roman Catholic, St. Stanislaus Kostka] Benevolent Society, 29 Mo.App. 337; People ex rel. Schmitt v. Saint Franciscus Benevolent Society, 24 How.Prac. (N.Y.) 216, 221; Berkhout v. Supreme Council Royal Arcanum, 62 N.J. Law 103, 43 A. 1. * * *

"It has been held that, in the absence of by-laws covering the subject, a member is entitled to a fair trial after due notice, and that the procedure in such cases is to be analogous to ordinary judicial proceedings so far as necessary to render substantial justice. People [ex rel. Meads] v. Alpha Lodge, 13 Misc.Rep. 677, 35 N.Y.Supp. 214, 218; Wachtel v. Noah Widows & Orphans' Ben. Soc., 84 N.Y. 28, 38 Am.Rep. 478; Simmons v. Syracuse, 56 Hun 645, 10 N.Y.Supp. 293, 294; Fritz v. Muck, 62 How.Prac. [N.Y.] 69, 74. In Von Arx v. San Francisco Gruetli Verein, 113 Cal. 377, 379, 45 P. 685, 686, this court said:

"'Where there are no * * * by-laws, a court will inquire whether or not an expelled member has had a reasonable notice of the proceeding which resulted in his expulsion, and a fair opportunity of presenting his defense in accordance with general principles of law and justice.'"

[6] Appellant also contends that the remedy of injunction is not available to respondent because she in effect is asking for specific performance of a personal service contract and of a contract that calls for a succession of acts by defendant. Whether or not this contract falls within either classification is beside the question at this stage of the proceedings. Respondent is seeking a declaration of the rights and duties of the parties under the contract and a fair hearing, after due notice, by the board of directors before being dismissed from the Home. As we have found she is entitled to that declaration and to such notice and hearing. Pending such a declaration and determination as to whether she was given such notice and hearing she is entitled to have the situation created by the contract remain unchanged and to enjoy her home of nine years (room 201) and the other benefits granted her by the contract. The only legal remedy by which she can be so protected is by a preliminary injunction. The court properly exercised its discretion and by issuing such an injunction gave her the protection to which she was entitled under Code of Civil Procedure, section 526, subsections 1, 3, 4, 5 and 6. The extent of the relief, if any, to which she will be finally entitled can only be determined at the time of trial.

[7] The portion of the injunction that enjoins the appellant from proceeding further with the municipal court action is clearly proper since the superior court through the service of process first obtained jurisdiction, see Code of Civil Procedure sec. 416 and Gorman v. Superior Court, 23 Cal.App.2d 173, 72 P.2d 774, and the equitable relief which respondent seeks and to which she appears to be entitled is in excess of the jurisdiction of the municipal court. See Kaloutsis v. Maltos, 9 Cal.2d 493, 71 P.2d 68 and Engelman v. Superior Court, 105 Cal.App. 754, 288 P. 723.

The order is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



LIBERTY MUT. INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.*

No. 15025.

District Court of Appeal, First District, Division 1, California.

Jan. 7, 1952.

Hearing Granted March 6, 1952.

Petition by Liberty Mutual Insurance Company against Industrial Accident Commission of the State of California and Glenn W. Dahler, a minor, by his guardian ad litem, Stanley P. Mamalakis to review an award of the Industrial Accident Commission. The District Court of Appeal, Bray, J., held that evidence sustained finding of Commission that college student who was employed by store and restaurant operator at mountain resort as a dishwasher and helper and who was injured while diving into a swimming pool on premises, although not on employer's property, sustained injury arising out of and in course of employment.

Award affirmed.

1. Workmen's Compensation ⇐1578

In workmen's compensation proceeding, evidence sustained finding of Industrial Accident Commission that college student who was employed by store and restaurant operator at mountain resort as a dishwasher and helper, who was injured while diving into a swimming pool on resort premises, although not on employer's property sustained injury arising out of and in course of employment.

2. Workmen's Compensation ⇐1939

Where different inferences may reasonably be drawn from the facts, District Court of Appeal is bound by determination thereof by Industrial Accident Commission.

3. Workmen's Compensation ⇐1358

Where young college student was employed by store and restaurant operator at mountain resort as dishwasher and helper in return for weekly salary plus room and board and student was injured while diving into swimming pool on resort premises, although not on property of employer, inference existed that employment of young college student contemplated that in addition to his pay, board and room, he was to use as an incident of employment swimming facilities provided by resort association for its employees and which restaurant and store operator's employees had right to use, and student's right to use pool was by reason of his distinct status as an employee and as an incident of his employment.

4. Workmen's Compensation ⇐710

Place of employee's injury is not criterion but whether act of employee when injured was reasonably contemplated by employment.

5. Workmen's Compensation ⇐51

Rule of strict interpretation of workmen's compensation acts does not prevail in California.

Leonard, Hanna & Brophy, San Francisco, for petitioner.

Stanley P. Mamalakis, San Francisco, for respondent Glenn W. Dahler, a minor, by and through his guardian ad litem, Stanley P. Mamalakis.

Edmund J. Thomas, Jr., T. Groezinger, Robert Ball, San Francisco, for respondent Industrial Accident Commission.

* Subsequent opinion 247 P.2d 697.

BRAY, Justice.

Petition to review an award of the Industrial Accident Commission. The sole issue is whether the injury arose out of and was incurred in the course of employment.

Facts.

There is practically no conflict in the evidence. The North Fork Association, comprised of persons enjoying the great out-of-doors, owns a large area in the Sierras. Approximately 25 cabins are owned by the members and are located in a portion of the area having a radius equal to about five city blocks. This area is called "The Cedars." In it is located a store and restaurant operated as a concession by Swafford & Co. Glenn W. Dahler, a student at the University of California, was 19 years of age. About June 19, 1950, he was employed by Mr. Swafford for Swafford & Co. in San Francisco as a dishwasher and helper. About all that was said about his duties at that time was that he was to serve breakfast and dinner and open and operate the store a couple of hours in the morning. He was to receive $35 per week plus room and board. His employment started on the 26th when he went in Swafford's truck with the Swafford & Co. cook and her husband to The Cedars. They arrived late that night. On the morning of the 27th, he helped clean the grill (the restaurant) and apparently worked around it until July 1st when it opened for business. It was patronized exclusively by the members of the North Fork Association, their guests and the employees of the members. Mr. Swafford was present the first two or three days the grill opened. Glenn's duties started about 8 a. m. when he helped serve breakfast, except on days when the trays were dirty, when he started at 7:30 and cleaned the trays. After breakfast he washed dishes. About 10:00 or 10:30 he opened the store and filled orders until 12:00. If patrons wanted meat he would thaw it out and deliver it in the afternoon. He usually ate lunch between 12:00 and 1:00 with the employees of the association. He would then go back to the dishes, clean the dining room and sweep the floor, finishing between 2:00 and 3:00. About once a week the truck would come with groceries and he would unload and pack them away after he finished the dining room. If meat had been ordered, he would deliver it at this time also. He would then be free until around 5:00 when he would get the trays dried and ready for dinner, serve salads, bus dishes and wash them. This would take until about 10:30. Swafford had given him no definite hours to work. Swafford, however, observed the work that Glenn did. The cook's husband, Robinson, was in charge and supervised some of Glenn's duties but Swafford established Glenn's routine. When telephone calls came for members, Glenn would go to their cabins and notify them to go to the telephone in the amusement hall adjoining the grill.

On the association property, but not on the portion occupied by the employer's concession, a distance of about ten blocks from the grill, was a dam where the members, their guests and their employees and employees of the association swam. Glenn had swum there before, the first time being July 3rd. No one had told him he could go swimming there, or that he could not; it was just more or less taken for granted that he could. On one occasion when Swafford decided not to take inventory, Glenn told him he would go swimming instead. Swafford did not object. During his work at The Cedars, Glenn left camp only three times at the most. One night he went with Swafford to Reno to see the sights, and twice he left camp to get groceries. When he did not have time to go swimming he stayed around the camp. When he had free time he could have gone fishing or hiking. On July 19th, Glenn got through with washing the lunch dishes and getting the dining room in order for dinner around 3 o'clock. He then went to the dam to swim, and for no other purpose. He swam, sun-bathed, and attempted to show a girl who was a daughter of a member how to swim. He then dove off around two and a half to three feet from the steep rocks into the water, which at that spot was about four feet deep. A girl was standing about where he dove as he had asked her to

do so as to show the depth. He struck a mudbank or something. He could not move his body and he was pulled out by the girl. He received severe damage to his spinal cord.

On this evidence the referee made a finding that Dahler "sustained injury arising out of and *in the course of the employment * * * while diving into a pool on the employer's premises.*" (Emphasis added.)

Was Swimming at the Dam Contemplated in the Employment?

Respondents concede that the place of injury, the pool, was not on the employer's premises and hence that portion of the finding is erroneous. This, however, does not end the case. The question left to be determined is whether swimming at the dam was reasonably contemplated in the employment of Glenn, and therefore the injury arose out of and in the course of that employment. It is apparent from the record that at the time Glenn was hired by Swafford very little was said about his duties, and that what he was to do was determined in large part by what he was told to do by Swafford and Robinson at the camp, and what all took for granted he did without his being expressly directed. He was confined rather closely to camp and his leisure time was quite restricted. A reasonable inference from all the facts and circumstances is that it was contemplated as a part of his employment that he was to receive, besides his pay, room and board, the right to swim at the dam. This was the recreation he was expected to take as the time element did not permit him any form which would take him away from camp. While "camp" was generally considered to be the area occupied by the homes of the members, a reasonable inference from the evidence is that it also included the dam where everyone at The Cedars went to swim.

[1, 2] The inferences above mentioned are not compelled by the circumstances nor are they the only ones that could be drawn therefrom. However, they are reasonable ones and under the well known rule, where different inferences may reasonably be drawn from the facts, we are bound by the determination thereof by the commission.

Authorities.

The parties have not cited, nor have we found, any case where the facts were identical with those in the case at bar. The nearest case factually is Dowen v. Saratoga Springs Commission, 1944, 267 App.Div. 928, 46 N.Y.S.2d 822. There, locker boys, during their lunch hour and after working hours, when accommodations were not crowded, were given permission to use the swimming pool maintained by the employer in connection with its business and upon the premises where the boys were employed. One of the boys, during his recreation hour, was climbing a ladder leading to a diving board from which he intended to dive into the pool. He slipped and was injured. The State Industrial Board ruled that he was entitled to compensation under the Workmen's Compensation Law. The court affirmed the award. There, of course, the injury occurred on the employer's premises. In our case it was off his premises. This distinction, however, is not important. If the recreation facilities are provided *as a part of the employment,* it could make no difference whether they were on or off the employer's premises or were or were not owned by the employer.

A case illustrating the principle applied by the commission, although the facts are stronger than in our case, is Piusinski v. Transit Valley Country Club, 283 N.Y. 674, 28 N.E.2d 401. There the claimant was employed by the club as a golf caddy. He and the other caddies were encouraged to play golf on the club's course each Monday under the supervision of a caddy master, not only for their own amusement, but because the practice tended to make them more efficient caddies. Claimant was injured while engaged in such a practice game with the other caddies. The court supported the finding of the commission that the injury arose out of and in the course of the employment.

While the facts are somewhat different, it is difficult to distinguish the ruling in Employers' Liability Assur. Corp. v. Industri-

al Accident Comm., 37 Cal.App.2d 567, 99 P.2d 1089, from that of the commission here. There the employee, hired as a cook, was required to live at her employer's residence, and, as part of her compensation, received her room and board. On what was normally her "day off," the maid had left, so she worked until 11:00 or 11:30 a. m. She then told her employer that she would return early that evening to wash the dishes. A little before 8 p. m. she returned. She put an apron over her street dress and washed the dishes. She then retired to her room. She was then on call to answer the telephone or the doorbell, and was expecting her employer to call her to take care of the child. While waiting, she noticed that her dress was a little long. The mirror was not adjustable. To observe more clearly the hem of the dress she stood on a stool. While shortening the dress, she slipped and fell, sustaining injuries which the commission found occurred in the course of and arose out of her employment. After pointing out that where an employee is required to live on the employer's premises, any injury received while the employee is making a reasonable use of said premises is in the course of the employment, even though received during the employee's leisure time, the court states that the only debatable question is whether the injury could be said to have arisen out of the employment. It then stated, 37 Cal. App.2d at page 570, 99 P.2d at page 1090: "The mere fact that the employee was engaged in performing a personal act when injured does not, *per se,* determine that the injury did not arise out of the employment." It refers to a number of cases in which the employee was engaged in performing a personal act when injured, and such act was held to arise out of the employment, such as Western Pac. R. R. Co. v. Industrial Accident Comm., 193 Cal. 413, 224 P. 754, where a messenger was struck by an automobile while returning to his place of employment from his home where he had gone to get his overcoat; Whiting-Mead Commercial Co. v. Industrial Accident Comm., 178 Cal. 505, 173 P. 1105, 5 A.L.R. 1518, where an employee had injured his hand while working for his employer and later, while lighting a cigarette, set fire to the bandage which had been soaked in turpentine; Martin v. Lovibond & Sons, 7 B.W.C.C. 243, where a drayman was required to work from 8 a. m. to 9 p. m.; during that time he took no meals at home; he left his team at the side of the street and crossed over to refresh himself at a pub with a glass of beer; he was there about two minutes and on returning across the street was killed by an automobile; Thomas v. Proctor & Gamble Mfg. Co., 104 Kan. 432, 179 P. 372, 6 A.L.R. 1145, where an employee was injured while at play during the noon hour. The court refers to Campbell's Workmen's Compensation, vol. 1, pp. 199–202, for a long list of situations where the employee was allowed compensation while performing purely personal acts. It refers to the cases from other states collected by Campbell which show a contrary rule but points out that they are in states which have a doctrine of strict construction of compensation acts, and that such doctrine has never been adopted in this state. It then holds that the theory of the cases which it approved, as well as the one upon which it decided the case, is that the employee, when injured, was engaged in doing something he might reasonably have been expected to do while in the performance of his duty, or something which was reasonably contemplated by his employment. "If the particular act is reasonably contemplated by the employment, injuries received while performing it arise out of the employment, and are compensable. In determining whether a particular act is reasonably contemplated by the employment, the nature of the act, the nature of the employment, the custom and usage of a particular employment, the terms of the contract of employment, and perhaps other factors should be considered. Any reasonable doubt as to whether the act is contemplated by the employment, in view of this state's policy of liberal construction in favor of the employee, should be resolved in favor of the employee." 37 Cal.App.2d at pages 573–574; 99 P.2d at page 1092.

[3] In Pacific Indemnity Co. v. Industrial Accident Comm., 26 Cal.2d 509, 159 P.

2d 625, two boys, Tomas and Adolfo, with other members of their family, were employed as grape pickers on a piece work basis. After working all morning one Saturday they quit at noon, as did all the other pickers. Accompanied by their sister and two friends, fellow workers, they went by automobile to their home, some few miles distant from the camp supplied by the employer to most of his employees, to pick up their work cards, which showed their earnings for the week. They had been told that they would get their pay at the office after 1 p. m. About 12:40 they stopped at an irrigation reservoir located on the employer's property to wash their hands, face and feet, as they were "dirty." They then intended to go to the office for their pay. Adolfo and one of the other boys had finished their ablutions and were standing by the automobile, when Tomas, then in the reservoir and unable to swim, called for help. Adolfo and the other boy plunged into the reservoir to rescue Tomas. They were unsuccessful. The other boy, with the aid of a woman, managed to pull himself out, but both Tomas and Adolfo were drowned. The reservoir was used regularly for washing after work by all the grape pickers, and many of them went swimming there. The commission found that the deaths arose out of and occurred in the course of their employment. The court upheld the finding of the commission. The following excerpts from the opinion in that case apply to our case: "In considering the problem of the compensable nature of the deaths in question, it must be remembered that the reviewing court is not to determine the weight to be given the evidence [citations] or which of two opposing inferences should be drawn therefrom. [Citations.] A review of the record in the light of these principles of law sustains the commission's findings and awards." 26 Cal.2d at pages 512–513, 159 P.2d at page 627. "Whether a given accident is so related or incident to the work in which the employee is engaged depends upon its own particular circumstances. No exact formula can be laid down which will automatically solve every case. [Citations.] The question is, of course, primarily one for the commission to determine." 26 Cal.2d at page 516, 159 P.2d at page 629. The contention was made that there was no causal connection between the employment and the death of Adolfo. He had finished his ablutions and was standing by the automobile when he heard his brother and coemployee Tomas cry for help. Adolfo was drowned in the attempted rescue. The court held that the death was of an industrial nature and compensable. A somewhat similar situation occurred in O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483, although in the latter case the death occurred off the employer's premises. The employer was a government contractor operating on the island of Guam. It maintained for its employees a recreation center near the shoreline, along which ran a channel so dangerous for swimmers that its use was forbidden, and signs to that effect erected. John Valak, the employee, spent the afternoon at the center and was waiting for his employer's bus to take him from the area, when he heard two men, standing on the reefs beyond the channel, signaling for help. Followed by nearly twenty others, he plunged in to effect a rescue. In attempting to swim the channel to reach the two men he was drowned. On a claim filed by his dependent mother under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., 33 U.S.C. A. § 901 et seq., the commissioner found as a "fact" that the death arose out of and in the course of the employment. The Court of Appeals for the Ninth Circuit reversed this finding, 182 F.2d 772 on the ground that the lethal currents were not a part of the facilities supplied by the employer and that the attempted rescue was neither for recreation nor was it in the course of the employment. The Supreme Court, with a dissent by three justices, reversed the decision of that court, and held that, while the facts did not compel, they supported an inference that the death was fairly attributable to the risks of the employment. It pointed out that an application of the act which "precluded an award for injuries incurred in an attempt to rescue persons not known to be in the employer's service, undertaken in forbidden wa-

ters outside the employer's premises. * * * is too restricted an interpretation of the Act. Workmen's compensation is not confined by common-law conceptions of scope of employment." 71 S.Ct. at page 471. "The test of recovery is not a causal relation between the nature of employment of the injured person and the accident. Thom v. Sinclair, [1917] A.C. 127, 142. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose." 71 S.Ct. at pages 471–472. Applying to the facts of our case the test as set forth in Employers' Liability Assur. Corp. v. Industrial Accident Comm., supra, 37 Cal.App.2d 567, 99 P.2d 1089, and in the cases above mentioned, raises an inference that the employment of this young college student contemplated that in addition to his pay, board and room, he was to use as an incident of that employment the swimming facilities provided by the association for its employees, and which Swafford's employees had the right to use. Actually, Glenn's right to use the pool was by reason of his *distinct status* as an employee and as an incident of his employment. See Pacific Indemnity Co. v. Industrial Accident Comm., supra, 26 Cal.2d 509, 515, 159 P.2d 625.

[4] Petitioner contends that the fact that the place of injury was off the employer's premises is controlling, quoting from Makins v. Industrial Accident Comm., 198 Cal. 698, 247 P. 202, 49 A.L.R. 411, and that for the same reason the so-called "bunkhouse rule" does not apply. However, the place of injury is not the criterion. See Associated Indemnity Corp. v. Industrial Accident Comm., 18 Cal.2d 40, 112 P.2d 615. It is, whether the act of the employee when injured is reasonably contemplated by the employment.

[5] There are a number of jurisdictions where the rule of strict interpretation of Workmen's Compensation Acts prevails, the cases from which support petitioner's contentions. But as that rule does not prevail in California, it is unnecessary to discuss them. Graf v. Montecito County Water Dist., 1 Cal.2d 222, 34 P.2d 138, is easily distinguishable on the facts from our case. There, the injured employees "were neither going to nor returning from their work, they lived at the camp site, and had been to their abodes, changed their clothes, and boarded the train [belonging to the employer] for an excursion of pleasure wholly aside from their duties as employees." 1 Cal.2d at page 225, 34 P.2d at page 139. Moreover, the court stated that the record failed to show the exact terms of the employment, and there was no evidence that transportation was promised the employees as a part of their contract, and hence nothing in the record to support the petitioner's contention that riding on the train was incidental to the employment. Moreover, the case was decided in 1934. The dissenting opinion of Shenk, J. to the effect that the train ride was incidental to the employment more nearly represents the Supreme Court's attitude today. Nor is Torrey v. Industrial Accident Comm., 132 Cal.App. 303, 22 P.2d 525, in point. There, the employee went to a picnic ground to discuss business with a coemployee. The latter invited him to go for a motor boat ride. The boat turned over and both men were drowned. The commission held that the death did not occur in the course of employment. The court upheld this determination, holding that the business of the employer was either concluded, or postponed at the time of the boat ride and that the evidence failed to show that the employee went on the boat ride for any purpose other than his personal pleasure. The court refers to the fact that adverse as well as favorable inferences may be drawn from the petitioner's evidence. It may well have been that had the commission drawn an inference to the effect that business was to be discussed during the five minute boat ride, the court would have upheld such action of the commission. In that case, differing from ours, there was no finding that the interlude of pleasure was an incident of the employment. This same factor is the distinction between our case and Langendorf United Bakeries, Inc., v. In-

dustrial Accident Comm., 6 Cal.App.2d 46, 43 P.2d 1106; Pacific Indemnity Co. v. Industrial Accident Comm., 27 Cal.App.2d 499, 81 P.2d 572; Red Arrow Bonded Messenger Corp. v. Industrial Accident Comm., 39 Cal.App.2d 559, 103 P.2d 1004, and others cited by petitioner.

In Roberts v. Means, 146 Pa.Super. 188, 22 A.2d 98, a boy employed at a hotel to carry bags and rent boats on the shore of a lake, was drowned while diving from a boat which after his day's work and after his supper he had rowed out on the lake. The court held that under the evidence he was using the boat solely for his own pleasure. While the boy had been given permission by the employer to swim from the wharf, if his employer was present, he had been forbidden to go out in a boat under penalty of losing his job. Obviously there is no similarity with the facts in our case. The court also held that the boy's injury occurred off the employer's premises but pointed out that this fact would not be conclusive had the appellant met the burden of showing that the injury occurred in the course of the employment.

In State Young Men's Christian Ass'n v. Industrial Commission, 235 Wis. 161, 292 N.W. 324, Kregel, a medical student, was employed as a counselor to assist the first aid medical director of a Y. M. C. A. summer camp. He was subject to call on his free time, and hence he was usually within the camp area. He was paid a salary and room and board. When not actually occupied he was privileged to use the camp recreational facilities including the tennis courts. While engaged in a game of tennis with other counselors he was struck in the eye by a tennis ball, causing the injury for which he sought compensation. In reversing the lower court, which had confirmed an award of the Wisconsin Industrial Commission, the Supreme Court acted on the theory that his play was purely voluntary on his part and was in no wise for the benefit of his employer. The theory of the case is that "there is no evidence that at the time the injury was received the claimant was engaged in any work for his employer" 292 N.W. at page 326. In California the right to compensation by an employee is not limited to injuries received while actually engaging in the employer's work.

The facts in Aetna Casualty & Surety Co. v. Fulmer, 81 Ga.App. 97, 57 S.E.2d 865, cited by petitioner, are so dissimilar to those in our case as not to require comment. It, Brynwood Land Co. v. Industrial Commission, 243 Wis. 380, 10 N.W.2d 137, and Mishawaka Rubber & Woolen Mfg. Co. v. Walker, 119 Ind.App. 309, 84 N.E.2d 897, applied the well known rule that an injury sustained by an employee while engaging in recreational activity for his own amusement is not compensable. None of them consider the situation where, as in our case, the place and type of recreation is provided by the employer as an incident of the employment.

Petitioner cites Pacific Indemnity Co. v. Industrial Accident Comm., supra, 27 Cal.App.2d 499, 81 P.2d 572, for the proposition that "the mere fact of employment and permission to use the premises of the employer does not give rise to a right to compensation under the [Workmen's] Compensation Act * * * for an injury resulting to an employee." 27 Cal.App.2d at page 503, 81 P.2d at page 574. There, the claimant was injured while attending a union meeting in a room on the employer's premises, which the employer had expressly agreed with the union committee might be used for that purpose. In denying compensation, the court points out that not only was the employee not engaging in any business for her employer, but for aught that appears, the meeting may have been held for purposes antagonistic to her employer. There can be no quarrel with the principle above mentioned. Our case, as herein shown, does not depend upon that principle.

The award is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

108 Cal.App.2d 438

Ex parte LUKASIK.

Civ. 8140.

District Court of Appeal, Third District, California.

Dec. 27, 1951.

Proceeding in the matter of the application of Dolores Lukasik for writs of habeas corpus and prohibition. The District Court of Appeal, Van Dyke, J., held that where appeal from interlocutory decree of divorce wherein mother was awarded custody of minor children was pending, trial court had no jurisdiction to entertain guardianship petition by grandmother of the children, and prohibition would issue restraining court from further proceedings in guardianship, and grandmother who obtained custody under order of the trial court would be directed to return the children to the mother.

Order in accordance with opinion.

1. Divorce ⇐289

Guardian and Ward ⇐8

Jurisdiction of trial court in divorce action in so far as custody of minor children of the parties is concerned is to all intents and purposes as broad as would be the jurisdiction it might exercise in a proceeding for the appointment of a guardian of the children, and in either proceeding it may award custody to father, mother, or other persons deemed suitable if neither of the parents is fit. Probate Code, § 1406.

2. Divorce ⇐312.4

Where appeal from interlocutory decree of divorce granting mother custody of minor children was pending, jurisdiction of the court in the divorce action to make any order affecting custody of children was suspended.

3. Divorce ⇐182

Appeal from interlocutory divorce decree stays all further proceedings in the trial court upon the decree or matters embraced therein. Code Civ.Proc. § 946.

4. Appeal and Error ⇐436

Where an appeal is pending, even consent of parties is ineffective to reinvest trial court with jurisdiction over the subject matter of the appeal.

5. Divorce ⇐312.4

Where appeal is pending from interlocutory divorce decree wherein mother was awarded custody of children, whether attempt be made to set aside, modify or amend custodial orders made by trial court through the medium of a habeas corpus proceeding, guardianship proceeding or through attempted direct action in the divorce action, perfecting of appeal stays hand of trial court during pendency thereof, and it can neither directly or indirectly further act upon subject matter of the appeal.

6. Divorce ⇐312.4

Prohibition ⇐10(2)

Where appeal was pending from interlocutory decree of divorce wherein custody of minor children was awarded to mother, the trial court had no jurisdiction to entertain a petition by the grandmother of the children for appointment as guardian of the children, and writ of prohibition restraining trial court from further proceedings in guardianship would issue, and grandmother would be ordered to return the children to the mother.

7. Guardian and Ward ⇐13(3)

While any person may initiate a guardianship proceeding, whether related to minors or not, none but the parents have anything in the nature of a right to be adjudicated.

8. Guardian and Ward ⇐13(1, 3)

Welfare of children is essential subject matter of guardianship action and a stranger is little more than an informant to the court when he initiates the proceedings.

James M. Thuesen, Fresno, George C. Barrett, Merced, for appellant.

Anderson & Peck, Oakland, for respondent.

VAN DYKE, Justice.

William M. Lukasik and Dolores Lukasik are husband and wife and the parents of two minor children, Ronald William Lukasik and Kenneth Mathew Lukasik,

who are 7 and 5 years of age. Heretofore Dolores filed suit for divorce against her husband William and a temporary order was made granting her the legal custody of the two children pending the further order of the court. Later the court granted her an interlocutory decree of divorce wherein the custody of the children was awarded to her. William took an appeal from the whole of that decree, which appeal is now pending in this Court. Since the appeal was taken and upon petition of William, filed in the juvenile department of the respondent court, proceedings were taken by that court to have these children made wards thereof. This Court, in a habeas corpus proceeding instituted by Dolores, directed that the children, who had been, under process of the juvenile court, taken from Fresno County, the county of their residence, back into Merced County, be returned to their mother. In re Lukasik, 105 Cal.App.2d 145, 232 P.2d 520. Therein we held that the juvenile proceedings were within the exclusive jurisdiction of the Superior Court for Fresno County.

When this decision was announced, Veronica Lukasik, the paternal grandmother of the children, filed a petition in the respondent court for her appointment as guardian of the persons of said minors. Therein she alleged that they were residents of Fresno County; that they had no guardian of their persons legally appointed by will or otherwise; that they were in need of the care and attention of some fit and proper person; that the Merced County court in the divorce action had made its interlocutory decree awarding the custody and control of the minors to Dolores, their mother, and that she had them with her in the City of Fresno; that she had neglected them, failed to properly care for them and kept an unclean house; that she indulged in drinking parties in their presence until late and unusual hours at night; that she was often intoxicated and on more than one occasion had driven her automobile in a negligent and careless manner while the children were riding therein, and had been once charged with the crime of manslaughter as the result of the death of three persons arising out of an automobile accident in which she was involved while the children were in the car; that she had been cruel to them and unnecessarily inflicted inhuman punishment on them. From this she concluded that it was necessary that a guardian of the persons of the minors be appointed, recited that she was able and willing to provide a proper home for the children at LeGrand in Merced County and that the father, William, was filing with her petition his nomination of the petitioner as guardian. Acting under the provisions of the Probate Code § 1442, the grandmother filed in the guardianship proceeding an affidavit restating, in the main part, the allegations of her petition, and declaring that the minors would be imperiled if allowed to remain in the custody of Dolores until a hearing could be had upon the guardianship petition. She asked that the court exercise its power to make temporary disposition of the minors' custody. The court thereupon issued its warrant of arrest directed to the sheriff of Merced County, ordering that he forthwith take the minors from the custody of Dolores and place them in the custody of their grandmother. Apparently the probation officer, responsive to the order of this Court, took the children and delivered them into the custody of their mother and the sheriff promptly, acting under the warrant of arrest, took them away from her and returned them to the grandmother in whose custody they had been.

Dolores has now petitioned this Court again, asking that we prohibit further proceedings in the guardianship matter by the respondent court, and that we grant habeas corpus. She claims lack of jurisdiction in respondent court to entertain the guardianship proceeding, and therefore that the respondent court's order temporarily granting custody to the grandmother and ordering the arrest of the children by the Merced County sheriff so as to effectuate that temporary order were acts void for want of jurisdiction and that the children are unlawfully detained. This Court issued an alternative writ of prohibition and granted the petition for writ of habeas corpus and both matters have been argued and submitted for decision. The appeal from the interlocutory divorce decree is still pending.

The fundamental question to be answered in these proceedings is this: Where, in a divorce action between the parents of minors, a temporary order granting legal custody to the mother has been made, thereafter an interlocutory decree has been made which likewise grants custody to the mother, and an appeal has been taken therefrom, has the trial court, wherein the divorce action is pending, jurisdiction, through the appointment of a personal guardian, to affect the existing order as to custody of the minors during the pendency of the appeal?

Respondents rely upon Greene v. Superior Court, 37 Cal.2d 307, 231 P.2d 821. There the Supreme Court held that where by a final decree of divorce granted by the Superior Court of Santa Barbara County the custody of minors had been awarded to the mother who had thereafter remarried and established the residence of herself and the minors in San Francisco, the Superior Court for the City and County of San Francisco had no jurisdiction to appoint a guardian of the persons of said minors. The court said that ordinarily the Superior Court of the county of a minor's residence or temporary domicile had jurisdiction to appoint a guardian, but that since the Santa Barbara court had assumed and was exercising jurisdiction over the custody of the persons of the minors through its custody decree the San Francisco court had no jurisdiction to appoint a guardian of the persons of those minors. The decision was based upon the rule that when two or more courts in this State have concurrent jurisdiction the court first assuming jurisdiction retains it to the exclusion of all other courts in which the action might have been initiated, the Supreme Court declaring that the rule was particularly apposite to prevent unseemly conflict between courts that might arise if they were free to make contradictory custody awards at the same time. The court pointed out that when a court had appointed a guardian and it was thereafter sought in another county to modify the right to custody so given, it had been generally held that in the interest of orderly administration of justice no other court had jurisdiction, either in habeas corpus or guardianship proceedings, to interfere with the existing guardian's custody so long as the guardianship continued; that the jurisdiction of the court which appointed the guardian was a continuing one, so that its jurisdiction remained and was exclusive. The court said it found no reason to hold that a continuing jurisdiction of a divorce court over its custody awards was not also a continuing and an exclusive jurisdiction, saying that a decree awarding custody to a parent claiming adversely to the other parent differed only in formal respects from a decree appointing one parent guardian of the person of the child, since the effect in either case was to confer upon the party appointed the care and custody thereof.

[1] We do not, however, understand the Greene case to be controlling here. It must be said in respect of the present proceedings that the jurisdiction of the respondent court in the divorce action in so far as the custody of the persons of the minors is concerned is to all intents and purposes as broad as would be the jurisdiction it might exercise in a proceeding for the appointment of a guardian of the persons of the same minors. In either proceeding it may award the custody of the minors to the father, to the mother, or to the grandmother or other person deemed suitable if neither of the parents is fit. Probate Code, § 1406 et seq.; 9 Cal.Jur. p. 783, sec. 132; Newby v. Newby, 55 Cal. App. 114, 202 P. 891. The Greene case decided that under the rule governing conflicting jurisdictions the divorce court, though the minors no longer resided within its county, had exclusive jurisdiction in the matter of custody and no other court could exercise jurisdiction over that subject matter. But that does not answer the questions before us.

[2] Since the jurisdiction of a divorce court in the matter of custody of minors is to all intents and purposes as broad as is the jurisdiction of a court in a guardianship proceeding, there would never seem to arise any necessity or convenience for the appointment of a guardian of the persons of minors whose custody was thus be-

ing adequately administered. However, petitioner, not being a party to the divorce action, seeks to enter upon the scene through the medium of a guardianship proceeding brought in the same court which has rendered its custody decrees in the divorce action. She alleges the pendency of the divorce action, the making of the interlocutory decree, the appeal therefrom, and argues that the effect of that appeal is to suspend the jurisdiction of the court in the divorce action to make any order affecting the custody of the children while the appeal is pending. That the appeal does have such effect cannot be questioned. Foster v. Superior Court, 4 Cal.2d 125, 47 P.2d 701; Foster v. Foster, 5 Cal.2d 669, 55 P.2d 1175; Ritter v. Superior Court, 99 Cal.App. 121, 278 P. 240; Browning v. Browning, 208 Cal. 518, 282 P. 503; see cases collected and discussed in 9 Cal.Jur. p. 799, sec. 141, and 5 Cal.Jur. 10-year Supp., p. 340, sec. 141. In short, notwithstanding the respondent court in the divorce action has by its temporary order determined that the mother of these minors is a fit and proper person to have their custody and has made the same decision in its interlocutory decree from which an appeal has been taken, and notwithstanding that upon determination of that appeal, whether the custodial decree be affirmed or reversed, the respondent court will resume jurisdiction in the divorce action to adjudge what should thereafter be done concerning the custody of these minors, still because of the hiatus, temporary in character, brought about by the statutory supersedeas during appeal, the grandmother contends she may, through a guardianship proceeding, have the custodial decree annulled. If she may do this she will effectually render futile the jurisdiction of this Court on appeal.

[3, 4] An appeal such as is pending here "stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein". Code Civ.Proc. § 946. So complete is this loss of jurisdiction effected by the appeal that even the consent of the parties has been held ineffective to reinvest the trial court with jurisdiction over the subject matter of the appeal and that an order based upon such consent would be a nullity. Kinard v. Jordan, 175 Cal. 13, 15, 16, 164 P. 894. "Pending the appeal the superior court had no more power to modify the order appealed from in the manner indicated than it would have had to proceed and enforce it in its entirety. The effect of the appeal is to *remove the subject-matter of the order from the jurisdiction of the lower court,* and that court is without power to proceed further as to any matter embraced therein until the appeal is determined. Ruggles v. Superior Court, 103 Cal. 125, 37 Pac. 211." Stateler v. Superior Court, 107 Cal. 536, 40 P. 949, "We think it very plain that the superior court cannot deprive this court of jurisdiction of an appeal from a judgment by amending the judgment while the appeal is pending here." San Francisco Savings Union v. Myers, 72 Cal. 163, 13 P. 403, 404. "The stay of proceedings pending appeal has the legitimate effect of keeping them in the condition in which they were when the stay of proceedings was granted. It operates so as to prevent any future change in the condition of the parties." Merced Mining Co. v. Fremont, 7 Cal. 130. "[W]hile an appeal from the judgment is pending, that court has no power to amend or correct its judgment." Shay v. Chicago Clock Co., 111 Cal. 549, 552, 44 P. 237, 238. "An appeal from a judgment or order would be futile, and this court would be deprived of jurisdiction, if, pending the appeal, the judgment or order appealed from could be modified or changed into something radically different by a subsequent order of the lower court. Of course, circumstances can be imagined under which a power in the trial court to change a judgment or order while an appeal was pending could be wisely used for the welfare of children; but that consideration was pressed in the Queirolo Case, and the court there said: 'With the supposed evil consequences suggested by respondent as possibly flowing from this conclusion, the court may not concern itself in an instance such as this. The effect of an appeal from the judgment, as suggested in Foster v. Superior Court [115 Cal. 279], 47 Pac. 58,

is purely a matter of statutory regulation, to be determined by a construction of the statute under which the appeal is taken, and by the terms of which, when clear and unambiguous, we are concluded. It is for the legislature to make the law. Our function is simply to enforce it.'" Vosburg v. Vosburg, 137 Cal. 493, 70 P. 473, 474.

[5] In France v. Superior Court, 201 Cal. 122, 255 P. 815, 819, 52 A.L.R. 869, it was held that while in this State the power to issue the writ of habeas corpus is conferred by the Constitution upon the Supreme Court and each of the justices thereof, District Courts of Appeal and each of the justices thereof, and the Superior Courts; and the decision of any court in habeas corpus proceeding, providing the court has jurisdiction, cannot be reviewed by any other court in any way, nevertheless this did not mean that the superior courts "have the power to interfere with the appellate jurisdiction of either of said last-named courts in matters pending before said appellate courts or to overrule or set aside a judgment rendered therein." The court further said: "It is not claimed that this could be done directly by any proceeding instituted for that purpose in the superior court, but if the last-named court has power under the Constitution to discharge from custody by a writ of habeas corpus a defendant whose appeal is at the time pending before either of the appellate courts of the state, then the superior court may do indirectly that which it must be admitted it has no power to do directly." We hold that whether the attempt be made to set aside, modify or amend the custodial orders made by the respondent court in the divorce action through the medium of a habeas corpus proceeding or through the medium of a guardianship proceeding or through attempted direct action in the divorce action, the perfecting of the appeal stays the hand of the respondent court during the pendency thereof and that neither directly nor indirectly can the respondent court further act upon the subject matter of the cause, jurisdiction over which has by the appeal been transferred from respondent court to the appellate court.

[6–8] Through the guardianship proceeding the respondent court was vested with no jurisdiction pending the appeal to further consider and act upon the subject matter of the custodial decree adjudicated in the divorce action. The fact that we have an apparent difference in parties in the guardianship proceeding is not material. The Greene case was based upon the theory that a divorce decree awarding to a parent the custody of a minor was the equivalent of a decree appointing a guardian of the person of the minor in a guardianship proceeding. While any person may initiate a guardianship proceeding, whether related to the minors or not, none but the parents have anything in the nature of a right to be adjudicated. The welfare of the children is the essential subject matter of the action and strangers are little more than informants to the court when they initiate the proceeding. The argument that these minors are imperiled by being left in the custody of their mother to whose custody the respondent court has heretofore committed them is but a repetition of the argument that has so frequently been made in this and like situations as was noted by the Supreme Court in Vosburg v. Vosburg, supra. If, indeed, that peril is real, then far from justifying further action by the trial court pending appeal the situation is one, as was suggested in Ritter v. Superior Court, supra, where the State, acting in its capacity as parens patriae may through the juvenile court temporarily care for the interests of these children. Such a proceeding, to be brought in the county of their residence, was suggested as appropriate in our former decision, In re Lukasik, supra, but for some unexplained and perhaps inexplicable reason the petitioner in guardianship and the father of these minors in the juvenile proceedings he brought in the respondent court, seem extremely reluctant to submit the decisions of the issues they propose to the Superior Court of Fresno County. This reluctance indicates either that the peril they allege does not in fact exist or that they seek to gain a fancied advantage by proceeding in the respondent court.

Since the respondent court has no jurisdiction in the guardianship proceeding to affect the custody of these minors, pending the appeal, its order to the sheriff of Merced County issued in that proceeding was void and the detention of these minors by their paternal grandmother is unlawful.

Let the writ of this Court issue, prohibiting and restraining the respondent court from further proceedings in guardianship which will in any manner or to any degree affect the custody of these minors, pending the appeal from the orders of that court in the divorce action, and let the petitioner in the guardianship proceedings and respondent herein in the habeas corpus proceedings, Veronica Lukasik, be ordered and directed to immediately deliver said minors to petitioner herein, Dolores Lukasik, who, pending said appeal, is declared to be their legal custodian and entitled to their physical custody.

PEEK, J., and SCHOTTKY, J. pro tem., concur.



108 Cal.App.2d 609

LUKASIK v. LUKASIK.

Civ. 8092.

District Court of Appeal, Third District, California.

Jan. 9, 1952.

Rehearing Denied Jan. 31, 1952.

Action for divorce by Dolores Lukasik against William M. Lukasik, commenced on August 21, 1950, wherein defendant failed to file an answer and a default was taken on February 8, 1951, and an interlocutory decree of divorce was rendered on the default on April 20, 1951, in favor of the plaintiff. On May 3 the defendant filed motion to set aside the judgment. The Superior Court, Merced County, R. R. Sischo, J., entered an order denying the motion and the defendant appealed from the default judgment and the order. The District Court of Appeal, Van Dyke, J., held that the defendant was without lawful excuse for the delay in filing pleadings, and refusal to set aside judgment was not abuse of discretion.

Judgment and order affirmed.

See also 239 P.2d 492.

1. Appeal and Error ⇐935(2)

On appeal from order refusing to set aside default judgment, all presumptions are in favor of the order.

2. Appeal and Error ⇐996

Where an issue is tried upon affidavits, those affidavits favoring contentions of respondent establish not only the facts stated therein but also all facts which may be reasonably inferred therefrom.

3. Appeal and Error ⇐957(1)

Order denying motion to set aside judgment by default will not be disturbed on appeal unless clear abuse of discretion is shown.

4. Divorce ⇐161

Defendant's excuse for failure to file answer to divorce action commenced August 21, 1950, and to take steps to obtain leave to file pleadings between February 8, 1951, when default was entered, and April 12, 1951, when cause was presented on default, that parties were attempting to negotiate settlement, was insufficient, in absence of showing of oral agreement, or facts from which such could be implied, that default would not be taken, and denial of motion of May 3 to set aside default judgment, on ground that defendant prevented filing answer to prevent trial, was not abuse of discretion.

5. Divorce ⇐184(1)

On appeal from judgment of divorce rendered on default, appellant could not obtain review of sufficiency of evidence, notwithstanding that he had succeeded in filing reporter's transcript showing evidence taken at default hearing, but appellant would be confined to attacking jurisdiction or sufficiency of pleadings.

6. Divorce ⇐184(1)

Statute providing that no divorce can be granted upon the uncorroborated state-

ment of the parties does not make available to appellant against whom judgment was rendered on default, a review of the sufficiency of evidence. Civil Code, § 130.

Anderson & Peck, Oakland, for appellant.

Don C. Mayes, George C. Barrett, Merced, for respondent.

VAN DYKE, Justice.

This is an appeal from a default judgment of the Superior Court of Merced County awarding an interlocutory decree of divorce to respondent, Dolores Lukasik, and also from an order of the court denying appellant's motion to set aside the judgment and default and permit appellant to file an answer and cross-complaint. The divorce action was commenced on August 21, 1950. The complaint was amended October 8th following to substitute specific allegations of cruelty for the general allegations contained in the complaint as filed. The relief sought by respondent's pleading was a divorce, based upon extreme cruelty, custody of two minor male children then six and five years old, respectively, and a division of the community property belonging to the parties. The appellant did not appear in the action although served shortly after the filing of the complaint, and on February 8, 1951, his default was entered. On April 12, 1951, respondent presented her evidence in support of her allegations to the trial court and on April 20th following an interlocutory decree of divorce was entered. The community real property of the parties was divided equally between them. Respondent received, in addition, the furniture and furnishings in the family residence. The decree further divided equally the farm machinery, equipment, and all of the other personal property. Custody of the two minor children was awarded to respondent, Dolores, with reasonable right of visitation accorded to appellant. He was also directed to pay respondent $100 per month for her support and an additional $100 per month for the support of the minor children. He was further ordered to pay an additional sum of $100 to respondent's attorney for his services in the action.

Thereafter, on May 3rd, appellant served and filed a notice of motion to set aside the judgment. Affidavits in support of and in opposition to the motion were filed by the respective parties and the matter submitted to the court after oral argument. The court denied the motion, declaring in a memorandum opinion which has been brought up that appellant had been guilty of inexcusable neglect in failing to appear.

[1–4] Upon an appeal from an order refusing to set aside a judgment by default all presumptions are in favor of the order of the trial court. Security Loan & Trust Co. v. Estudillo, 134 Cal. 166, 169, 66 P. 257, Brainard v. Brainard, 82 Cal.App.2d 478, 186 P.2d 990. "In all matters in which an issue is tried upon affidavits it is the rule that those favoring the contentions of respondent establish not only the facts stated therein but also all facts which may be reasonably inferred therefrom." Brainard v. Brainard, supra, 82 Cal.App.2d at pages 480–481, 186 P.2d at page 991. Applying these rules we find that the affidavits upon which the motion to set aside the default judgment was submitted established the following: Approximately six months elapsed between the time the complaint was served upon appellant and the time when his default was taken. During this period appellant was represented by attorneys, not his present counsel. On September 15, 1950, a temporary order was made by the trial court granting custody of the minor children to respondent. In October the complaint was amended, as before noted, and filed with the consent of appellant's counsel. On January 19, 1951, appellant was brought before the court on an order to show cause why he should not be punished for failure to obey the support order and during the hearing, the trial court having inquired as to why the case was not ready for trial, appellant's counsel answered that within a very short time they would have an answer and cross-complaint on file and had every confidence that the trial could be set shortly. Appellant's

counsel were repeatedly asked to file an answer and finally were given a "deadline" of February 5, 1951, the clear intimation being that if the pleadings were not in by that time a default would be taken. They prepared an answer and had it ready for signature on February 6th, whereupon appellant informed them that he desired the assistance of other counsel and he did not verify the pleadings. The default was taken February 8th. The cause was not presented on default to the trial court until two months more had elapsed, during which time no steps were taken to obtain leave to file an answer or cross-complaint. Appellant seeks to excuse the obvious failure to exercise his rights to contest respondent's cause by averring that he was engaged during the long intervening period between the service upon him of the complaint and the entry of the interlocutory decree in attempting to negotiate a settlement. Undoubtedly such negotiations did take place, but unless accompanying such negotiations there is something in the nature of at least an oral stipulation that pleadings need not be filed and that a default will not be taken, or in the absence of something from which such an agreement can be implied, so that it can be said that the taking of the default amounted to a breach of faith, the negotiation proceedings do not excuse the failure to proceed with due diligence in the filing of pleadings. Although appellant argues that such a showing was here made, the affidavits of respondent and her counsel negative this showing and the court was therefore justified in concluding, as it declared in the memorandum opinion filed in response to the motion, that the case presented was one in which the client took over the management of the case from his attorneys and by "preventing his attorneys from filing an answer and regardless of demands of opposing counsel that an answer be filed and without any request of the Court for further time" was successful in preventing the cause from coming to trial for a considerable time. All of this the court justifiably held to be without lawful excuse. The most that can be said in favor of appellant upon this aspect of the appeal is that by the affidavits he filed in support of his motion he presented an issue of fact which the trial court resolved against him. Such an order will not be disturbed on appeal unless a clear abuse of discretion is shown. The record here falls far short of such a showing and the order appealed from must be affirmed.

[5, 6] Appellant further contends on his appeal from the judgment that the evidence given at the hearing of the cause was insufficient to support the judgment appealed from, that the award of custody of the children to the respondent was an abuse of the court's discretion and that the court had no power to award further attorneys' fees. On an appeal from the judgment rendered on default a review of the sufficiency of the evidence is not available. Line v. Line, 75 Cal.App.2d 723, 728, 171 P.2d 733, 736. There the court said: "Defendant asks us to review the sufficiency of the evidence to support the allowance of a fee of $2500. This ground of appeal is not available to an appealing defendant whose default has been taken. Such a defaulting appellant must confine his attack to the consideration of jurisdiction or of the sufficiency of the pleadings. Reed Orchard Co. v. Superior Court, 1912, 19 Cal.App. 648, 662, 128 P. 9, 18." Nor is this rule affected by the fact that appellant has succeeded in filing in connection with this appeal a reporter's transcript showing the evidence taken by the trial court at the default hearing. In Crackel v. Crackel, 17 Cal. App. 600, 601–602, 121 P. 295, 296, hearing denied by Supreme Court, the court said: "The defendant urges four grounds upon which she seeks a reversal of the judgment, all of which depend upon, and require an examination of, the evidence taken at the hearing of the case. This, however, being an appeal from the judgment in a default case, and therefore no issue of fact having been raised by the pleadings, the defendant was not entitled to have the testimony incorporated in the transcript * * *; and the mere fact that the evidence is inserted in the record here does not warrant the court in reviewing or considering it for any purpose. (Sutton v. Symons, 97 Cal. 475,

32 Pac. 588; Thomson v. Thomson, 121 Cal. 11, 12, 53 Pac. 403; Lane v. Tanner, 156 Cal. 135, 138, 103 Pac. 846)." See, also, Reeves v. Reeves, 34 Cal.2d 355, 209 P.2d 937. But appellant argues that in divorce actions the appellate court can review the evidence taken for the reason that Section 130 of the Civil Code provides that "No divorce can be granted * * * upon the uncorroborated statement" of the parties and appellant then argues that the record as presented by him here discloses that there was no sufficient corroboration and that, therefore, the court lacked jurisdiction to enter the decree appealed from. The contention is answered by Crackel v. Crackel, supra, 17 Cal.App. at pages 602–603, 121 P. at page 296, as follows:

"The defendant concedes as a general rule that these propositions are true; but she contends, on the other hand, that as section 130 of the Civil Code provides that the court shall, in defaults in divorce causes, require proof of the facts alleged before granting the relief, the law thereby raises an issue of fact, and consequently provides for a trial. But the contrary of this was expressly held in the case of Foley v. Foley, 120 Cal. 33, 37, 52 P. 122, 123, [65 Am.St. Rep. 147]. * * *

"We think it clearly appears * * * that a defendant who has defaulted is not entitled to a new trial, nor to have a bill of exceptions settled, nor [to] the certification of the evidence 'in lieu' thereof, both of which proceedings are intended to review issues of fact 'after a trial.' Here, as we have seen, there were no issues of fact and no trial. Where a defendant fails to answer, the only question that can arise upon an appeal is a legal one, and the appellate court is limited in its examination in such a case to the judgment roll, i. e., the papers mentioned in subdivision 1 of section 670 of the Code of Civil Procedure.

* * * * * *

"* * * the evidence is not legally before us".

Notwithstanding the foregoing, we have been at pains to consider the contentions of appellant as though they were properly before us and to that end have examined the reporter's transcript which has been filed herein. We are satisfied from such examination that the points argued by appellant are without merit.

The judgment and order appealed from are affirmed.

ADAMS, P. J., and PEEK, J., concur.



108 Cal.App.2d 624

In re RUGANI'S ESTATE.

RUGANI et al. v. LEONOFF.

Civ. 14797.

District Court of Appeal, First District, Division 2, California.

Jan. 14, 1952.

Hearing Denied March 13, 1952.

Proceeding in the matter of the estate of Silvio Rugani, deceased, wherein a will contest proceeding by Fosco Rugani and others and an action by the same plaintiffs against Dorothy Cunningham Leonoff to cancel two deeds were consolidated for trial. The Superior Court, City and County of San Francisco, I. L. Harris, J., entered a decree denying the will admission to probate and a decree declaring the deeds void and defendant, proponent of will and grantee named in each of deeds appealed. The District Court of Appeal, Jones, J. pro tem., held that evidence sustained finding that confidential relationship existed between proponent and testator and finding of undue influence with respect to both will and deeds.

Judgment affirmed.

1. Wills ⇐163(4)

Where a person sustains a confidential relation to testator, is active in preparation of a will and unduly profits by its terms, a presumption of undue influence arises casting burden of showing that will was not product of undue influence on proponent of will, and presumption created by combination of three elements is in itself a species of evidence which proponent must overcome before she can prevail.

2. Wills ⇐163(4)

Presumption of undue influence existing where person who sustained confidential relation to testator and was active in preparation of will unduly profited by its terms is evidence and standing alone it supports a finding against contradictory evidence.

3. Wills ⇐400

The trier of fact is sole judge of credibility and weight of evidence in a will contest the same as in any other case.

4. Appeal and Error ⇐1010(1)

If there is any substantial evidence from which a legitimate and reasonable inference to support it may be drawn, finding of trial court must be upheld on appeal.

5. Appeal and Error ⇐989

Where a verdict is attacked as being unsupported, power of appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury.

6. Appeal and Error ⇐996

Where two or more inferences can be reasonably deduced from the facts, reviewing court is without power to substitute its deductions for those of trial court, and rule is as applicable in reviewing findings of a judge as it is when considering a jury's verdict.

7. Fraud ⇐7, 50

Confidential relations may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another, and such relationship is a fact to be established in same manner and by same kind of evidence as any other fact as proven.

8. Deeds ⇐72(3)
Insurance ⇐587
Wills ⇐157

Where proponent of will undertook to prepare testator's will making her sole beneficiary, the two deeds naming proponent as grantee and letters to insurance companies naming proponent beneficiary of testator's policies, having voluntarily assumed such a position of trust and confidence, proponent was bound by it.

9. Deeds ⇐211(4)
Wills ⇐166(2)

In will contest proceeding and to obtain cancellation of two deeds executed by testator on ground of undue influence by proponent, who was also named as grantee in deeds, evidence sustained finding that confidential relationship did in fact exist between proponent and testator, who was advanced in years, who suffered from a heart ailment of which he died about four months after alleged will was made, who was illiterate and alone in world, except for his children in Italy, and who was dependent entirely on friends for advice and comfort, and finding of exercise of undue influence with respect to both will and deeds.

Theodore M. Monell, San Francisco, for appellant.

Hoberg & Finger, J. A. Pardini, Elda Granelli, and F. Campagnoli, San Francisco, for respondent.

JONES, Justice pro tem.

This is a proceeding in which the contest of a will was consolidated for trial with an action to cancel two deeds. Two sets of findings were made by the trial court and two judgments entered. For the purpose of this appeal the findings will be considered as a single set, and the two judgments as but one. People v. Ocean Shore R., Inc., 22 Cal.App.2d 657, 72 P.2d 167; East Bay Mun. Utility Dist. v. Kieffer, 99 Cal.App. 240, 278 P. 476, 279 P. 178.

The two children of the decedent, Rugani, filed the contest to his alleged will. Upon the trial they abandoned their other grounds of contest and relied solely upon that of undue influence. The court found in their favor and entered a decree denying the will admission to probate. The children are also the plaintiffs in the action to cancel the two deeds. The deeds were also attacked upon the ground of un-

due influence and upon the additional ground that they had never been delivered. The trial court found in favor of the children of the decedent upon both of these issues and entered a decree declaring the deeds void. The proponent of the will, who is also the grantee named in each of the deeds, filed this appeal.

The record shows that Rugani came to this country from Italy in 1912. The evidence does not disclose whether his first wife died before he left Italy or after he arrived here. In any event his two children by his first marriage, Fosco Rugani, a son, and Leonetta Rugani Peschiera, a daughter, remained in Italy. His second wife, and by which marriage there were no children, died a little less than a year before he did. Her death was on March 10, 1948 and he died on February 21, 1949. Mrs. Rugani's estate was still in probate on the date when the will and the deeds in question here were alleged to have been executed.

Rugani was illiterate and could speak only broken English. Among the witnesses who testified as to his illiteracy were W. J. McChrystle, his attorney in the matter of the probate of his wife's estate, W. R. Collum, manager of the Safe Deposit Department at the Crocker First National Bank, under whom Rugani worked as a porter, and Mrs. Myrtle E. Noah. Mrs. Noah had been a tenant in the Rugani house before Mrs. Rugani's death, and after her death she continued on. She testified that: "He (Rugani) could not read; he read the pictures, as far as reading was concerned by his own admission he had no education in Italy or in the United States; he could not read or write. All that he—his reading was mostly to find a picture, that he spelled out, deciphered out; as far as writing was concerned he signed his name; that was simply from memory."

Mr. Collum gave testimony that Rugani could neither read nor write, except that he could write his name. For a period after Mrs. Rugani's death it was Rugani's custom to bring all business correspondence to him for explanation. Collum would then follow Rugani's directions as to what should be done. Much of this had to do with the probate of Mrs. Rugani's estate and many of the explanations were of legal documents. McChrystle testified that when he addressed communications to Rugani the reply usually came through Mr. Collum. Rugani never read any of the documents pertaining to the probate of his wife's estate in McChrystle's presence but would, after explanation of the document under consideration, sign it without reading it. He never wrote anything except his name in McChrystle's presence.

At the date of his death Rugani was sixty-two years of age. For several years he had been suffering from a heart affliction, the exact nature of which the record does not disclose. Mrs. Rugani was apparently in better health than her husband and her sudden death was a pronounced shock to him.

The proponent of the will, Mrs Dorothy Cunningham Leonoff, was some twenty-five years younger than Rugani. She had married a man by the name of Cunningham in 1930. In 1940 she married one Constantine Leonoff, and at the time of the trial she was engaged to marry one Harry Selleneit. She was known to some of her friends as Mrs. Cunningham, but to most of them she was known as Mrs. Leonoff. She met Rugani in 1939. The testimony is conflicting as to whether she met him in a coffee shop at the rear of the bank where he worked, or whether their first meeting was in a tavern. By vocation she was a legal secretary. The evidence discloses that she kept her own file of legal forms including forms of wills and deeds as well as particular paragraphs and wordings for special provisions therein. She also had her own typewriter.

Mrs. Leonoff was acquainted with Mrs. Rugani and on one or two occasions had visited in the Rugani home prior to Mrs. Rugani's death. After her death she frequently had lunch or dinner with Rugani. According to her testimony, on one of these occasions he suggested that she move into his home. She also testified that when he told her that he would leave

all of his property to her she made up her mind to accept his invitation. This was at a luncheon on her birthday on September 4, 1948 in the home of one Mrs. O'Shea.

On October 1, 1948, she and Mrs. MacPherson, one of the witnesses to the will, moved all of her belongings into the Rugani house. Mr. Rugani was not there when she arrived but they took charge and she was all settled by the time he came home. This was about 3:30 o'clock in the afternoon. Rugani immediately went upstairs and soon came back with a metal box from which he took some documents embodying the descriptions of his property in San Francisco and in Sonoma County. Mrs. Leonoff took a position at her typewriter and using her file of forms drafted the will in question here. She also drew the two deeds from him to her of the San Francisco and Sonoma County properties and wrote two letters to different life insurance companies for him to sign. These letters contained the direction that she be made the beneficiary under his two life insurance policies. In addition she drafted her own will naming Rugani as the sole legatee thereunder. A Mrs. Price, another close friend of Mrs. Leonoff, who had already been notified that she would be needed, was summoned by telephone to act as the other witness to the wills. After the wills were signed and witnessed, the four, Mrs. Leonoff, Mrs. MacPherson, Mrs. Price and Rugani went to the City Hall where the deeds were signed by Rugani and acknowledged before a Notary Public, another acquaintance of Mrs. Leonoff. This being done, the four returned to Rugani's home. The two deeds had been placed in an envelope upon which was endorsed the instruction: "To be opened at my death."

With reference to the deeds, Mrs. Leonoff testified: "Q. What happened to the deeds after you got back home? A. He put them in the little box; he took me upstairs; he had a cedar chest at the foot of his bed which had a lock although the little box did not. He handed me the box and handed me the keys and opened up the chest. He said 'Put that in there; if anything—if anything happens to me take it to the City Hall'."

Changes, alterations and repairs were made to the Rugani house under the supervision and direction of Mrs. Leonoff after she moved in. Mrs. Noah was moved out and Mrs. Leonoff and Rugani occupied the place alone. While living there they made frequent trips to his summer cottage near Guerneville on the Russian River. There they became acquainted with a Mrs. Doyle who, when called as a witness for the proponent, testified:

"Mr. Finger: Q. Mrs. Doyle, you say that Mr. Rugani always said that he regarded Mrs. Leonoff as a very competent person? A. Yes; he respected her intelligence; he looked up to her by reason of her intelligence.

"Q. Isn't it a fact also that he also said that he had the utmost confidence in her? A. Yes.

"Q. Did they give the appearance of being two people who shared each others full confidence? A. Yes, they did.

"Q. They did. Did he tell you that as long as he had known Dorothy he had regarded her as a friend? A. Yes.

"Q. Had placed great confidence in her? A. Yes."

After he made his will Rugani's health declined steadily. A day or two before his death he took to his bed and was later removed to a hospital by Mrs. Leonoff where he passed away early on the following morning. Mrs. Leonoff recorded the deeds to the San Francisco property before noon on the day of Rugani's death and on the same date deeded this property to Harry Selleneit. On February 23, two days after Rugani died, she recorded the deed to the Sonoma County property and immediately thereafter executed a deed to this property to her uncle.

On the day that the deed to the Sonoma County property was recorded she visited the Crocker Bank and by appointment there met Mr. Collum and Mr. McChrystle. To these men she voluntarily stated as testified to by Mr. Collum: "That Mr. Rugani had left everything to her in a will; had given her gift deeds—deeds of

gift to the real property. She made the statement: 'I had it transferred very fast, to get those deeds in and out of my name to avoid creditors.' She mentioned that he had left a will. She acted kind of surprised—she said—'Oh, yes, he had gone to the avenue and procured the forms, and he had gone down to the City Hall with two neighbors who were not friends of mine and had these papers executed and when he came back he handed me the sealed envelope, and he said, "This is yours".'" In explanation of these statements the appellant testified that she could not without embarrassment have stated before Rugani's attorney that the will and the deeds had been prepared by her.

[1-6] In Estate of Leonard, 92 Cal. App.2d 420, 429, 207 P.2d 66, 72, governing situations such as is here presented is stated to be that, "Where a person sustains a confidential relation to the testator, is active in the preparation of a will and unduly profits by its terms, a presumption of undue influence arises casting the burden of showing that the will was not the product of undue influence upon the proponent of the will", citing Estate of Teel, 25 Cal.2d 520, 154 P.2d 384; Estate of Hull, 63 Cal.App.2d 135, 146 P.2d 242; Estate of Abert, 91 Cal.App.2d 50, 204 P.2d 347. The presumption created by the combination of these three elements is in itself a species of evidence which the proponent must overcome before she can prevail. It is said in Khoury v. Barham, 85 Cal.App.2d 202, 212, 192 P.2d 823, 829: "This presumption is evidence. Standing alone it supports a finding against contradictory evidence offered by plaintiff. (Lieber v. Rigby, 34 Cal.App.2d 582, 584, 94 P.2d 49.) It was for the trial court to say whether the evidence offered by plaintiff outweighs the presumption." (Citing cases.) And in Estate of Teel, 25 Cal.2d 520, 526, 154 P.2d 384, 387, it is said: "The trier of fact is the sole judge of the credibility and weight of the evidence in a will contest the same as in any other case." (Citing numerous authorities.) The rule, of course, is that if there is any substantial evidence from which a legitimate and reasonable inference to support it may be drawn, the finding of the trial court must be upheld on appeal. In Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, 690, this rule is expressed as follows: "'It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' (Italics added.) (Crawford v. Southern Pacific Co. (1935), 3 Cal.2d 427, 429, 45 P.2d 183.) The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict."

Our problem here is somewhat narrowed by the fact that the appellant is disputing only one of the elements upon which the presumption is based. She makes no point that she was not active in the preparation of the will or the deeds, nor does she contend that she would not stand to profit unduly if either were upheld. The sole ground for reversal urged by her is that the evidence is insufficient to support the finding of undue influence because, as she contends, it does not establish a confidential relationship.

[7] In Estate of Cover, 188 Cal. 133, 143, 204 P. 583, 588, it is said: "Confidential * * * relations * * * may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another." This definition is restated in Estate of Arbuckle, 98 Cal.App.2d 562, 569, 220 P.2d 950, which cites in addition to Estate of Cover, supra, Hemenway v. Abbott, 8 Cal.App. 450, 463, 97 P. 190, and 37 C.J.S., Fraud, § 2 c (2), p. 214. In applying the above mentioned standard of what is necessary to make out a case of confidential relationship the court in the case of Steinberger v. Steinberger, 60 Cal. App.2d 116, 123, 140 P.2d 31, 35, in which a hearing was denied by the Supreme Court, said: "In the instant case the trial court found that Earle and his uncle William stood in a confidential relationship to each

other. This finding is amply supported. There is not only the evidence of the status of uncle and nephew, and of cotenants, but there is ample evidence to show that a confidential relationship in fact existed. The respondent testified that he had trust and confidence in his uncle. The evidence shows that Earle and William lived in the house on the property here involved from the time of Earle's birth; that the uncle gave Earle money when he needed it, and that Earle reciprocated; that the uncle frequently expressed solicitude for his nephew Earle; that the uncle frequently stated he was keeping and holding the home for the boys. The evidence shows a *friendly intimate relationship* existed between Earle and his uncle. From this evidence it is apparent that the finding of confidential relationship is amply supported." (Emphasis added.) The cited cases are to the effect that a confidential relationship exists whenever trust and confidence is reposed by one person in the integrity and fidelity of another, and that such relationship is a fact to be established in the same manner and by the same kind of evidence as any other fact is proven.

In the case before us we have a person of Italian birth, without the ability to read or write, and who could speak only broken English. He was advanced in years and was suffering from a heart ailment of which he died about four months after the alleged will was made. He was alone in the world, except for his children in Italy, and dependent entirely upon friends for advice and comfort.

He had known Mrs. Leonoff for several years prior to his wife's death. And, after her death, the intimacy of their relationship built up until she moved into his home. It is reasonable to infer that he found solace in her companionship before as well as after she moved into his house. They frequently made trips together to his summer cottage in Sonoma County. He told Mrs. Doyle, a close acquaintance of Mrs. Leonoff's that as long as he had known Mrs. Leonoff he had regarded her as a friend and had placed great confidence in her. He respected her intelligence and regarded her as a very competent person. To her they gave the appearance of being two people who shared each other's full confidence.

In further evidence of the mutual trust and confidence and intimacy existing between the two, is the fact that at the time Mrs. Leonoff drew Rugani's will, she also drew and executed her own will making him the sole legatee to the exclusion of her own relatives. His confidence in her is demonstrated again by his placing in her keeping the will and the deeds contained in the envelope bearing the endorsement, "To be opened at my death." He trusted her not to open the envelope before, and not to record the deeds, until, he died. As she testified he took her upstairs to his room and had her place the documents in a chest which he locked. He then handed her a key to the chest and said, "If anything happens to me take them to the City Hall."

[8] In addition to the fact that there existed between the decedent and Mrs. Leonoff a friendly and intimate relation of trust and confidence, she assumed a position of trust when she undertook to prepare his will, the two deeds, and the letters to the insurance companies. The evidence is that she prepared the documents from her own forms and not at the dictation of the decedent. This is supported by her admission that "I completely forgot to put in the non-contest clause." Having voluntarily assumed such a position of trust and confidence, as the court said in Estate of Lances, 216 Cal. 397, 403, 14 P.2d 768 770, she "must be deemed bound by it."

[9] The evidence produced by the respondents upon the trial is of such a substantial character that when taken as a whole it precludes the question that a confidential relationship did not in fact exist between the proponent and the testator and abundantly sustains the finding of undue influence with respect to both the will and the deeds.

Appellant raises no question with respect to the finding that the deeds were not delivered. It is unnecessary, therefore, for us to comment upon this phase of the case.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

108 Cal.App.2d 734

PEOPLE v. HEAD et al.

Cr. 763.

District Court of Appeal, Fourth District, California.

Jan. 16, 1952.

Eugene J. Head and John N. Purvis and others were convicted in the Superior Court of San Diego County, Dean Sherry, J., of felonious possession of marijuana, and from the judgment and order denying a new trial, John N. Purvis and others appealed. The District Court of Appeal, Griffin, J., held that argument of prosecutor to jury was not prejudicially erroneous.

Judgment and order affirmed.

1. Criminal Law ⇐720½

In prosecution of several defendants for feloniously possessing marijuana, statement of prosecutor in argument to jury that he believed that the evidence showed that all of the defendants were guilty, was not improper.

2. Criminal Law ⇐720½

A prosecutor has a right to state his views and his beliefs and convictions as to what the evidence established and to urge that evidence convinces his mind or is conclusive of the guilt of a defendant.

3. Criminal Law ⇐719(1)

If it was common knowledge that teenagers needed to be stopped from using narcotics, it would be proper for prosecutor in argument to jury in prosecution for feloniously possessing marijuana to state that teenagers needed to be stopped from using narcotics, though there was no evidence in the record to such effect.

4. Poisons ⇐9

Evidence was sufficient to sustain convictions for felonious possession of marijuana.

5. Criminal Law ⇐1171(3)

In prosecution of several defendants ranging from 18 to 21 years for feloniously possessing marijuana, statement of prosecutor in argument to jury that it was necessary for jury to return a proper verdict in order to put up a stop light for all teenagers, and that if jury did not return a proper verdict, then jury would be giving a green light, and that he felt certain that all defendants were guilty, was not prejudicially erroneous.

Riley & Ferguson, San Diego, for appellants.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Appellants John N. Purvis, Jerry K. Golightly, and James Russell Grimes were charged jointly with defendants Eugene J. Head and Robert L. McCabe with the crime of feloniously possessing a narcotic, to wit, marijuana. Their ages ranged from 18 to 21 years. A jury trial resulted in a conviction of all five defendants. Appellants appealed.

About 9:30 p. m. on April 9, 1951, three police officers were touring Golden Hill Park in San Diego in their police car. As they drove around a turn in the road, the lights of their car shone upon a two-door Plymouth sedan parked as though it had backed into a large bush. At that time the officers saw defendant Head standing on the left of that car near the driver's side and behind the open door. He was looking at the police car. He then turned, moved quickly toward the rear of the car and the officer saw his hand raise and lower again. Head returned to the front of the car and sat in the driver's seat.

The officers asked defendants who they were and what they were doing there. They replied they were just seated there talking. They were asked if they had been drinking and they said "No". It had been drizzling that evening and the ground was damp. A search was there made and a dry package of cigarette papers was found on the ground about three feet to the rear of the opening of the left-hand door of the car. Defendants were searched and no narcotics were found on them. Three dry cigarettes, containing marijuana, were found on the ground about six yards from the right rear wheel. Others were found on the left side. In the area back of the

car 52 such cigarettes were found on the ground, which trail led to a Velvet Pipe Company tobacco can containing 14 such cigarettes. The car was searched and on the floor of the rear seat was found a newspaper which had one such cigarette in it. A newspaper was discovered near the left rear wheel of the car and under it was found 25 or 50 burned paper matches. The defendants were arrested. Their car was towed to a lot and later there was found marijuana seeds on the floor of the back seat compartment, under the seat cushions, and on the floor of the front seat compartment. Defendants denied any knowledge of possession of marijuana. When asked what it was they were throwing from the car, one defendant stated it was a bottle of whiskey. He also stated they had had one or two drinks. The officer testified he smelled no odor of liquor on their breaths.

Counsel for appellants concede the sufficiency of the evidence to support the verdicts but assign as prejudicial misconduct statements of the prosecuting attorney which he made in his argument to the jury. Excerpts therefrom show that he said: "Ladies and gentlemen * * * You will recall at the outset on voir dire I asked each one of you specifically whether or not if you believed the evidence showed it beyond a reasonable doubt you would find one or more of the defendants guilty. You said that you would. * * * I believe that the evidence now shows that all of these defendants are guilty."

Thereafter, the prosecutor summarized the evidence and counsel for defendants replied. In his closing argument the prosecutor stated:

"I believe, ladies and gentlemen, that if you convict one person you must necessarily convict all of them, so I am going to start out my rebuttal * * * by telling you why I think the evidence proves beyond all reasonable doubt that the defendant Head is guilty * * *." The evidence was summarized as it applied to the defendant Head and the deputy district attorney stated: "* * * If Head threw away narcotics then their whole story is all blasted open. They are all guilty." Then follows the portion of the argument about which appellants complain:

"* * * Mr. Riley states to you that I will probably tell you that they were making marijuana cigarettes out there. I don't know what they were doing out there because I was not there, and I can only piece the evidence together as you can, but I am *positive* that they all went out there for the one single purpose that had something to do with marijuana, and that the defendant Head threw that marijuana, and as Mr. Riley says, maybe they were making marijuana cigarettes, I don't know. * * * I think, ladies and gentlemen, that the evidence proves that all of these five defendants were mixed up in that marijuana, and I think the evidence proves beyond a reasonable doubt that they are all guilty * *.

"Ladies and gentlemen, it is very necessary for you to return a proper verdict in this case. It is necessary for you to return a verdict for these five boys as much as it is for anybody else, and I might say right now that I, as district attorney or deputy district attorney, represent all of the people, including these five defendants; that I hold no animosity whatsoever against these five defendants, and my pay will go on whether there is a conviction here today or not. I had never seen them before—before I walked into this court room, and I imagine many of you saw them before I did. But I think it is very necessary for you to return a proper verdict. It is necessary, ladies and gentlemen, for you to put up *a stop light for all the teenagers.* If you don't return a proper verdict, ladies and gentlemen, *you are giving a green light.*

"* * * I can't ask you to bring in a verdict of guilty on one and not guilty on the others. If you find that one of them was not guilty, then bring in a verdict of not guilty on all of them. But *I feel certain,* ladies and gentlemen, *that they are all guilty.* I feel the evidence shows they are all guilty, I should say, and I feel certain that you will bring in a proper verdict of guilty."

The portion italicized is criticized as being an expression of opinion by the prosecutor that the defendants were guilty,

claiming they were such expressions as were condemned in People v. Henderson, 4 Cal.2d 188, 48 P.2d 17; People v. Hidalgo, 78 Cal.App.2d 926, 179 P.2d 102; and People v. Edgar, 34 Cal.App. 459, 167 P. 891. It is also argued that in view of the fact that considerable publicity ran in the local newspapers just before and during the progress of the trial of these defendants, about the teenagers' use of narcotics and the efforts the enforcement officers were making to prevent it, the statement of the district attorney in reference to a green light and a red light was highly prejudicial; that no conclusion other than that the remarks were inflammatory and most objectionable could be reasonably reached, in view of the circumstances, and that the remarks must have influenced the verdict that was rendered against these defendants and that therefore these defendants were deprived of the benefit of a fair trial, citing People v. Adams, 14 Cal.2d 154, 161, 93 P.2d 146.

[1, 2] A reasonable interpretation of the prosecutor's argument in reference to his belief that all defendants were guilty of the offense as charged, is that it was clearly predicated upon his statement that he believed the *evidence showed* that they were guilty. No prejudicial error therefore resulted in this respect. A prosecutor has a right to state his views and his beliefs and convictions as to what the evidence establishes and to urge that the evidence convinces his mind or is conclusive of the guilt of the defendant. People v. Acuff, 94 Cal.App.2d 551, 558, 211 P.2d 17.

The Adams case criticizes any statement on the part of the prosecutor which may seek to inflame the minds of the jurors, particularly where much newspaper publicity has been given to arouse the indignation of the public generally in respect to the crime charged.

The prosecutor's statement that it was necessary for the jury to "put up a stop light for all teenagers", and if they did not return a proper verdict they were giving a green light, could only be construed, in the light of the previous and subsequent statements of the district attorney, i. e., that it was the prosecutor's belief, based on the evidence, that defendants were guilty, and that a verdict of guilty was therefore the proper verdict; that since the evidence showed that the appellants were guilty they should not be found "not guilty"; and that a verdict of not guilty under those circumstances would encourage them and others to continue their activities regarding narcotics. We do not believe the statement can be construed to be a request that the jury find the appellants guilty whether the evidence showed them to be guilty or not, but was rather in the nature of a request not to allow these defendants, if guilty, to escape.

The appellants' counsel points out that he did not make objections to this argument at the time in open court before the jury but he does claim that immediately following the closing of the argument of the prosecuting attorney, in chambers and in the absence of the jury, he cited the remarks of the prosecutor as improper and prejudicial and moved for a mistrial, or in the alternative that the jury be admonished to disregard completely the closing statement of the prosecutor in reference to a red light or a green light toward the teenage behavior. The motion was denied. Error is claimed in the denial of this motion.

[3–5] The most serious criticism that can be made of that statement is that the prosecuting attorney went outside of the record in assuming that a certain condition existed in the community, i. e., that teenagers needed to be stopped from using narcotics. This reference may be permissible where such matters are of common knowledge. People v. Ridgeway, 89 Cal.App. 615, 618, 265 P. 349; People v. Hermes, 73 Cal.App.2d 947, 958, 168 P.2d 44. If such application had been timely made, the trial court might well have admonished the jury to disregard the statement of the prosecutor that teenagers needed to be stopped from using narcotics, and again instructed the jury that the only question before it was the innocence or guilt of the defendants as charged. The evidence was ample to support the verdicts. The appellants do not maintain that it is not. We conclude that the remarks of the deputy district attorney were not prejudicially erroneous,

nor that they resulted in a miscarriage of justice. People v. Godsey, 71 Cal.App.2d 82, 93, 162 P.2d 46; People v. Dillon, 1 Cal. App.2d 224, 230, 36 P.2d 416; People v. Torres, 98 Cal.App.2d 189, 193, 219 P.2d 480; People v. Rose, 119 Cal.App. 487, 489, 6 P.2d 963; People v. McRoberts, 1 Cal. App. 25, 28, 81 P. 734; People v. Pratt, 77 Cal.App.2d 571, 579, 175 P.2d 888; People v. Cabaltero, 31 Cal.App.2d 52, 62, 87 P.2d 364.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



108 Cal.App.2d 724

NELLIS v. MASSEY.

Civ. 18535.

District Court of Appeal, Second District, Division 1, California.

Jan. 16, 1952.

Rehearing Denied Feb. 11, 1952.

Hearing Denied March 13, 1952.

Action by Floyd H. Nellis against Harry A. Massey to recover on an alleged contract to pay money. The Superior Court, Los Angeles County, Walter H. Odemar, Judge assigned, entered a judgment for the defendant and plaintiff appealed. The District Court of Appeal, White, P. J., held that the evidence sustained the conclusion that defendant's attorney was without actual authority to enter into an agreement binding upon his client.

Judgment affirmed.

1. Attorney and Client ⇐72

In action upon alleged contract to pay money, evidence supported conclusion that defendant's attorney was without actual authority to enter into agreement binding upon his client. Code Civ.Proc. § 283, subds. 1, 2.

2. Attorney and Client ⇐77

Attorney has no general authority to act for his client. Code Civ.Proc. § 283.

3. Attorney and Client ⇐81

Commonly, attorneys are employed by principals in all manner of business transactions and negotiations not involving lawsuits, but it is not rule that in such situations attorney has, merely by virtue of his employment as such, plenary authority to enter into contracts on behalf of his client.

4. Appeal and Error ⇐994(3), 996, 1012(1)

Questions of value and effect of evidence and testimony, credibility of witnesses and inferences to be drawn from evidence, are matters to be settled by trier of fact and not by appellate court.

5. Attorney and Client ⇐74

In action upon alleged contract for sum of money, it was for trier of fact to determine under evidence whether defendant's conduct amounted to ratification of contract entered into by his attorney, whether defendant had conferred authority upon his attorney to enter into agreement and whether defendant acted promptly in disavowing agreement if it was made by his attorney.

6. Trial ⇐382

Province of trial judge, sitting without jury, is to render decision by resolving conflicting testimony and determining inferences to be drawn from facts deemed by him to have been legally proved.

7. Appeal and Error ⇐1010(1)

Conclusion of trial judge, sitting without jury, cannot be disturbed on appeal where substantial evidence or reasonable inference lends support thereto.

8. Appeal and Error ⇐989

Power of District Court of Appeal begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support findings.

9. Appeal and Error ⇐996

When two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of trial court.

Harry M. Irwin, Leslie S. Bowden, Los Angeles, for appellant.

Abe Richman, Edward K. Brody, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff appeals from a judgment that he take nothing by his complaint on an alleged "contract to pay money."

In June, 1948, plaintiff was the holder of a judgment against Kathleen A. Clawson and others in the sum of $8,276.41, which judgment was a lien upon a parcel of real property owned by Mrs. Clawson. This property was subject to a deed of trust held by defendant, and two deeds of trust held by defendant's sister. The priority as among these various liens at the time the purported contract was assertedly entered into, was as follows:

1. The trust deed held by defendant, securing $24,982.46, which defendant had purchased in order to protect his sister's claims, and which trust deed was in process of foreclosure by trustee's sale;

2. A trust deed held by defendant's sister for $3,000;

3. Plaintiff's judgment for $8,276.41;

4. A trust deed held by defendant's sister for $2,200.

Plaintiff alleged in his complaint that prior to the trustee's sale plaintiff and defendant were informed and believed that the reasonable market value of the real property was in excess of $35,000. That on June 28, 1948, the day before the date set for the trustee's sale, "plaintiff and defendant made and entered into a verbal contract, wherein and whereby the plaintiff promised and agreed that, for and in consideration of the sum of $4,000 which the defendant promised and agreed to pay to the plaintiff as herein alleged, the plaintiff would attend at the time and place of the sale of said real property by said trustee and that the plaintiff would execute thereat, for the use and benefit of the defendant, whatever instrument would be required by said trustee to receipt for and credit as payment upon plaintiff's said judgment the overage which otherwise would be payable to plaintiff on his said judgment, viz.: the excess of the amount at and for which the defendant would purchase said real property at said sale over and above the total indebtedness and obligations secured by said deed of trust, without any actual payment whatever to the plaintiff of any part of said overage; and wherein and whereby, in consideration thereof and of the benefit to the defendant of his being enabled thereby to bid for and purchase said real property at said trustee's sale, against other anticipated bidders thereat, at and for any sum not exceeding $33,168.87, to wit: the amount of the obligations secured by said deed of trust plus the amount then unsatisfied and owing to the plaintiff on his said judgment, at the actual cost to the defendant therefor of only $28,982.46, to wit: the amount of said obligations plus said $4,000, the defendant promised and agreed to pay to the plaintiff the sum of $4,000 within ninety days after the date of the sale of said real property by said trustee under said deed of trust."

It was further alleged that on June 29, 1948, the date for which the sale was noticed, and on July, 7, 1948, to which date it was postponed, plaintiff atetnded at the time and place of sale and notified defendant he was ready, able and willing to perform his obligations under the contract; that on July 7, 1948, the property was sold to the defendant for the sum of $24,982.46, the amount of the trust deed held by him.

The trial court found adversely to plaintiff on the issue of whether an oral contract as alleged was entered into, and further found that "the purported agreement was discussed between plaintiff's counsel and an attorney then representing the defendant, but that the defendant's attorney had no authority from the defendant to make or enter into any agreement regarding the purported use of said judgment." It was also found that the asserted contract was invalid by reason of section 1624 of the Civil Code, "and particularly subdivision 4 thereof, as well as section 1624a of the same code." The court also found that defendant purchased the property at the trustee's sale for the precise balance due on the first trust deed owned by him, "and that by so doing he received no consideration whatsoever

from the plaintiff, either by reason of the plaintiff's judgment, or by reason of any act of the plaintiff."

As grounds for reversal, appellant asserts that "respondent authorized Mr. Hammack (his attorney) to make the contract"; that the findings are contrary to and unsupported by the evidence, as to Mr. Hammack's authority, respondent's promise to pay $4,000, as to consideration, and the effect of the statute of frauds (Civ.Code, secs. 1624, 1624a). Further, it is urged, respondent is estopped to rely upon the statute of frauds; that no finding was made on material issues, and that evidence was taken and findings made outside of the issues.

We find, upon a consideration of the evidence adduced at the trial, that it is unnecessary to consider appellant's arguments that the asserted contract was not invalid under the statute of frauds and that it was supported by a valid consideration, for the reason that there is contained in the record substantial evidence to support the court's finding that no contract was entered into.

The negotiations between the parties were conducted by their respective attorneys. The trustee's sale had been noticed for Tuesday, June 29, 1948. Plaintiff's attorney, according to his testimony, on either Friday or Monday preceding the date of the sale, had a telephone conversation with defendant's attorney, in which they arrived at an agreement; that on Monday he had a second telephone conversation with defendant's attorney, in which he told defendant's attorney "I was confirming our oral agreement, and the understanding that it would be a firm commitment and contract on the part of both parties without being reduced to writing. I said further so that there may not be any misunderstanding, 'I want to restate the agreement in the presence of Mr. Nellis (Plaintiff), with you listening on the phone,' and then I stated in substance my understanding of the agreement, that Mr. Massey (Defendant) had made a firm commitment, that he will pay Mr. Nellis $4000 on or about 90 days after the date of the sale, and that in consideration thereof, Mr. Nellis will attend the sale; he will there execute any and all papers which may be necessary so that Mr. Massey may use Nellis' judgment as a part of the amount which he will bid at the sale, if the bidding goes up high enough so it is necessary to do so, and that if the whole judgment is used, then Nellis will have nothing left; that is used by Mr. Massey in the bidding, but that whatever portion of the judgment has not been used by Mr. Massey in the bidding at the sale will remain the property of Mr. Nellis." That defendant's attorney agreed. On the following day, the parties and their attorneys appeared at the time and place of the sale, and after some consultation, the sale was postponed to July 7. According to the evidence of plaintiff and his attorney, when they appeared at the sale on June 29, they indicated to defendant that plaintiff was ready to perform his agreement and defendant acquiesced by nodding his head or saying, "Very well."

The defendant, however, denied that he so acquiesced at the sale. He further testified that he never authorized his attorney to enter into such an agreement with plaintiff's attorney, and did not understand why plaintiff and his attorney were present at the sale; that he first learned of the purported agreement between the attorneys on Sunday, June 27, and then told his attorney to notify plaintiff's attorney that the agreement was not satisfactory, not "according to the instructions I gave him."

[1, 2] The evidence, with the reasonable inferences to be drawn therefrom, supports a conclusion that defendant's attorney was without actual authority to enter into an agreement binding upon his client. Under section 283 of the Code of Civil Procedure, an attorney has authority: "1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise; 2. To receive money claimed by his client in an action or proceeding during the pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of

the judgment." In Woerner v. Woerner, 171 Cal. 298, 152 P. 919, the court said: "An attorney has no general authority to act for his client. His stipulation for a disposition of his client's property cannot bind the client, if the attorney had no legal authority to make it; at least not unless it is acted on by the court and carried into the judgment. * * * Since the attorneys were without written authority to stipulate for the conveyance of land, and the omission of the agreement from the stipulation was not caused by a mutual mistake, it follows that it was of no binding force on the parties with respect to the land."

[3] Commonly, attorneys are employed by principals in all manner of business transactions and negotiations not involving lawsuits, but it is not the rule that in such situations an attorney has, merely by virtue of his employment as such, plenary authority to enter into contracts on behalf of his client. His function in such matters is that of negotiating for and advising his client. So in the present cause, the attorneys during the negotiations repeatedly referred each proposal or counter-proposal back to the client for approval. This course of conduct was of evidentiary significance in the trial court's determination of whether an ostensible authority had been conferred upon his attorney by the defendant.

[4, 5] It is urged by appellant that respondent conferred upon his attorney actual authority to enter into a contract and caused and allowed plaintiff's attorney and plaintiff to believe that defendant's attorney possessed such authority; and that defendant ratified the contract "by affirmatively assenting to the appellant's attendance at the trustee's sale for the purpose of signing whatever papers might be required to carry out the contract." These contentions must fail before the settled rule that questions of the value and effect of evidence and testimony, the credibility of witnesses and the inferences to be drawn from the evidence, are matters to be settled by the trier of fact and not by an appellate court. The testimony of defendant, if believed, indicated that he did not ratify "by affirmatively assenting to the appellant's attendance at the trustee's sale" and that he advised his attorney that he would not go through with the deal. It was for the trier of fact to determine under the evidence whether defendant's conduct amounted to a ratification, whether he had conferred authority upon his attorney to enter into an agreement, and whether he acted promptly in disavowing the agreement if the same was made by his attorney.

[6–9] Further discussion of the testimony of the parties and their attorneys would serve only to demonstrate that the decision of the cause rested upon the trier of fact in resolving conflicting testimony and in determining the inferences to be drawn from the facts deemed by him to have been legally proved. This was the province of the trial judge, and his conclusion cannot be disturbed on appeal where, as here, substantial evidence or reasonable inference lends support thereto. See Nichols v. Mitchell, 32 Cal.2d 598, 606, 197 P.2d 550; Hicks v. Reis, 21 Cal.2d 654, 659, 660, 134 P.2d 788. The power of this court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the findings, and when two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. Crawford v. Southern Pac. Co., 3 Cal.2d 427, 429, 45 P.2d 183.

The conclusions at which we have arrived render it unnecessary to consider other contentions raised. The criticisms of the findings made by appellant afford no ground of reversal, since it is apparent that had more detailed findings been made they would have been adverse to appellant.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

108 Cal.App.2d 686

WESTON et al. v. FOREMAN et al.
(two cases).

Nos. 14802, 14825.

District Court of Appeal, First District, Division 1, California.

Jan. 16, 1952.

Hearing Denied March 13, 1952.

Action by John O. Weston, Edith E. Weston, and others, against William E. Foreman, Jane Doe Foreman, and others, and action by John O. Weston, Madelyn T. Wright, and others, against William E. Foreman, Lois C. Foreman, and others, to enforce a building restriction. The Superior Court, Contra Costa County, Leo G. Marcollo and S. C. Masterson, JJ., entered a judgment for defendants in each action and plaintiffs appealed. The appeals were consolidated. The District Court of Appeal, Peters, P. J., held that a restrictive covenant which provided that no building should be erected or altered until the building plans, specifications and plot plan had been approved by a certain committee, and that said committee should act and serve until January 1, 1947, at which time the record owners of the majority of the lots subject to the covenants could designate their authorized representative, who thereafter should have all of the powers, subject to the same limitations, as were previously delegated to the committee, gave committee power to act and serve at all events until January 1, 1947 and thereafter until the designation by the lot owners of their representative.

Judgments reversed.

Peters, P. J., dissented.

1. Covenants ⇐51(2)

In building restriction providing that no building shall be erected or altered until building plans, specifications and plot plan have been approved by certain committee, and that said committee shall serve until January 1, 1947, "at" which time record owners of a majority of lots may designate their authorized representative who thereafter shall have all the powers previously delegated to committee, quoted word means "at or after" or "at any time after", and words "thereafter" and "previously" refer to time the designation of authorized representative is made and not to January 1, 1947.

2. Covenants ⇐51(2)

Restrictive covenant which provided that no building should be erected or altered until the building plans, specifications and plot plan had been approved by certain committee, and that committee should act and serve until January 1, 1947, at which time the record owners of a majority of the lots subject to the covenant could designate their authorized representative who thereafter should have all the powers previously delegated to committee, gave committee power to act and serve at all events until January 1, 1947, and thereafter until the designation, by the lot owners, of their representatives even though such designation was not made until 1950.

3. Covenants ⇐49

Restrictive covenants must be strictly construed against limitations upon the free use of property.

4. Covenants ⇐49

The primary object in construing restrictive covenants should be to effectuate the legitimate desires of the covenanting parties.

5. Appeal and Error ⇐840(4)

Where copy of declaration of restrictions pleaded in actions to enforce a restrictive covenant, authorized lot owners to designate a "representative", whereas the complaint alleged that lot owners designated as their "representatives" three named persons, such inconsistency was not significant on appeal, from judgments rendered against plaintiffs on the pleadings, but was for resolution in trial court.

Wagener & Brailsford, Wm. H. Brailsford, Jr., Dreher, McLeod & Bowman and Orlando J. Bowman, all of Oakland, for appellants.

Harry M. Gross, Oakland, George Gordon, Martinez, for respondents.

FRED B. WOOD, Justice.

Plaintiffs appeal from two judgments rendered against them on the pleadings,

in actions to enforce a building restriction which requires that no building be erected or altered until the building plans, specifications and plot plan have been approved by a certain committee. Upon stipulation of the parties, the two appeals have been consolidated for hearing before this court, and submitted upon a single set of briefs.

The sole question is whether or not the committee's life had terminated and with it the requirement for committee approval. The answer turns upon the meaning of a certain provision of a declaration of restrictions recorded June 13, 1941, by the then owners of all the lots designated upon a recorded subdivision map. The declaration stated that three named persons composed the committee, and that "Said committee shall act and serve until January 1, 1947, at which time the then record owners of a majority of the lots which are subject to the covenants herein set forth may designate in writing duly recorded among the land records their authorized representative who thereafter shall have all of the powers, subject to the same limitations, as were previously delegated herein to the aforesaid committee." [1]

Did the committee as thus composed terminate upon January 1, 1947, despite the failure of the record owners to appoint their representative? Appellants claim it did not. Respondents claim it did.

Which of these interpretations is correct may best be ascertained by reading the disputed clause in its context. The declaration of restrictions recites that the declarants are the owners of all the lots in the subdivision, are about to sell the lots, and desire to subject the lots to the conditions, restrictions and reservations thereinafter set forth "for the benefit of said lots, and each of them, and of the present and subsequent owners thereof," except lots 1 and 2 which are not subject to those restrictions. It then declares that the property shown on the map "is held and shall be conveyed subject to the conditions, restrictions and reservations set forth in the following clauses," consisting of 14 numbered paragraphs.

The first paragraph declares that "These covenants and restrictions are to run with the land[,] shall be binding on all the parties and all persons claiming under them until January 1, 1966, and are expressly made for the direct benefit of each and every parcel * * *." If any of the parties to the declaration, their heirs or assigns, shall violate or attempt to violate any of the covenants or restrictions, any other lot owner may prosecute any proceeding at law or in equity to prevent such violation or to recover damages.

The second, fifth to eleventh, and the thirteenth paragraphs impose restrictions absolute in nature (without reference to approval or disapproval of any committee); e. g., no temporary dwellings, no slaughter house, no public garage, minimum floor area, height limitations, racial restrictions, single-family dwellings only, no hogs or goats, no livestock for profit, set-back lines, easements for utilities.

The third paragraph requires building plans and specifications and plot plans to be approved before erection or alteration, and provides a committee to do the approving.

1. The complaint in action No. 14802, filed August 3, 1950, after setting forth the declaration of restrictions and stating its purpose and effect, alleges that defendants William E. and Mrs. Foreman purchased a lot in the subdivision; that the Foremans and their agent, defendant A. Lundegren, commenced the construction of a house on said lot without first submitting plans and specifications to the committee; that later, during construction, defendants did submit plans and specifications, which were not approved for certain reasons, and are proceeding with the work of construction without committee approval; and prays for injunctive relief.

The complaint in action No. 14825, filed September 7, 1950, is the same in all material respects as the complaint in No. 14802, except that it additionally alleges that a majority of the lot owners recorded a designation of their authorized representatives on September 6, 1950, to succeed the committee originally appointed in the declaration of restrictions, and asks for damages as well as injunctive relief.

It reads as follows: "No building shall be erected, placed or altered on any building plot in this subdivision until the building plans specifications, and plot plan showing the location of such building have been approved in writing as to conformity and harmony of external design with existing structures in the subdivision, and as to location of the building with respect to topography and finished ground elevation, by a committee composed of John O. Weston, Edith E. Weston, and E. A. Johnson, or their authorized representative. In the case of the death of any member or members of said committee, the surviving members or member shall have authority to approve or disapprove such design or location. If the aforesaid committee or their authorized representative fails to approve or disapprove such design and location within 30 days after plans have been submitted to it, or if no suit to enjoin the erection of such building, or the making of such alterations has been commenced prior to the completion thereof, such approval will not be required. Said committee or their authorized representative shall act without compensation. Said committee shall act and serve until January 1, 1947 at which time the then record owners of a majority of the lots which are subject to the covenants herein set forth may designate in writing duly recorded among the land records their authorized representative who thereafter shall have all of the powers, subject to the same limitations, as were previously delegated herein to the aforesaid committee."

Paragraph four prescribes set-back lines for buildings, but authorizes deviation in respect to attached garages, with committee approval: "Excepting as otherwise provided or as controlled by law and with written approval of the Property Owner's Committee, private one-story attached garages may be located nearer to the street line than the established building lines, but not nearer than 5 feet to any street line, where the natural grade of the lot at the established building line is more than either eight feet above or four feet below the average established roadway level of the street on which the lot abuts, on condition that the floor level of such attached garage shall be not more than one foot above the established roadway grade of the street."

The twelfth paragraph prescribes height limits for fences, walls, and hedges, and declares that no tight board fence shall be "erected thereon without the approval in writing of the committee referred to in paragraph Third hereof and in the manner therein required."

The fourteenth paragraph declares that the breach of any of the foregoing restrictions shall not affect the lien of any mortgage or deed of trust made in good faith for value on the land, but such breach may be enjoined, abated, or remedied.

There can be no doubt that the declarants intended that the covenants, conditions, restrictions and reservations expressed in this declaration be effective and operative continuously until January 1, 1966. They said that in the declaration in words that admit of no doubt or equivocation.

That period of life applies automatically to the various restrictions which are absolute in character, those which operate without approval or disapproval by any person or agency.

It applies equally to every construction or alteration project which requires approval, whenever such a project is undertaken, at any time prior to January 1, 1966. Each type of such project is of a kind that may occur at any time, early or late, during that period: The erection or alteration of a building (paragraph third); the placing of an attached garage near a street line (paragraph fourth); the erection of a tight board fence (paragraph twelfth).

The requirement of approval would be futile and meaningless were there no agency in existence to do the approving, whenever the need for approval might arise. To provide such an agency was the obvious purpose of creating the committee in paragraph third. It follows that the committee so created would have continuous existence during the 25-year period unless some provision of the declaration requires a limitation thereon.

[1] The only suggestion of a limitation appears in the disputed clause, quoted earlier in this opinion. It says that the com-

mittee first appointed "shall act and serve until January 1, 1947." It does not say that the committee shall then cease to act or serve. It says "at which time" the record owners of a majority of the lots "may" designate "their authorized representative" who "thereafter shall have all of the powers * * * as were previously delegated herein to the aforesaid committee." The preposition "at" is indefinite in its meaning. In the expression "at or prior to" it may signify "within reasonable time after", Estate of Clark, 17 Cal.App.2d 323, 325–326, 61 P.2d 1221; in the expression "at the expiration of" it may mean "*the exact moment* or *near* it" or "any time *after*", People ex rel. Knight v. Blanding, 63 Cal. 333, 339, or "after", Ex parte Szumrak, D.C., 278 F. 803, 810. Its meaning in each case is governed by the intent of the person using it, ascertained from the context. In this case, the context in which the declarants used the expression "at which time" compels the conclusion that they meant "at or after," "any time after." The words "thereafter" and "previously," as used in the disputed clause, reasonably refer to the nearest antecedent (the time the designation of an authorized representative is made), not to the more remote antecedent (the first day of January, 1947).

[2] The reasonable intendment is that the committee act and serve at all events until January 1, 1947, and thereafter until the designation, by the lot owners, of their representative; until January 1, 1966, if no such designation be made.

[3, 4] Respondents base their interpretation of the disputed clause upon the established rule that restrictive covenants are to be strictly construed against limitations upon the free use of property, citing Wing v. Forest Lawn Cemetery Ass'n, 15 Cal.2d 472, 479, 101 P.2d 1099, 130 A.L.R. 120, and Werner v. Graham, 181 Cal. 174, 181, 183 P. 945. In the Wing case, a cemetery association conveyed various lots by deeds which contained restrictions of use for burial purposes only, but contained no description of a dominant tenement which was to be benefited by the restrictions, nor did the grantor by the terms of those deeds bind itself to impose similar restrictions upon lots retained by it, nor to do anything in favor of the property of the grantees. There was no reference to a common plan of restrictions and no indication that one was in existence. In the Werner case, although the owner of a tract of land inserted substantially similar restrictions in the various deeds by which he conveyed lots to the several purchasers, there was no statement in any deed that the restrictions were for the benefit of any other lot and no declaration in writing of a common plan. Enforcement, under each deed, was vested in the grantor by a right of reverter given to or reserved in him. The mere statement of these facts demonstrates the difference between those two cases and the instant case. Here, as in Hannula v. Hacienda Homes, 34 Cal.2d 442, 211 P.2d 302, 304, 19 A.L.R.2d 1268, the parties "have expressed their intention to limit the use," an intention which "should be carried out, for the primary object in construing restrictive covenants, as in construing all contracts, should be to effectuate the legitimate desires of the covenanting parties", 34 Cal.2d at pages 444–445, 211 P.2d at page 304. It may be observed, also, that the declaration of restrictions under consideration does not necessarily decrease the use of the land, in view of the general plan of development in which uniformity of use is sought. Each purchaser of a lot benefits by his own promise and that of each of the other purchasers. That well may operate to increase rather than to diminish land use. (See discussion in Restatement of the Law of Property, § 526 and Comment, particularly paragraph (c) of the Comment.)

We have considered the suggestion that the committee appointed in the declaration of restrictions was to represent the subdividers until January 1, 1947, at which time a representative, if designated, was to represent the purchasers of individual lots. Upon the recording of the declaration, the committee (two of the subdividers and one other person) became the representative of the subdividers in the capacity of the latter as owners of lots benefited by and burdened

with the restrictions, not in their individual capacity. The committee was immediately impressed with duties and responsibilities, as well as authority, toward each lot owner, to exercise its functions justly, fairly and reasonably in carrying out and effectuating the general plan of development within the framework of the declared restrictions. As lots sold, the committee's representation changed to the extent of including each new purchaser, in turn, as owner of the lot purchased. Upon paying his money and accepting the deed, he in effect joined in the original appointment, became equally interested with the subdividers, and other purchasers, in the continued functioning of the committee, now his representative as well as theirs, as lot owners. We deem significant these words of the Supreme Court in Hannula v. Hacienda Homes, supra, 34 Cal.2d 442, at page 445, 211 P.2d at page 304: "The highest courts of Maryland, Massachusetts and Pennsylvania have held restrictions valid and enforceable which were similar to the one here involved, *requiring approval of all construction by an individual or body of persons acting on behalf of other lot owners in a tract.* [Citations.]" (Emphasis added.) In the Maryland and Pennsylvania cases cited, approval was vested in the subdivider; in the Massachusetts case, trustees were given the power of approval. That type of representative does not warrant the inference of an intent to terminate the approval function on January 1, 1947, nor to then suspend that function until a new designation be made, no matter how short or how long the gap might prove to be. It is quite conceivable that, upon the expiration of the indicated period, the lot owners would want the committee to continue without change in membership, if satisfied with its work, in view of the experience it had gained.[2]

We must remember, too, that we are dealing with private property rights. Each individual lot owner has his own bundle of rights. He has an interest in the adherence of other lot owners to the plan of development, for the protection and benefit of the home which he has built or hopes to build. He should not be put to the risk of delay in getting the owners of a majority of the lots to agree upon a representative, unless the language of the declaration *clearly* puts him to that risk, the intent to require committee approval having been clearly expressed. A protracted delay might well result in such a change of conditions (new houses of incongruous types, haphazardly located) as would render the major features of the plan unenforceable, the promised benefits incapable of attainment.[3] For these reasons we infer from the declaration no intent to terminate the committee function on January 1, 1947.

[5] It follows that the judgment in each action should be reversed. In this connection we note that the copy of the declaration of restrictions pleaded in the second action (as well as that in the first) authorizes the lot owners to designate a "representative" (singular), whereas the complaint in the second action alleges that the lot owners designated as their "representatives" three named persons. That inconsistency is not significant upon this appeal. That is for resolution in the trial court. Whether the designation made September 6, 1950, was valid or not, a committee was in existence at all times.

Each of the judgments appealed from is reversed.

BRAY, J., concurs.

PETERS, Presiding Justice (dissenting). I dissent.

2. The representatives designated in 1950 included the two subdividers who were on the original committee, and one purchaser. That may signify that the purchasers were well satisfied with the work of the committee or that the subdividers still owned a majority of the lots.

3. That there has been no suspension of the committee function is, perhaps, inferable from the allegations of the complaint in each action that the plan for development and improvement has been followed and maintained from its inception, and that the plan and restrictions have been accepted, relied upon and acted upon by all interested.

The majority construed the disputed clause to mean that the original committee, under the agreement, was to serve until January 1, 1947, and thereafter, until the property owners should select their representative. This construction is primarily predicated upon the belief that it was the fundamental intent of the signers of the agreement to limit the use of the property up to January 1, 1966. For this reason, it is held, the parties must have intended that a committee should be in existence at all times up until that date. This is a possible and perhaps even a reasonable construction of the agreement, but it is not the only construction, and, in my opinion, is not the most reasonable construction.

The interpretation of the restriction in question, there being no extrinsic evidence of intent, is a question of law and not of fact. For that reason I agree with the implied holding in the majority opinion that this court is not bound by the interpretation of the trial court, even though that interpretation may have been a reasonable one. Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825; Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 339, 182 P.2d 182. But the fact that the trial court has construed the provision is a factor that should be weighed together with all other factors in arriving at a construction.

Reference should be made to one other rule of law. The provision here involved is a limitation upon the free use of property. It is the established rule, mentioned in the majority opinion "that restrictive covenants are to be strictly construed against limitations upon the free use of property." See Wing v. Forest Lawn Cemetery Ass'n, 15 Cal.2d 472, 479, 101 P. 2d 1099, 130 A.L.R. 120; Werner v. Graham, 181 Cal. 174, 181, 183 P. 945.

The majority opinion attempts to construe the words used in paragraph third and comes to the conclusion that the controlling intent of the parties was that they wanted a committee in existence to approve plans and specifications during the entire twenty-five year period. Predicated on this basic premise the majority conclude that it must have been the intent of the parties that the original committee should have continuous existence during the entire twenty-five year period unless the property owners, after January 1, 1947, superseded the original committee by designating a new representative. This reasoning is sound only if the basic premise is sound, and, in my opinion, it is not.

Such a construction not only violates the rule that restrictive covenants are to be construed strictly against limitations on the free use of property, but completely disregards the relative positions of the contracting parties and the realities of that relationship.

The declaration of restrictions was drafted by Weston and his wife and by Stanley and his wife. It recites that they were then the owners of all the lots in question and were about to subdivide the area and sell the lots. This declaration was executed and recorded in June of 1941, before any lots were sold. By paragraph third the subdividers set up a committee of three of their own choosing—the two Westons and a Mr. Johnson—which committee, it was provided, "shall act and serve until January 1, 1947" at which time the then record owners of the property were authorized to elect their representative if they so desired. The first committee was to represent and be controlled by the subdividers; the new representative, if elected, was to represent the prospective purchasers of lots in the tract, an entirely different group of people from the subdividers and with different interests to protect. Thus, it seems quite clear to me that the agreement contemplates that the subdividers by 1947 would have sold all of the lots in the tract. The subdividers desired to retain complete control of the types of structures to be erected thereon until they had completed the subdivision, but after that date they contemplated that they would have no further interest therein. Paragraph third clearly expresses the intent to set up a committee to represent the subdividers, which committee should serve until 1947, and then the property owners, if they desired, could elect their representative to represent them. Since the property owners did not exercise

this power until sometime in 1950, the conclusion seems inevitable that the restriction in question became inoperative during this three-year period, and that this was the intent and desire of the property owners. The construction is strengthened by the fact that there is no allegation in either complaint that the subdivider's committee continued to act after January 1, 1947, and until August 10, 1950, when it purported to disapprove the plans of defendants.

For these reasons I think the construction given the agreement by the trial court was correct and should be affirmed.

Hearing denied; CARTER, J., dissenting.

38 Cal.2d 289

In re LEFRANC'S ESTATE.

MASSON v. HORNEY et al.

S. F. 18239.

Supreme Court of California, in Bank.

Jan. 18, 1952.

Proceeding in the matter of the estate of Marie Lefranc in which Adele Masson's objections to proposed distribution under will of Marie Lefranc were opposed by Nelty Lefranc Horney and others, executors of last will and testament of Marie Lefranc, deceased, and Wells Fargo Bank & Union Trust Co. The Superior Court, Santa Clara County, Leonard R. Avila, J., entered decree of final distribution denying Adele Masson's claim to share in the estate, and Adele Masson appealed. The Supreme Court, Schauer, J., held that where will created trust of residue of estate, with income payable to principal beneficiary during her life, and remainder to be distributed upon her death to her issue if any, and otherwise to alternate beneficiary if surviving, and if not surviving, to alternate's issue, and will further provided for forfeiture of bequest of any beneficiary who contested will, and there was no provision for termination of trust upon forfeiture, forfeiture by principal beneficiary of her intermediate interest could not defeat contingent interest of presently living children of alternate beneficiary, and trust did not terminate upon occurrence of such event, but it continued until death of principal beneficiary, with income payable to alternate beneficiary as person presumptively entitled to next eventual interest, so long as no child was born to principal beneficiary.

Decree reversed.

Prior opinion 232 P.2d 4.

1. Descent and Distribution ⇐48

Where will provided that if any person, whether beneficiary under will or not, should contest will or object to any of provisions therein, testatrix gave to such person the sum of one dollar and no more in lieu of provision which she had made for person contesting or objecting to will, whether legatee who by contest had forfeited her right under will to equitable life estate in trust income was entitled to succeed as an heir at law to any portion of legacy involved was dependent upon whether testatrix had made other valid disposition thereof.

2. Descent and Distribution ⇐48

A testator must do more than merely evince intention to disinherit before heirs' right of succession can be cut off, but in order to accomplish such result he must make valid disposition of his property.

3. Wills ⇐587(1)

A "residuary clause" is that clause in will by which that part of property is disposed of which remains after satisfying bequests and devises.

See publication Words and Phrases, for other judicial constructions and definitions of "Residuary Clause".

4. Wills ⇐449

The making of a will raises presumption that testator intended to dispose of all his property.

5. Wills ⇐587(1)

Residuary clauses are generally inserted in wills for purpose of making disposition complete, and clauses are to receive broad and liberal interpretation with view of preventing intestacy as to any portion of estate of testator.

6. Wills ⇐439, 440

The function of court in construing will is to ascertain testator's intention as expressed and, if lawful, give it effect. Probate Code, §§ 101, 102, 103, 126.

7. Wills ⇐665, 687(2)

Provisions of will creating trust of entire residue with income payable to named beneficiary during her life, and remainder to be distributed upon her death to her issue if any, and otherwise to named person if surviving, and otherwise to such person's issue, and alternative provision limiting bequest to one dollar for any person who objected to or contested will, were valid and lawful. Civ.Code, § 864.

8. Executors and Administrators ⇐315(5)
Wills ⇐681(2)

Where will created trust of residue of estate with income payable to named beneficiary during her life, and remainder upon her death to her issue if any, and other-

wise to named alternate if surviving, and if not surviving, to alternate's issue, trust came into existence and legal title to property involved vested in trustee upon death of testatrix and decree of distribution merely operated to confirm such title in trustee. Probate Code, §§ 28, 300.

9. Wills ⇐852, 853

Where will created trust of residue of estate, with income payable to named beneficiary during her life and remainder to be distributed upon her death to her issue if any, and otherwise to named alternate if surviving, and if not surviving, to alternate's issue, future interests of contingent remainderman who were to take upon named beneficiary's death came into existence at testatrix's death and could not be defeated by any act of beneficiary which forfeited her intermediate or precedent interest, nor could such future remainder interest be accelerated by any event other than death of named beneficiary.

10. Wills ⇐852, 853

Where will created trust of residue of estate with income payable to principal beneficiary during her life, and remainder to her issue, if any, and otherwise to alternate beneficiary if surviving and if not surviving, to alternate's issue, and contest clause gave bequest of one dollar to any beneficiary who contested or objected to will, forfeiture of equitable life estate by principal beneficiary by contest could not defeat contingent interests of presently living children of alternate beneficiary or authorize distribution to alternate free of trust.

11. Wills ⇐665, 686(2)

Where will created trust of residue of estate, with income payable to named beneficiary during her life, and remainder upon her death to her issue if any, and otherwise to alternate beneficiary if surviving, and if not surviving to alternate's issue, and provided for forfeiture of any beneficiary's interest upon contest of will, in absence of provision for termination of trust upon forfeiture of principal beneficiary, intent was evinced that trust should continue until death of principal beneficiary regardless of forfeiture.

12. Wills ⇐728

Under statute providing that when in consequence of valid limitation of future interest, there is suspension of power of alienation or of ownership during continuation of which income is undisposed of, and no valid direction for its accumulation is given, such income belongs to persons presumptively entitled to next eventual interest, when life tenant of equitable estate in trust created by will forfeited her interest and there was no direction as to disposition of income in such event, question as to who were persons presumptively entitled to next eventual interest was to be determined by reference to provisions of will. Civ.Code, § 733.

13. Wills ⇐728

Where will created trust of residue of estate, with income payable to principal beneficiary during her life, and remainder upon her death to her issue if any, and otherwise to alternate beneficiary if surviving and if not surviving, to alternate's issue, and will contained clause providing for forfeiture of interest of any beneficiary who contested will, but did not direct termination of trust in event of forfeiture by principal beneficiary, when principal beneficiary forfeited her equitable life estate in trust while she as yet had no issue, income from trust would be paid to alternate beneficiary as person presumptively entitled to next eventual interest in accordance with statute, until such time as principal beneficiary might give birth to child. Civ.Code § 733.

14. Wills ⇐665

Where will contains provision for forfeiture of bequest upon contest by beneficiary, no artificial distinctions are to be indulged in so that person plainly and properly coming within scope of forfeiture clause may escape penalty of same.

James A. Brown, San Francisco, for appellant.

Burnett & Burnett, San Jose, for Nelty Lefranc Horney.

SCHAUER, Justice.

Appellant, Adele Masson, is both an heir at law and named as a legatee under the last will of decedent, Marie Lefranc. She appeals from a decree of final distribution which provides that because she had contested the will she had forfeited her substantial rights thereunder and which orders distribution of the entire residue of the estate to respondent, Nelty Lefranc Horney. We have concluded that the trial court correctly denied Adele a share of the estate, other than an alternative bequest of $1.00, but that the decree appealed from must be reversed because of failure to comply with provisions of the testatrix' will and with the law relating thereto.

Marie Lefranc died on April 7, 1942, leaving as her sole heirs at law two nieces, who are the appellant Adele and the respondent Nelty. By her will decedent made certain minor specific bequests and then left "all the rest, residue and remainder of my Estate" to a trustee to be held "subject to the following, uses, terms, conditions and limitations:

"(a) My said trustee shall pay to my niece, Adele Masson, during her lifetime, all of the net income of said Trust Estate.

"(b) This Trust shall cease and terminate upon the death of my said niece, Adele Masson, whereupon the corpus of said trust, as well as any undistributed income thereon shall become the property of and vest in the issue of my said niece, Adele Masson, born in lawful wedlock. If my said niece, Adele Masson, shall leave no issue born in lawful wedlock upon her death, then the corpus of said trust and the undistributed income thereon shall become the property of and vest in my niece Nelty Lefranc Horney, if she be alive at said time. If Nelty Lefranc Horney should predecease Adele Masson, then upon the death of said Adele Masson, without issue born in lawful wedlock, the corpus of said trust and the undistributed income thereon shall vest in the issue of said Nelty Lefranc Horney.

"(c) [The powers of the trustee over the property are here set forth.]

"(d) It is expressly understood that the net income arising from this trust estate, and the principal thereof, are intended for the sole and individual use and enjoyment of the said beneficiary, Adele Masson, subject to the terms and conditions hereof, and said beneficiary shall not in any event sell, assign, transfer, convey, pledge, hypothecate or otherwise encumber her interest under this trust nor shall the principal or any of the income arising therefrom be liable for any debt of said beneficiary, nor subject to a judgment or judgments rendered against said beneficiary nor to the process of any Court in aid or execution of any judgment or judgments so rendered."

The next succeeding clause of the will provides: "I purposely make no provision for any other person whether claiming to be an heir of mine or not, and if any person, whether a beneficiary under this Will or not mentioned herein, shall contest this Will or object to any of the provisions hereof, I give to such person so contesting or objecting the sum of $1.00 and no more in lieu of the provision which I have made, or which I might have made herein for such person so contesting or objecting."

The will was admitted to probate and some six months later, in October, 1942, Adele petitioned to revoke the probate thereof on the ground that decedent was of unsound mind when the will was executed. The will was upheld in the trial court and the judgment was affirmed on appeal. (In re Estate of Lefranc (1950), 95 Cal.App.2d 885, 214 P.2d 420.)

Thereafter the executors filed their first and final account, and petition for final distribution. They asked that, because Adele had by her contest of the will forfeited her rights (other than to the alternative bequest of $1.00) as a beneficiary thereunder, the entire residue of the estate be distributed to Nelty Lefranc Horney. Adele filed objections to the petition, asserting that she was entitled to take under the trust provisions of the will notwithstanding her contest of its probate. Nelty also filed certain objections to the account; but joined in the request of the executors that the residue of the estate be distributed to her. She alleged that Adele, who is childless, is unable by reason of a surgical operation to bear

a child; that "the only reason for said trust was the support of Adele"; that even if the "trust remains in effect, all income should be distributed to Nelty."

After a hearing the trial court found, among other things, "That at the time of the commencement of said will contest proceeding by said Adele Masson, to wit, on the 7th day of October 1942, said Adele Masson was unmarried and has never been married, was approximately 48 years of age, and had not then nor has she since given birth to any child or children, nor does she have nor has she ever had any child or children."

"That the only reason for the creation of the trust in said will was for the individual use and enjoyment of said Adele Masson as to net income and principal, subject to the terms and conditions of the will of said decedent; that by virtue of the contest of said will commenced by Adele Masson as aforesaid, together with the results flowing therefrom as aforesaid, including paragraph Sixth [the contest clause] of said will, the reasons for the creation of said trust ceased to exist, and said trust ceased and terminated and never came into effect or being, and that [the trustee] * * * is entitled to have distributed to it nothing under said will, and the entire rest and residue of said estate should be distributed to Nelty Lefranc Horney, free from any trust or other restriction." Final decree of distribution was thereupon entered, under which $1 is ordered distributed to Adele and the residue of the estate to Nelty. This appeal by Adele followed.

At the hearing there was read into the record certain testimony of the attorney who drafted the will, given on the trial of the will contest, to the effect that the reason "as to why there should be a trust" was that it was "considered that Adele was not competent to do business, to handle her own affairs as a business woman. * * * They didn't think that * * * Adele could compete with business people in dealings with her property. She needed a manager." No other evidence concerning the trust purpose was offered. Nelty's attorney offered to prove that as the result of a surgical operation Adele was incapable of bearing children; this offer of proof was never directly ruled upon, and no evidence on the issue was presented.

Appellant now concedes the law to be settled that by her contest of the will she has, pursuant to the contest clause contained therein, lost her rights to take more than $1 under the will. (See In re Estate of Hite (1909), 155 Cal. 436, 101 P. 443, 21 L.R.A.,N.S., 953; In re Estate of Miller (1909), 156 Cal. 119, 103 P. 842, 23 L.R.A., N.S., 868; In re Kitchen's Estate (1923), 192 Cal. 384, 389, 220 P. 301, 30 A.L.R. 1008; Lobb v. Brown (1929), 208 Cal. 476, 484, 281 P. 1010.)

Appellant (presently some 57 years of age) contends, however, that no act of hers could work a forfeiture of the rights of her unborn issue, "in whom the trust property is to vest upon her death"; and that distribution to Nelty free of the trust would effect such a forfeiture. In this connection she argues that under the law "both in this and every other American jurisdiction, the possibility of issue is never regarded as extinct until death." (See Fletcher v. Los Angeles Trust & Savings Bank (1920), 182 Cal. 177, 187 P. 425.) It appears, however, that the question need not be decided here, for the reason that Nelty has two minor children, now living, whose rights to take the property upon the death of Adele without issue and if Nelty predeceases Adele, are also involved, as discussed more fully hereinafter.

Adele's other contention on appeal is that "the residue of the estate could not be distributed to Nelty * * * for the reason that the will * * * makes no disposition of the residue * * * in the event of a contest. Therefore, as to the life estate of appellant in the trust property, an intestacy results and Adele Masson, as an heir at law, is entitled to her share of the income from the property of the deceased."

[1–3] Under the provisions of various contest clauses heretofore considered by the courts it has been held that whether one in the position of Adele is entitled to succeed as an heir at law to any portion of the legacy (here, the trust income, which has been

termed an "equitable life estate" [1]) which she forfeited depends upon whether the testatrix made other valid disposition thereof. It has been said that "A testator must do more than merely evince an intention to disinherit before the heirs' right of succession can be cut off. He must make a valid disposition of his property." (In re Walkerly (1895), 108 Cal. 627, 652, 41 P. 772; Campbell-Kawannanakoa v. Campbell (1907), 152 Cal. 201, 207, 92 P. 184; see also In re Estate of Heney (1944), 66 Cal.App.2d 867, 869, 153 P.2d 427; In re Estate of Mathie (1944), 64 Cal.App.2d 767, 781, 149 P.2d 485.) Thus, in Re Estate of Mathie it is held that inasmuch as the entire estate, after payment of debts and expenses, was left in equal shares to two persons without other bequests, the will contained no residuary clause, and a legatee who had forfeited his legacy by contesting the will was nevertheless entitled to receive a share of such legacy under the laws of intestate succession. "A 'residuary clause' has been defined to be the clause in a will by which that part of the property is disposed of which remains after satisfying bequests and devises. (69 C.J., p. 413, sec. 1472.)" (Childs v. Gross (1940), 41 Cal.App.2d 680, 684, 107 P.2d 424; see also In re Estate of Moorehouse (1944), 64 Cal.App.2d 210, 214–215, 148 P.2d 385; In re Estate of Mathie (1944), supra.)

In the present case inasmuch as the testatrix first made minor specific bequests and then left the "rest, residue and remainder" of her estate to the trustee "subject to the * * * uses, terms, conditions and limitations" expressed in her will, it is apparent that there is a residuary clause, which is to be construed with the other terms of the will in determining this appeal.

[4–6] Various rules for the interpretation and construction of wills are found in the Probate Code and in court opinions. A "will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible." (Prob. Code, § 101.) "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative; and of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy." (Prob.Code, § 102.) (See also In re Estate of Phelps (1920), 182 Cal. 752, 190 P. 17; In re Estate of McCurdy (1925), 197 Cal. 276, 282, 240 P. 498.) All "the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail." (Prob.Code, § 103.) "A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will." (Prob. Code, § 104.) "A devise of the residue of the testator's real property, or a bequest of the residue of the testator's personal property, passes all the real or personal property, as the case may be, which he was entitled to devise or bequeath at the time of his death, not otherwise effectually devised or bequeathed by his will." (Prob.Code, § 126.) "The making of a will raises a presumption that the testator intended to dispose of all his property. Residuary clauses are generally inserted for the purpose of making that disposition complete, and these clauses are always to receive a broad and liberal interpretation, with a view of preventing intestacy as to any portion of the estate of the testator, and this general rule is in harmony with the declaration of our code that the provisions of a will must be construed, if possible, so as to effect that purpose." (O'Connor v. Murphy (1905), 147 Cal. 148, 153, 81 P. 406; see also In re Estate of Beldon (1938), 11 Cal.2d 108, 112, 77 P.2d 1052.) The prevailing principle is that the function of the court is to construe a will, not to make one; to ascertain the testator's intention as expressed and, if lawful, give it effect. (In re Estate of Moorehouse (1944), supra, 64 Cal.App.2d 210, 216, 148 P.2d 385, and cases there cited.)

1. See In re Estate of McCurdy (1925), 197 Cal. 276, 286, 240 P. 498; Civ.Code, §§ 863–866.

[7–9] Applying these principles to the will here involved, it is clear that the intention of the testatrix was to create a trust consisting of the entire residue of her estate, with the income payable to Adele during her life, and the remainder to be distributed upon her death to her issue if any, otherwise to Nelty if surviving, otherwise to Nelty's issue. It is also explicit that the testatrix intended to give $1 and no more to "any person, whether a beneficiary under this Will or not mentioned herein" who "shall contest this Will or object to any of the provisions hereof." Such a trust and such alternative provision for a contestant are valid and lawful.[2] The trust came into existence and the legal title to the property included therein vested in the trustee at the death of the testatrix; a decree of distribution of the estate to the trustee would operate merely to confirm such title in the trustee. (Prob. Code, §§ 28, 300; In re Estate of Wellings (1923), 192 Cal. 506, 510, 221 P. 628; Title Ins. & Trust Co. v. Duffill (1923), 191 Cal. 629, 647, 218 P. 14; 25 Cal.Jur. 314, and cases there cited; 11b Cal.Jur. 238, § 834.) The future interests of the contingent remaindermen who are to take property upon Adele's death likewise came into existence at the testatrix' death (Civ. Code, § 749) and cannot be defeated by any act of Adele forfeiting her intermediate or precedent interest. (Civ. Code, §§ 741, 742[3]; see also Prob. Code, § 140; Estate of McCurdy (1925), supra, 197 Cal. 276, 286, 240 P. 498.) Neither could such future remainder interests be accelerated by any event other than the death of Adele. (Civ. Code, § 780.[4])

[10, 11] It is thus clear that the contingent interests of Nelty's presently living children may not be defeated by Adele's forfeiture of her intermediate interest, and that the decree here appealed from under which the entire trust property was ordered distributed to Nelty free of the trust cannot stand. (See Born v. Horstmann (1889), 80 Cal. 452, 460, 22 P. 169, 338, 5 L. R.A. 577; Woestman v. Union Trust etc. Bank (1920), 50 Cal.App. 604, 608–609, 195 P. 944; Moxley v. Title Ins. & Trust Co. (1946), 27 Cal.2d 457, 461–462, 165 P.2d 15, 163 A.L.R. 838.) In this connection it may be noted that under the provisions of section 871 of the Civil Code, "When the purpose for which an express trust was created ceases, the estate of the trustee also ceases," and that the trial court found (in part essentially as a conclusion of law) that "the only reason for the creation of the trust * * * was for the individual use and enjoyment of said Adele Masson as to net income and principal, subject to the terms and conditions of the will * * *; that by virtue of the [forfeiture of Adele's interest] * * * the reasons for the creation of said trust ceased to exist, and said trust ceased and terminated and never came into effect or being * * *." Such finding and conclusion, however, are contrary to not only the statutory law of this state cited and quoted hereinabove, but

2. See Civil Code, section 864: "* * * the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust." See also 25 Cal.Jur. 316, section 167, and cases there cited.

3. Civil Code, section 741: "No future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent interest, nor by any destruction of such precedent interest by forfeiture, surrender, merger, or otherwise, except as provided by the next section, or where a forfeiture is imposed by statute as a penalty for the violation thereof."

Civil Code, section 742: "No future interest, valid in its creation, is defeated by the determination of the precedent interest before the happening of the contingency on which the future interest is limited to take effect; but should such contingency afterwards happen, the future interest takes effect in the same manner and to the same extent as if the precedent interest had continued to the same period."

4. Civil Code, section 780: "When a remainder on an estate for life or for years is not limited on a contingency defeating or avoiding such precedent estate, it is to be deemed intended to take effect only on the death of the first taker, or the expiration, by lapse of time, of such term of years."

also to the purposes expressly set forth in the will of the testatrix. Although the will clearly expresses the purpose to provide an income for Adele during her life, *provided she did not contest it,* a purpose is also explicitly declared that at the termination of Adele's life the corpus of the trust and "any undistributed income thereon" shall become the property of the remaindermen specified, and that control of the trust property remain in the trustee in the meantime. If the testatrix intended that the trust terminate if Adele forfeited her interest by contest, she failed to so indicate in any portion of her will, including dispository clauses, contest clause, and other provisions. That the testatrix did contemplate the contingency of a contest and forfeiture is implicit in the contest clause by which Adele takes the $1.00 awarded her by the decree of distribution. "A court's inquiry in construing a will is limited to ascertaining what the testator meant by the language which was used." (In re Estate of Beldon (1938), supra, 11 Cal.2d 108, 112, 77 P.2d 1052. By the language here used the trust is to continue until the death of Adele; then, and then only, is it to terminate. The above quoted statutory provisions protect the rights of the contingent remaindermen and the trust cannot terminate or the remaindermen's rights be impaired prior to the event specified. It may also be mentioned that by terminating the trust by reason of Adele's forfeiture of her "equitable life estate" without control of the corpus, the forfeited interest would be increased to a full legal life estate, a result consonant with neither law nor the intention of the testatrix as expressed in her will.

[12] With the trust continued in existence, the question remains as to disposition of the income prior to termination of the trust upon Adele's death. It may first be noted that since the 1929 amendment to section 724[5] of the Civil Code accumulation of such income for the benefit of adults as well as of minors is permitted. (See Hutchins v. Security Trust etc. Bank (1929), 208 Cal. 463, 472, 281 P. 1026, 65 A.L.R. 1059; Manning v. Bank of California Nat. Ass'n (1932), 216 Cal. 629, 633, 15 P.2d 746.) And by statutory provision the ownership of such income is declared to be as follows: "When, in consequence of a valid limitation of a future interest, there is a suspension of the power of alienation or of the ownership during the continuation of which the income is undisposed of, and no valid direction for its accumulation is given, such income belongs to the persons presumptively entitled to the next eventual interest." (Civ.Code, § 733.) As well stated in 26 Cal.Jur. 963–964, sections 263–264 of Wills, "Where the will creates a future estate or interest in property, and fails to make disposition of the income or directs a forbidden accumulation thereof, a present disposition of such income is provided for by section 733 of the Civil Code. In the circumstances contemplated by this section, the undisposed of income is declared to belong to the persons presumptively entitled to the next eventual interest.' The situation to which the statute applies is presented by the following facts: (1) a valid limitation of a future interest,—that is, an interest which is limited to take effect in possession at a future time; (2) a suspension of the power of alienation or of the ownership of the property,—i. e., a valid trust; (3) an accrual of income during the trust period; (4) an absence of a valid direction for the accumulation of the income. * * * The question as to who, within the meaning of the statute, are the persons 'presumptively entitled to the next eventual interest,' is to be determined by reference to the provisions of the will."

5. Civil Code, section 724: "An accumulation of the income of property may be directed by any will, trust or transfer in writing sufficient to pass the property or create the trust out of which the fund is to arise, for the benefit of one or more persons, objects or purposes, to commence within the time in this title permitted for the vesting of future interests and not to extend beyond the period limiting the time within which the absolute power of alienation of property may be suspended as prescribed by law."

Cases interpreting or applying the provisions of section 733 of the Civil Code are as follows:

In re Estate of Duffill (1919), 180 Cal. 748, 760–761, 183 P. 337: The testatrix in her will directed establishment of a trust in favor of her son, an adult, from which income in a specified fixed sum was to be paid to him, and excess income accumulated, for a fixed number of years, at the termination of which both corpus and accumulations were to be distributed to him free of the trust. Since at that time (prior to 1949 amendment to Civil Code, § 724) directions for accumulations of income for the benefit of adults were void, it was held that the beneficiary (who was also the sole remainderman) was the "person entitled to the next eventual interest" under Civil Code, section 733, and that the decree of distribution correctly awarded the entire trust income to him "freed of the void condition against accumulation."

Manning v. Bank of California Nat. Ass'n (1932), supra, 216 Cal. 629, 634–635, 15 P.2d 746: Under the will and a decree of distribution entered January 6, 1925, the testamentary trustee was directed to pay $300 a month to each of the four daughters of decedent during the 20-year term of the trust, or to the issue of any daughter who died during such period leaving issue, otherwise the interest of the deceased daughter to terminate. Upon termination of the trust the "trust estate" was to be divided among the four daughters and the issue of any deceased daughter. Thereafter the daughters brought action seeking payment to them of accumulations of income beyond that required to meet the specified monthly payments, on the ground that since directions for such accumulations for the benefit of adults were at that time void, they were entitled thereto. The court declared, in reliance on Civil Code section 733, that if plaintiffs (the daughters) had appealed from the decree of distribution "it would be unhesitatingly held that under the will * * * plaintiffs had established their right to the surplus income, whether said income should be regarded as undisposed of, or as income directed to be accumulated by a void direction," but that the decree, which directed the accumulations to be made, was final on the subject. This declaration was made after the court expressly mentioned (216 Cal. page 630, 15 P.2d 746) that the daughters' fourteen children had a contingent interest in the trust estate. (See also In re Estate of Pichoir (1903), 139 Cal. 682, 73 P. 606.)

Woestman v. Union Trust etc. Bank (1920), supra, 50 Cal.App. 604, 609, 195 P. 944: Plaintiffs sued to terminate a testamentary trust in their favor created by the will of their deceased mother and confirmed by the decree of distribution. Although refusing termination (by reason of the contingent remainder interests of plaintiffs' children in case either plaintiff died before the trust period expired), the court held that since there "is no provision whatever in the will [or in the decree of distribution] for the accumulation of income" in excess of the fixed monthly payments to plaintiffs, the "excess, therefore, would come within the provisions of section 733 of the Civil Code, and belong to the plaintiffs as the persons presumptively entitled to the next eventual interest." (See also Moor v. Vawter (1927), 84 Cal.App. 678, 681, 258 P. 622; cf. In re Estate of Werner (1907), 3 Coff.Prob.Dec. 225, to the effect that inasmuch as testamentary directions for accumulation of trust estate income after the beneficiaries reached the age of 21 were void, such accumulations "will be distributed among the heirs at law.")

In re Estate of Arms (1921), 186 Cal. 554, 557–559, 564–565, 199 P. 1053, relied upon by appellant in the instant case, was decided without reference to Civil Code section 733 and is therefore not persuasive here. In re Estate of Gregory (1909), 12 Cal.App. 309, 310, 107 P. 566, and In re Estate of Lawrence (1941), 17 Cal.2d 1, 108 P.2d 893 (see also In re Estate of McCurdy (1925), supra, 197 Cal. 276, 240 P. 498), relied upon by respondent Nelty in the present case, do not involve disposition of trust income, but rather the disposition of the residue where the first beneficiary thereof named in the will prede-

ceased the testator, and are likewise not here in point.

[13] To summarize: Following the authorities above discussed we hold that the trust here involved must continue in existence until the death of Adele, as required by the will, and that the income therefrom shall in the meantime (during the life of Nelty and so long as no child is born to Adele in lawful wedlock) be paid to Nelty as the person "presumptively entitled to the next eventual interest."

[14] Such holding as to the income avoids intestacy and gives full force and effect to the contest clause of the will under which Adele has forfeited her rights to take as primary beneficiary. As declared in In re Kitchen's Estate (1923), 192 Cal. 384, 390, 220 P. 301, 30 A.L.R. 1008, "No artificial distinctions are to be taken advantage of or quibbling indulged in to the end that a person plainly and palpably coming within the scope of the forfeiture clause [of a will] may by 'some hook or crook' escape the penalty of forfeiture." To hold that intestacy resulted as to the income from the trust estate upon Adele's forfeiture thereof, that Adele is entitled to take the bequest provided in the contest clause ($1.00), and that she is nevertheless entitled to take one-half the trust income as an heir at law, would appear to constitute such an "artificial distinction" and "quibbling" to the end that she take a share of the estate despite the testatrix' clearly declared intention that the forfeiture clause operate as to "any person, whether a beneficiary under this Will or not mentioned herein," and that any such person should receive only $1.00 "in lieu of the provision which I have made, or which I might have made herein for such person so contesting or objecting."

The decree of distribution is reversed, with directions to the probate court to proceed with the administration of the estate in a manner not in conflict with the views expressed in this opinion, and in all proceedings wherein the interests of the infant contingent remaindermen are involved the court shall require that such minors appear by a guardian ad litem and counsel whose interests are not in conflict with those of the wards.

GIBSON, C. J. and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.



38 Cal.2d 265

SPAULDING v. CAMERON et al.

L. A. 21537.

Supreme Court of California, in Bank.

Jan. 18, 1952.

As Modified on Denial of Rehearing Feb. 14, 1952.

Mrs. Sumner Spaulding brought action against Arthur A. Cameron and others to recover for damage to plaintiff's property located at bottom of canyon as result of mud washing down from property of the named defendant on slope of canyon because defendants negligently constructed fill on the property of the named defendant. The Superior Court of Los Angeles County, Otto J. Emme, J., entered a judgment for the plaintiff, and the named defendant appealed. The Supreme Court, Traynor, J., held that to extent that Superior Court judgment awarded additional damages for future injury and also granted injunctive relief, it was erroneous and would be reversed.

Judgment affirmed in part and reversed in part, and cause remanded with instructions.

Carter, J., dissented.

Prior opinion 231 P.2d 921.

1. Waters and Water Courses ⇐126(2)

In action to recover for damage to plaintiff's property located at bottom of canyon, as result of mud washing down from property of one of the defendants on slope of canyon during rain because defendants negligently constructed a fill on the property, evidence was sufficient to support finding that the inundation of plaintiff's property was caused by negligence of defendants in constructing the fill.

2. Waters and Water Courses ⇐126(2)

In action to recover for damage to plaintiff's property located at bottom of

canyon, as result of mud washing down from property of one of the defendants on slope of canyon during rain because defendants negligently constructed a fill on the property, and for injunction, evidence sustained finding that fill constituted a threat of repetitions of inundations and would, unless corrected, compel plaintiff to abandon her residence.

3. Nuisance ⇐3(1)

Where defendants negligently constructed a fill on one defendant's property located on slope of canyon, so that mud washed down from that property during heavy rains onto property of plaintiff located at bottom of canyon, and evidence established that the fill constituted a threat of repetitions of such inundations and would, unless corrected, compel plaintiff to abandon her residence, the fill constituted a "nuisance." Civ.Code, § 3479.

See publication Words and Phrases, for other judicial constructions and definitions of "Nuisance".

4. Nuisance ⇐42

If defendant is not privileged to continue nuisance and is able to abate it, he cannot complain if plaintiff elects to bring successive actions as damages accrue until abatement takes place.

5. Nuisance ⇐50(4)

If it appears improbable as a practical matter that nuisance can or will be abated by defendant, plaintiff should not be left to the troublesome remedy of successive actions, but should be entitled to recover damages for anticipated injury to land.

6. Nuisance ⇐50(4)

In action to recover for damage to plaintiff's property located at bottom of canyon, as result of mud washing down from property of one of the defendants on slope of canyon during rain because defendants negligently constructed a fill on property, and for injunction, wherein there was evidence to support conclusion that there was little or nothing that defendants could do to abate the nuisance, and also evidence that would support conclusion that corrective measures taken by defendants would prevent further flows of mud, judgment of trial court awarding damages for future injury and also granting injunctive relief was erroneous and would be reversed.

7. Nuisance ⇐50(1)

In action to recover for damage to plaintiff's property located at bottom of canyon, as result of mud washing down from property of one of the defendants on slope of canyon during rain because defendants negligently constructed a fill on property, trial court should determine whether nuisance was in fact permanent, and, if court should find that it was permanent, court should enter judgment for decrease in market value of plaintiff's property, and if court should find that nuisance was not permanent, court should grant injunctive relief and such additional damages as might be proved for temporary decrease in value of use of property while nuisance was continued.

Martin H. Easton, Los Angeles (James A. Gardner, Bakersfield, Overton, Lyman, Prince & Vermille, and Donald H. Ford, all of Los Angeles, of counsel), for appellant.

Samuel A. Rosenthal, Los Angeles, Prinzmetal & Grant, Beverly Hills (Leonard G. Ratner, Los Angeles, of counsel), for respondent.

TRAYNOR, Justice.

Plaintiff owns and occupies a house on the east side of San Ysidro Drive, Los Angeles, at the bottom of Pea Vine Canyon. Defendant owns approximately 30 acres of land on the west slope of the canyon. In the summer and fall of 1946 defendant undertook leveling operations on his property. These operations consisted of removing the tops of three knolls and casting the earth over the sides of adjoining canyons, forming fills. Approximately one-fifth of the earth was pushed over the west side of the Pea Vine Canyon northwest of plaintiff's house. In November of 1946 as a result of heavy rains large quantities of mud washed out of defendant's fill, flowed down the canyon surrounded plaintiff's house and inundated the garages located on the ground level. Plaintiff brought this action for damages and

for injunctive relief. The trial court found that plaintiff's property had suffered physical damage in the amount of $2,732.29, and that its market value had been reduced in the amount of $24,000 because of the continuing threat of future inundations of mud. It entered judgment for damages for both items and also ordered defendant either to remove the fill or to "place protective structures around * * * [it] in such manner that the property of the plaintiff will not be endangered or threatened by the existence of such deposits of loose dirt." Defendant appeals.

[1, 2] It is unnecessary to decide whether in the absence of negligence defendant would be liable for creating on his property an earth fill that presented a continuing threat of injury to the property below. There is evidence that in making the fill defendant did not prepare the natural hillside to hold the dirt he deposited thereon, nor did he make use of available means to compact the earth as it was laid down to prevent it from washing away. Experts testified that proper procedures for making stable fills were not employed. Moreover, defendant was warned during the course of the leveling operations of the hazard being created to the property below. Accordingly, the evidence is sufficient to support the finding that the inundation of plaintiff's property was caused by defendant's negligence in constructing the fill. There is also sufficient evidence to support the finding that the fill constitutes a threat of repetitions of such inundations and will, unless corrected, compel plaintiff to abandon her residence.

On the basis of the foregoing findings it is clear that defendant's fill constitutes a nuisance. Civil Code, § 3479; Katenkamp v. Union Realty Co., 6 Cal.2d 765, 774, 776, 59 P.2d 473; McIvor v. Mercer-Fraser Co., 76 Cal.App.2d 247, 254, 172 P.2d 758. Defendant contends, however, that the trial court erred in allowing damages for the decline in market value of plaintiff's property in addition to damages for the physical injury, particularly in view of the fact that it ordered the abatement of the nuisance, the continuation of which is the cause of the decrease in the market value. Plaintiff, on the other hand, contends that there is in reality no way in which defendant can abate the nuisance and that it was therefore proper for the trial court to award damages caused by the continuing threat of future injury.

In early decisions of this court it was held that it should not be presumed that a nuisance would continue, and damages were not allowed for a decrease in market value caused by the existence of the nuisance but were limited to the actual physical injury suffered before the commencement of the action. Hopkins v. Western Pacific R. R. Co., 50 Cal. 190, 194; Severy v. Central Pacific R. R. Co., 51 Cal. 194, 197; see also, Coats v. Atchison, etc., Ry. Co., 1 Cal.App. 441, 444–445, 82 P. 640. The remedy for a continuing nuisance was either a suit for injunctive relief or successive actions for damages as new injuries occurred. Situations arose, however, where injunctive relief was not appropriate or where successive actions were undesirable either to the plaintiff or the defendant or both. Accordingly, it was recognized that some types of nuisances should be considered permanent, and in such cases recovery of past and anticipated future damages were allowed in one action. Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 622, 37 P. 750; Williams v. Southern Pacific R. R. Co., 150 Cal. 624, 626–628, 89 P. 599; Rankin v. DeBare, 205 Cal. 639, 641, 271 P. 1050; see, McCormick on Damages, § 127, pp. 504–505.

The clearest case of a permanent nuisance or trespass is the one where the offending structure or condition is maintained as a necessary part of the operations of a public utility. Since such conditions are ordinarily of indefinite duration and since the utility by making compensation is entitled to continue them, it is appropriate that only one action should be allowed to recover for all the damages inflicted. It would be unfair to the utility to subject it to successive suits and unfair to the injured party if he were not allowed to recover all of his probable damages at

once. See, McCormick, Damages for Anticipated Injury to Land, 37 Harv.L.Rev. 574, 584–585.

A more difficult problem is presented, however, if the defendant is not privileged to continue the nuisance or trespass but its abatement is impractical or the plaintiff is willing that it continue if he can secure full compensation for both past and anticipated future injuries. To attempt categorically to classify such a nuisance as either permanent or not may lead to serious injustice to one or the other of the parties. Thus, if the plaintiff assumes it is not permanent and sues only for past damages, he may be met with the plea of res judicata in a later action for additional injury if the court then decides the nuisance was permanent in character from its inception. See, Slater v. Shell Oil Co., 58 Cal.App.2d 864, 870, 137 P.2d 713. Similarly, if the initial injury is slight and plaintiff delays suit until he has suffered substantial damage and the court then determines that the nuisance was permanent, the defendant may be able to raise the defense that the statute of limitations ran from the time of the initial injury. See, Phillips v. City of Pasadena, 27 Cal.2d 104, 107–108, 162 P.2d 625. On the other hand, if the defendant is willing and able to abate the nuisance, it is unfair to award damages on the theory that it will continue. See, Meek v. DeLatour, 2 Cal.App. 261, 265, 83 P. 300; cf., Collier v. Merced Irr. Dist., 213 Cal. 554, 566, 2 P.2d 790; Colorado Power Co. v. Pacific Gas & Electric Co., 218 Cal. 559, 567, 24 P.2d 495.

[3, 4] Because of these difficulties it has been recognized that in doubtful cases the plaintiff should have an election to treat the nuisance as either permanent or not. Kafka v. Bozio, 191 Cal. 746, 752, 218 P. 753, 29 A.L.R. 833; see, Restatement, Torts, § 930; McCormick on Damages, § 127, p. 511 et seq.; 4 Sutherland on Damages [4th ed.] § 1046, p. 3874. If the defendant is not privileged to continue the nuisance and is able to abate it, he cannot complain if the plaintiff elects to bring successive actions as damages accrue until abatement takes place. Phillips v. City of Pasadena, 27 Cal.2d 104, 107–108, 162 P.2d 625; Strong v. Sullivan, 180 Cal. 331, 334–335, 181 P. 59, 4 A.L.R. 343. On the other hand, if it appears improbable as a practical matter that the nuisance can or will be abated, the plaintiff should not be left to the troublesome remedy of successive actions. See, Restatement, Torts, § 930, comment c; McCormick, Damages for Anticipated Injury to Land, 37 Harv.L. Rev. 574, 594–595.

The facts of the present case aptly illustrate the problem involved. As a result of the nuisance created by defendant, plaintiff's property suffered physical injury. There is also evidence that while the nuisance continues its rental value is impaired, an that if the nuisance is not abated its market value will continue to be substantially depressed. There is evidence that would support the conclusion that there is little or nothing defendant can do to abate the nuisance. On the assumption that this conclusion is correct, plaintiff contends that she is entitled to recover the full diminution in the market value caused by the probable continuation of the nuisance. On the other hand, defendant contends that he can and will abate the nuisance. There is evidence that would support the conclusion that corrective measures taken by defendant will prevent further flows of mud. Moreover, since defendant intends to make use of the top surface of the fill it is not improbable that he will do whatever is practically possible to stabilize it. On the assumption that he has or will be able to abate the nuisance defendant contends that plaintiff's damages should be limited to those suffered in the past and should not include speculative future losses based on the assumption that the nuisance will continue.

[5] The findings and conclusions of the trial court on these conflicting contentions are inconsistent. The court found that plaintiff's property had been permanently damaged because of the continuing threat of future injury. It also found, however, that this threat would continue unless corrective measures were taken, and by ordering that such measures be taken impliedly found that they were feasible. It is clear that plaintiff cannot have both remedies.

If defendant obeys the injunction and takes such measures that "the property of the plaintiff will not be endangered or threatened by the existence of such deposits of loose dirt," there will no longer be a threat to depreciate the value of the property. Plaintiff would obtain a double recovery if she could recover for the depreciation in value and also have the cause of that depreciation removed.

A similar problem was presented in Meek v. De Latour, 2 Cal.App. 261, 83 P. 300. In that case plaintiff secured a judgment ordering the abatement of a cream of tartar factory and awarding damages. In compliance with the judgment the factory was removed, and on appeal it was held that evidence of the decrease in market value caused by its presence was inadmissible. "It seems perfectly clear that such testimony * * *, where the abatement of a nuisance is sought, is inadmissible on the question of damages. Otherwise a plaintiff could recover for the depreciation in value of his property and at the same time remove the depreciation by abating the cause of it." 2 Cal.App. at page 265, 83 P. at page 302.

In the present case it cannot be said as a matter of law that the nuisance can or cannot be abated. In view of the inconsistent findings and the conflict in the evidence, it would be inappropriate for this court to determine whether the nuisance is in fact permanent and to modify the judgment by striking the damages for loss of market value on the assumption it is not permanent, or by striking the injunctive provisions on the assumption that it is. Tupman v. Haberkern, 208 Cal. 256, 269–270, 280 P. 970.

[6] Since plaintiff has proved defendant's liability for the actual physical injury to the property the judgment should be affirmed to the extent that it awards $2,732.29 damages for that injury. To the extent that the judgment awards additional damages and also grants injunctive relief it must be reversed. On retrial the trial court should determine whether or not the nuisance is in fact permanent. If it finds that it is, it should enter judgment for the decrease in market value. If it finds that it is not, it should grant injunctive relief and such additional damages as may be proved for the temporary decrease in the value of the use of the property while the nuisance continued. See, Bourdieu v. Seaboard Oil Corp., 48 Cal.App.2d 429, 437–438, 119 P.2d 973; Guttinger v. Calaveras Cement Co., Cal.App., 233 P.2d 914; McCormick on Damages, § 127, pp. 503–504.

To the extent that it awards damages of $2,732.29 the judgment is affirmed. In all other respects the judgment is reversed and the cause is remanded to the trial court with instructions to determine on the basis of the evidence previously presented and such additional evidence as may be presented by the parties whether or not the nuisance is in fact permanent. Each party is to bear his own costs on this appeal.

GIBSON, C. J., and SHENK, EDMONDS, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

I am of the opinion that the portion of the judgment for damages should be affirmed and the injunctive feature either amended or affirmed as correctly construed.

In this case the defendant negligently maintained loose dirt on his land which has in the past, when it rained, moved onto plaintiff's land. The court *expressly* found that such condition existing on defendant's land permanently depreciated the market value of plaintiff's land as follows: "* * * by reason of the acts of the defendant * * * plaintiff's property has suffered a substantial and *permanent impairment* of value and *has lost* its desirability as a residence for plaintiff or any prospective purchasers; that it is true that the fair market value of the house on plaintiff's property before the deposit of the loose dirt, and the damage occasioned thereby, was the sum of $40,000.00, and that the fair resale value of said house after the damage caused by the defendant * * * was the sum of $16,000.00, to plaintiff's detriment and damage in the sum of $24,000.00, and it is true that the main-

tenance by the defendant * * * of the loose quantities of dirt on his premises will cause plaintiff great and *irreparable* injury and will *permanently* deprive plaintiff's land of *any* value for residential purposes." (Emphasis added.) It is conceded by the majority that that finding is supported by the evidence. The majority opinion says, however, that there is an inconsistent finding to the effect that the condition on defendant's land is not permanent—can be abated. There is no *express* finding to that effect. Assuming there is an implied finding flowing from the fact that an injunction was given, then the duty of this court is to liberally construe the findings to support the part of the judgment based upon such findings, rather than reversing the entire judgment. Thus the implied inconsistent finding that the condition can be abated may be ignored, and the part of the judgment awarding injunctive relief reversed, while affirming the damage portion which is based on an *express* finding of permanent damage. In line with the settled rule that findings must be liberally construed to support the judgment and specific findings control over general ones, 24 Cal.Jur. 1007 et seq., an express finding prevails over an implied one. See Central Heights Improvement Co. v. Memorial Parks, 40 Cal.App.2d 591, 105 P.2d 596.

It is not necessary, however, to reverse the injunctive provision in the judgment, for correctly construed, under the rule requiring liberal construction to support it, there is no inconsistency. So interpreted, it enjoins only the maintenance in the future by defendant on his land of *additional* loose soil, that is, in addition to what is already there. The findings are readily susceptible of that construction. It is found that "Plaintiff is entitled to a permanent restraining order against the defendant, enjoining * * * defendant * * * from *excavating, re-surfacing* or *distributing* his said land and depositing loose dirt in any manner which *may* threaten or endanger the residence of the plaintiff, and ordering the defendant * * * to remove deposits of loose dirt upon his said land, or in lieu thereof, to place protecting structures around said loose dirt in such a manner that the property of the plaintiff will not be endangered or threatened by the existence of deposits of loose dirt." (Emphasis added.) It will be noted that the participle form of the verbs "excavate, re-surface or distribute" speak in the future. It could not be speaking of the past because that soil had already been excavated and distributed. The removal of the dirt being in the same tenor, refers to the dirt to be distributed in the future, after the entry of the judgment. It is true that the judgment also refers to the removal of dirt theretofore deposited. That portion of the judgment is out of harmony with the findings and should be modified.

I would therefore modify the judgment with respect to injunctive relief against dirt already deposited on defendant's land and affirm the judgment as so modified.



38 Cal.2d 273

GILL et al. v. CURTIS PUB. CO. et al.

L. A. 22037.

Supreme Court of California, in Bank.

Jan. 18, 1952.

John W. Gill and Sheila Gill brought an action against Curtis Publishing Company, a corporation, and Curtis Circulation Company, and others, for invasion of privacy. The Superior Court, Los Angeles County, Arnold Praeger, J., entered a judgment on the pleadings for the named defendants, and the plaintiffs appealed. The Supreme Court, Carter, J., held that the complaint stated a cause of action.

Judgment reversed.

Prior opinion 231 P.2d 565.

1. Appeal and Error ⇐863, 916(1)

A judgment on the pleadings for defendants, granted pursuant to defendants' motion, is reviewable the same as a judgment of dismissal entered following sustaining of general demurrer, and allegations in plaintiffs' complaint must be taken as true, and so taken the question is whether a cause of action has been stated.

2. Torts ⇐8

Recognition is given a right of "privacy", independent of the common rights of property, contract, reputation and physical integrity, and such right is the right to live one's life in seclusion without being subjected to unwarranted and undesired publicity and is the right to be let alone, and remedies are afforded for the protection of that right.

See publication Words and Phrases, for other judicial constructions and definitions of "Privacy".

3. Torts ⇐8

In defining boundaries of right to privacy, as applied in publication field, the public interest in dissemination of news, information and education must be balanced against the individuals interest in peace of mind and freedom from emotional disturbances, and when words relating to or actual pictures of a person or his name are published, the circumstances may indicate that public interest is predominant, and factors deserving consideration may include medium of publication, extent of use, public interest served by publication, and seriousness of interference with person's privacy.

4. Torts ⇐8

Where magazine article which was non-fictional psuedo-psychological or sociological discussion of love between the opposite sexes and its relation to divorce was illlustrated by photograph showing husband with his arm around wife and leaning forward with his cheek against hers, and the article and caption under photograph depicted husband and wife as persons whose only interest in each other is sex, and public interest did not require use of such a photograph without consent, and pressing need for speed in disseminating news was not present, and article and photograph were not aimed at giving news about business of husband and wife, the husband and wife had cause of action against magazine publishers for invasion of their privacy.

5. Torts ⇐26(1)

A complaint alleging facts which clearly show a violation of plaintiffs' right of privacy need not specifically allege that their right of privacy was invaded.

6. Torts ⇐26(1)

The absence of allegation that plaintiffs suffered mental distress did not render complaint insufficient to state cause of action for invasion of privacy, where complaint did allege that publication of photograph and article was made in disregard of plaintiffs' feelings and rights and that the article depicted plaintiffs as dissolute and immoral persons and robbed them of public esteem, and that by reason thereof the plaintiffs were damaged in the sum of $200,000, since such allegations warranted inference that plaintiffs' feelings were hurt and that they suffered mental anguish.

Shacknove & Goldman, Los Angeles (Ben F. Goldman, Jr., Los Angeles, of counsel), for appellants.

Macdonald & Pettit and Thomas H. McGovern, all of Los Angeles, for respondents.

CARTER, Justice.

[1] A judgment on the pleadings for defendants, Curtis Publishing Company and Curtis Circulation Company, was granted pursuant to defendants' motion. The case is reviewed, therefore, the same as would be a judgment of dismissal entered following the sustaining of a general demurrer, and the allegations in plaintiffs' complaint must be taken as true, and so taken the question is whether a cause of action has been stated. Rannard v. Lockheed Aircraft Corp., 26 Cal.2d 149, 157 P.2d 1; Seeger v. Odell, 18 Cal.2d 409, 115 P.2d 977, 136 A.L.R. 1291; 21 Cal.Jur. 234, et seq.

Plaintiffs are husband and wife. Defendants publish, circulate and sell for profit a monthly magazine named Ladies Home Journal. Cartier-Bresson, a photographer, and Dahl, a writer, are in the employ of defendants.

Plaintiffs own and operate a confectionery and ice cream concession in the Farmers' Market in Los Angeles. They have a reputation for industry, integrity, decency and morality. Cartier-Bresson, in the course of his employment, photographed plaintiffs at their place of business without

their knowledge or consent. The photograph depicts them apparently seated on stools side by side at the patron's side of the counter at their concession; plaintiff, Mr. Gill, has his arm around his wife and is leaning forward with his cheek against hers. The picture was published by defendants in their May, 1949, issue of the Ladies Home Journal, in connection with an article entitled "Love" written by Dahl in the course of his employment. Under the picture appears the caption "Publicized as glamorous, desirable, 'love at first sight' is a bad risk." The article is a somewhat philosophical and sociological discussion of love between the opposite sexes, and its relation to divorce. Love is classified generally on the basis of the extent it is founded upon "sex attraction" or "affection" and "respect." One of the classifications is called love at first sight, which is founded upon 100% sex attraction, the kind which the photograph is captioned to portray. That kind of love is called the "wrong" one, not lasting and will be followed by divorce. In this connection, plaintiffs allege that the picture depicts them "in such a manner as to indicate said plaintiffs are loose, dissolute and immoral persons engaged in the so-called 'wrong kind of love' * * *."

Defendants knew, or should have known, it is further asserted, plaintiffs were happily married and had a high moral reputation, but nevertheless, in a malicious disregard of their rights and feelings, published and sold the magazine with the article and photograph; that such publication and distribution caused plaintiffs to be held up to public "scorn, ridicule, hatred, contempt and obloquy and did rob and deprive plaintiffs of the benefits of public confidence, respect and esteem and injure said plaintiffs in their business and social contacts and associations and in their reputations and health" to their damage in the sum of $200,000.

[2] Recognition has been given of a right of privacy, independent of the common rights of property, contract, reputation and physical integrity, generally described as "the right to live one's life in seclusion, without being subjected to unwaranted and undesired publicity. In short, it is the right to be let alone." Melvin v. Reid, 112 Cal. App. 285, 289, 297 P. 91, 92. Remedies have been afforded for the protection of that right. See Melvin v. Reid, supra; Cohen v. Marx, 94 Cal.App.2d 704, 211 P. 2d 320; Metter v. Los Angeles Examiner, 35 Cal.App.2d 304, 95 P.2d 491; Kerby v. Hal Roach Studios, 53 Cal.App.2d 207, 127 P.2d 577; Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133; Smith v. Doss, 251 Ala. 250, 37 So.2d 118; Cason v. Baskin, 155 Fla. 198, 20 So.2d 243, 168 A.L.R. 430; Corliss v. E. W. Walker Co., C.C., 64 F. 280, 31 L.R.A. 283; Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101; Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194; Goodyear Tire & Rubber Co. v. Vandergriff, 52 Ga.App. 662, 184 S.E. 452; McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga.App. 92, 2 S.E.2d 810, 811; Sikes v. Foster, 74 Ga.App. 350, 39 S.E.2d 585; Sidis v. F-R Pub. Corp., 2 Cir., 113 F.2d 806, 138 A.L.R. 15, dealing with California, Georgia, Kansas, Kentucky and Missouri law; Paramount Pictures v. Leader Press, Inc., D.C., 24 F.Supp. 1004; State ex rel. Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755; Kunz v. Allen, 102 Kan. 883, 172 P. 532, L.R.A.1918D, 1151; Jones v. Herald Post Co., 230 Ky. 227, 18 S.W.2d 972; Itzkovich v. Whitaker, 115 La. 479, 39 So. 499, 1 L.R.A.,N.S., 1147; Pallas v. Crowley, Milner & Co., 322 Mich. 411, 33 N.W.2d 911; Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076; Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291; Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55; Norman v. City of Las Vegas, 64 Nev. 38, 177 P.2d 442; McGovern v. Van Riper, 137 N.J.Eq. 24, 43 A.2d 514; Bednarik v. Bednarik, 16 A.2d 80, 18 N.J. Misc. 633; Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.2d 438, 138 A.L.R. 1; Holloman v. Life Ins. Co. of Virginia, 192 S.C. 454, 7 S.E.2d 169, 127 A.L.R. 110; Rest., Torts, § 867; 37 Va.L.Rev. 335; 22 So.Cal.L.Rev. 320; 48 Col.L.Rev. 713; 4 Harv.L.Rev. 193; 41 Am.Jur., Privacy § 5; 138 A.L.R. 22; 168 A.L.R. 446; 14 A.L.R.2d 750. There are more states which

have recognized such a right than have not, and the former represent the modern trend. See cases collected 138 A.L.R. 22; 168 A.L.R. 446; 14 A.L.R.2d 750; 40 Col.L.Rev. 713. The arguments advanced by the authorities pro and con are summarized: "One of the principal arguments advanced in support of the doctrine of privacy by its original exponents is that the increased complexity and intensity of modern civilization and the development of man's spiritual sensibilities have rendered man more sensitive to publicity and have increased his need of privacy, while the great technological improvements in the means of communication have more and more subjected the intimacies of his private life to exploitation by those who pander to commercialism and to prurient and idle curiosity. A legally enforceable right of privacy is deemed to be a proper protection against this type of encroachment upon the personality of the individual. While the early law gave redress only for physical interference with life and property, it is now recognized that man's spiritual nature also needs protection, and that his feelings as well as his limbs should be inviolate. In the formative period of the common law, before the day of newspapers, radio, and photography, when life was simpler and human relations more direct, the individual could himself adequately protect his privacy. Today this would be impossible, and to cast the individual upon his own resources in this regard would only result in a relapse into a system of private vengeance and violence which our civilization has outgrown. Freedom of speech and freedom of the press have been urged as a ground for denying the existence of the right of privacy. The right of privacy does undoubtedly infringe upon absolute freedom of speech and of the press, and it also clashes with the interest of the public in having a free dissemination of news and information. These paramount public interests must be taken into account in placing the necessary limitations upon the right of privacy. But if this right of the individual is not without qualifications, neither is freedom of speech and of the press unlimited. The latter privilege is subject to the qualification that it shall not be so exercised as to abuse the rights of individuals. Accordingly, it is held by courts recognizing the right of privacy that the constitutional guaranties of freedom of speech and of the press do not warrant the publication of matter constituting an invasion of the right of privacy any more than they give the right to defame a person. The absence of precedent affirming the existence of the right of privacy has been stressed by the courts denying or doubting the existence of such a right. This was one of the principal grounds of the first decision repudiating the doctrine of privacy. But the courts adopting the other view take the position that the lack of specific precedent is not decisive. It has been objected that a recognition of the right of privacy would open up a vast field of litigation, some of it bordering on the absurd. But courts recognizing the right deny the validity of this objection. According to the latter view, the fact that a recognition of the right would involve many cases near the border line, and would present perplexing questions, is not a good ground for denying the existence of such right or refusing to give relief in a case where it is clearly shown that a legal wrong has been done. While it is clear that when dealing with injuries to feelings alone it is difficult to fix definite and practical limits separating that which is merely a trivial annoyance to a particular individual from that of which the law will take cognizance, the difficulty is not insurmountable. The supposed principle of law that remedies are not afforded for mental pain or distress or injuries to the sensibilities, where there is no other injury involved, has been asserted as an argument against the right of privacy." 41 Am.Jur., Privacy § 9.

We believe the reasons in favor of the right are persuasive, especially in the light of the declaration by this court that "concepts of the sanctity of personal rights are specifically protected by the Constitution, both state and federal, and the courts have properly given them a place of high dignity and worth of especial protection." Orloff v. Los Angeles Turf Club, 30 Cal.2d 110, 117, 180 P.2d 321, 325, 171 A.L.R. 913.

[3, 4] The difficulty in defining the boundaries of the right, as applied in the publication field, is inherent in the necessity of balancing the public interest in the dissemination of news, information and education against the individuals' interest in peace of mind and freedom from emotional disturbances. When words relating to or actual pictures of a person or his name are published, the circumstances may indicate that public interest is predominant. Factors deserving consideration may include the medium of publication, the extent of the use, the public interest served by the publication, and the seriousness of the interference with the person's privacy. In the instant case, it is not necessary to decide whether the article accompanying the photograph is news or information such as the public interest demands. It might be described as a non-fictional pseudo-psycho logical or sociological discussion. Assuming it to be within the range of public interest in dissemination of news, information or education, and in a medium that would not be classed as commercial—for profit or advertising—there appears no necessity for the use in connection with the article without their consent, of a photograph of plaintiffs. The article, to fulfill its purpose and satisfy the public interest, if any, in the subject matter discussed, could, possibly, stand alone without any picture. In any event, the public interest did not require the use of any particular person's likeness nor that of plaintiffs without their consent. The likeness is only illustrative of a part of the article, like a schematic diagram in a scientific dissertation, except that there is far less necessary pertinency. On the other hand, the impact on plaintiffs has been as alleged, and it is apparent from the article and caption under the picture, that they are depicted as persons whose only interest in each other is sex, a characterization that may be said to impinge seriously upon their sensibilities.

In Melvin v. Reid, supra, 112 Cal.App. 285, 297 P. 91, defendant exhibited a motion picture depicting degrading incidents in plaintiff's past life, using her maiden name, when she had reformed for eight years. It was held that such incidents as occurred during her trial for murder, being part of a public record, were clothed with a public interest, but that it was "unnecessary" to use her name in connection with other incidents in her life. On the other hand, in Metter v. Los Angeles Examiner, supra, 35 Cal.App.2d 304, 95 P.2d 491, the court felt the public interest in the news of a suicide by a woman from a downtown business building resulting in a news story and photograph of her over-shadowed the invasion, if any, of her husband's right of privacy. The court found liability in Kerby v. Hal Roach Studios, supra, 53 Cal.App.2d 207, 127 P.2d 577, where an actress' name was signed to advertising material, consisting of a questionable letter, concerning a motion picture in which she did not have a part, pointing out that the publicity arising from her position as an actress did not justify the invasion. Cohen v. Marx, supra, 94 Cal.App.2d 704, 211 P.2d 320, turned upon the legitimate public interest in a public prize fighter.

Defendants urge, however, that there is not a sufficiently serious invasion of plaintiffs' privacy. In that connection, they refer to the Restatement where the right is stated: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." Rest., Torts, § 867. "The rule stated in this Section gives protection to the interest which a person has in living with some privacy, but this protection is relative to the customs of the time and place and to the habits and occupation of the plaintiff. One who is not a recluse must expect the ordinary incidents of community life of which he is a part. These include comment upon his conduct, the more or less casual observation of his neighbors as to what he does upon his own land and the possibility that he may be photographed as a part of a street scene or a group of persons. * * * On the other hand, liability exists only if the defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities. It is only

where the intrusion has gone beyond the limits of decency that liability accrues. These limits are exceeded where intimate details of the life of one who has never manifested a desire to have publicity are exposed to the public, or where photographs of a person in an embarrassing pose are surreptitiously taken and published. * * * In determining liability, the knowledge and motives of the defendant, the sex, station in life, previous habits of the plaintiff with reference to publicity, and other similar matters are considered. A distinction can be made in favor of news items and against advertising use." Rest., Torts, § 867, comments C & D. We have seen that the caption under the picture describes it as "love at first sight" and the article says such love is based on 100% sex. It is not unreasonable to believe such would be seriously humiliating and disturbing to plaintiffs' sensibilities, and it is so alleged, especially when we consider it deals with the intimate and private relationship between the opposite sexes and marriage. If the test is, as defendants claim, what an ordinary man would consider such, then it is a question for the trier of fact rather than one of law.

Defendants rely upon cases where through their own acts or by an incident thrust upon them, a person's affair became of public interest and he cannot recover for the publicity given; that they have waived their right of privacy. We have seen, however, that there was no legitimate interest in using plaintiffs' likenesses in this article, and it may be added that there was no pressing need for speed which is customarily a factor in disseminating news. It should be observed, that referring to the use of a person's likeness for a legitimate public interest as not actionable because it indicates a waiver by the person of his right, is of doubtful validity, for it has been applied whether the publication having news value arose out of an incident of his own making or involuntarily and without his fault thrust upon him. We cannot agree that from the allegation in the complaint that plaintiffs' business is well known to persons throughout the world, puts the case within the category of legitimate and overriding public interest, for the article, and use of the photograph with it, was not aimed at giving news or information about plaintiffs' business.

The article may be interpreted as not dealing with actual recent or past events in the lives of actual persons. It is more a philosophical or psychological or semi-educational discussion of abstractions. Hence, such cases as Sidis v. F-R Pub. Corp., supra, 2 Cir., 113 F.2d 806, 138 A.L.R. 15, dealing with the later career of a once infant protegy, under a "Where Are They Now" heading, are not in point. Cases from New York are of little assistance, for there the court of appeals rejected the existence of a right of privacy and a statute which was passed creating the right limited it to the use of a person's name, picture or portrait "for advertising purposes, or purposes of trade". See Sarat Lahiri v. Daily Mirror, 162 Misc. 776, 295 N.Y.S. 382.

[5, 6] Plaintiffs do not allege that their right of privacy was invaded or that they suffered mental distress, assert defendants, and thus no cause of action is stated. Plainly the complaint alleges facts which clearly show a violation of plaintiffs' right of privacy. More is not necessary. It is alleged that in disregard of plaintiffs' feelings and rights the publication was made; that the article depicted plaintiffs as dissolute and immoral persons and robbed them of public esteem; that by reason of the acts alleged, plaintiffs were damaged in the sum of $200,000. We think that it may be at least inferred therefrom that their feelings were hurt and they suffered mental anguish. The proceeding is, as heretofore stated, to be treated as though a general demurrer had been sustained. So treated, the complaint states a cause of action. Hudson v. Craft, 33 Cal.2d 654, 204 P.2d 1, 7 A.L.R. 2d 696.

It is said the allegation that the publication depicts plaintiffs as dissolute persons and holds them up to public scorn and ridicule are conclusions of law. We do not think so. The published article and likeness are attached to the complaint, and as seen from the foregoing discussion, they

are susceptible of the construction placed thereon by plaintiffs.

Judgment reversed.

EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



GILL et al. v. HEARST PUB. CO., Inc. et al.
L. A. 22038.*

Supreme Court of California, in Bank.
Jan. 18, 1952.
Rehearing Granted Feb. 14, 1952.

John W. Gill and Sheila Gill brought an action against Hearst Publishing Company, Inc., and Hearst Magazines, Inc., for invasion of privacy. The Superior Court, Los Angeles County, Arnold Praeger, J., sustained defendants' demurrer to the complaint without leave to amend and entered judgment and the plaintiffs appealed. The Supreme Court, Carter, J., held that the publication without their consent of photograph, standing alone, depicting man and woman in an amorous pose is an invasion of their right of privacy.

Judgment reversed.

Prior opinion 231 P.2d 570.

1. Pleading ⇐225(2)

Where defendants' objection to complaint was in nature of claim of uncertainty and defect was capable of being cured by amendment, sustaining demurrer to complaint without leave to amend was abuse of discretion.

2. Pleading ⇐225(2)

Where plaintiffs suing defendant magazine publishers for invasion of privacy by reason of publication of publishers' photograph of plaintiffs in another publisher's magazine accompanying an article, alleged that defendants consented to publication of photograph but did not directly allege that defendants consented to publication of article with the photograph, and the photograph when considered with the article did constitute an invasion of privacy, and the defect in complaint with respect to defendants' consent to publication of article with photograph was capable of being cured by amendment, sustaining defendants' demurrer to complaint without leave to amend was abuse of discretion.

3. Torts ⇐8

The publication without their consent of photograph, standing alone, depicting man and woman in an amorous pose is an invasion of their right of privacy.

Shacknove & Goldman, Los Angeles (Ben F. Goldman, Jr., Los Angeles, of counsel), for appellants.

Flint & MacKay and Arch R. Tuthill, all of Los Angeles, for respondents.

Loeb & Loeb, Los Angeles, amicus curiae for respondents.

CARTER, Justice.

As in Gill v. Curtis Publishing Company, Cal.2d, 239 P.2d 630, plaintiffs commenced an action for damages for an alleged violation of their right of privacy. Defendants' demurrer having been sustained without leave to amend, a judgment was entered from which the appeal was taken.

It is charged in the amended complaint that defendants, Hearst Publishing Company and Hearst Magazines, corporations, publish and sell for profit a monthly magazine, Harper's Bazaar, and employ Henri Cartier-Bresson as a photographer, who in the course of his employment photographed, without their consent, plaintiffs at their place of business in the Farmers' Market in Los Angeles. The likeness was published in the October, 1947, issue of the magazine, along with photographs of two other couples in amorous poses, the one of plaintiffs being the largest, occupying a full page. The picture is a larger size replica of the same photograph involved in Gill v. Curtis Publishing Company, supra. Accompanying the likeness was a short article entitled "And So the World Goes Round," stating that these couples "immortalized in a moment of tenderness" affirm the poets conviction that the world

* Subsequent opinion 253 P.2d 441.

would not revolve without love, despite the "vulgarization" of it by some; that ballads still may be written about everyday people in love. Thereafter, the picture was republished by Curtis Publishing Company in May, 1949, issue of the Ladies Home Journal, together with the article "Love" discussed in Gill v. Curtis Publishing Company, supra, with the "knowledge, permission and consent" of defendants and "credit" for the publication was given to and required by defendants. The likeness depicts plaintiffs in an "uncomplimentary" pose. The publication of the photograph invaded plaintiffs' right of privacy and caused them humiliation and annoyance to their damage in the sum of $25,000.

It is conceded by plaintiffs that the publication of the article in the Harper's Bazaar did not reflect adversely upon them and any action they might have for such publication is barred by the statute of limitations. We do not have presented to us, therefore, whether the publication in the Harper's Bazaar is actionable. Their claimed right rests upon the consent of defendants to the publication by the Curtis Publishing Company in the Ladies Home Journal. In this connection defendants assert that while there is an allegation that such publication was made with their consent, there is no allegation that they also consented to the use of the article "Love" in connection with the photograph, and thus the only basis left for plaintiffs' action is the publication of the likeness in the Ladies Home Journal without any accompanying article or caption under the picture.

With reference to the consent to the publication in the Ladies Home Journal, it is alleged that the photograph was published with the knowledge, permission and consent of defendants, and a copy of the picture, together with the article "Love," is attached as an exhibit. There is no direct allegation that the article was published with the picture with defendants' consent. The complaint in other parts deals with the photograph alone: It is alleged that the likeness depicted plaintiffs in a derogatory fashion; that by publishing the picture defendants invaded plaintiffs' right of privacy; and that by reason of the acts of defendants they were damaged.

[1] Plaintiffs urge, however, that as the demurrer was sustained without leave to amend, the judgment should be reversed for the claimed deficiency in the complaint with reference to the article could be easily corrected by amendment. There is some basis for the inference from the incorporation of the article as an exhibit that it was an inseparable part of the photograph. The allegation of consent is broad and it cannot be said that it necessarily negates a consent to publishing the article. The objection to the complaint is thus somewhat in the nature of a claim of uncertainty. Clearly the defect is capable of being cured by amendment. The rule applies, therefore, that there was an abuse of discretion in sustaining the demurrer without leave to amend. Wilk v. Vencill, 30 Cal. 2d 104, 180 P.2d 351; 21 Cal.Jur. 119, et seq.

The demurrer so sustained was to the first amended complaint. The original complaint was predicated upon the publication in Harper's Bazaar and a demurrer on the ground of the statute of limitations, among others, was sustained with leave to amend. The leave to amend was taken and the amended complaint, as above discussed, was filed, which related the action to the publication of the article in the Ladies Home Journal. The demurrer to the latter was sustained without leave to amend, according to the court's memorandum opinion, on the ground that even with the article there was no invasion of the right of privacy as had been held by the same court in Gill v. Curtis Publishing Company, supra. Under those circumstances, there was no waiver by plaintiffs or estoppel. It is true that they stressed in their argument on the last demurrer that the likeness alone violated their right of privacy rather than its use in connection with the essay "Love," but it is apparent the ruling by the trial court would have been the same, for even with the article the court considered that a cause of action had not been stated. Hence authorities such as Alberts v. Amer-

ican Casualty Co., 88 Cal.App.2d 891, 200 P.2d 37; Gordon v. Kifer, 26 Cal.App.2d 252, 79 P.2d 164, and 2 Cal.Jur., 844–852, are not in point. Defendants' position would not be altered to their injury.

[2] It follows from the foregoing that inasmuch as there would be liability for the publication of the picture in connection with the article in the Ladies Home Journal, Gill v. Curtis Publishing Company, supra, the court abused its discretion in sustaining the demurrer without leave to amend.

[3] We believe, moreover, that plaintiffs have stated a cause of action for an infringement on their right of privacy by the publication without their consent of the photograph standing alone. Members of opposite sexes engaging in amorous demonstrations should be protected from the broadcast of that most intimate relation. Nothing could be more intrinsically personal or more within the area of a person's private affairs than expressions of the emotions and feelings existing between such persons. That should be true even though the display is in a public place. They may be unthinking of the stares of those in the vicinity and thus unaffected by them, but that is far from consenting to the photographing of their likeness and publishing it in a magazine. Of course, the public interest discussed in Gill v. Curtis Publishing Company, supra, is to be reckoned with. We fail, however, to see any substantial public interest in the bare publication of a picture of a couple in an amorous pose. Authorities relied upon by defendants such as Themo v. New England Newspaper Pub. Co., 306 Mass. 54, 27 N.E.2d 753, are not in point, for they were concerned with the publication of a picture of one person alone, in normal everyday poses, not of persons in the pose here discussed. Nor can we say, as a matter of law, that picturing persons in such poses would not outrage or injure the feelings of an ordinary person.

It cannot be inferred from the allegations in the complaint that plaintiffs have waived or consented to a violation of their right of privacy, Gill v. Curtis Publishing Company, supra, or that the photograph in question depicts an indiscriminate street scene to which the right may not extend.

Judgment reversed.

TRAYNOR, SCHAUER and SPENCE, JJ., concur.



38 Cal.2d 282

COOKE et ux. v. RAMPONI et ux.

Sac. 6082.

Supreme Court of California, in Bank.

Jan. 18, 1952.

Action by Charles M. Cooke and Mary Louise Cooke, husband and wife, against Antonio Ramponi and Eda Ramponi, husband and wife, to establish ownership of easement and to enjoin interference therewith. The defendants filed a cross-complaint. The Superior Court, Sonoma County, Hilliard Comstock, J., rendered judgment for plaintiffs, and the defendants appealed. The Supreme Court, Spence, J., held that where plaintiffs and purchaser of adjoining property orally agreed to jointly use and maintain road across purchaser's property giving the only access to plaintiffs' land and both paid respective share of one year's repair work, and plaintiffs orally agreed with defendants who thereafter purchased the adjoining property for mutual use of road and for maintenance by plaintiffs only, and plaintiffs incurred substantial expenditure for necessary maintenance in the succeeding year, and defendants accepted benefits of such work and used road, plaintiffs had an executed irrevocable parol license to use road and owned an easement therein and would be granted injunction against interference with such use.

Judgment affirmed.

Prior opinion, 226 P.2d 719.

1. Licenses ⇐58(4)

Where a licensee has entered under a parol license and has expended money, or its equivalent in labor in execution of license, the license becomes irrevocable, and the licensee has a right of entry upon the lands of the licensor for the purpose of maintaining his structures or his rights un-

der the license, and the license will continue for so long a time as the nature of it calls for.

2. Easements ⇐12(1), 61(2)
Licenses ⇐58(4)

Where plaintiffs and purchaser of adjoining property orally agreed to jointly use and maintain road across purchaser's property giving the only access to plaintiffs' land and both paid respective share of one year's repair work, and plaintiffs orally agreed with defendants who thereafter purchased the adjoining property for mutual use of road and for maintenance by plaintiffs only, and plaintiffs incurred substantial expenditure for necessary maintenance in the succeeding year, and defendants accepted benefits of such work and used road, plaintiffs had an executed irrevocable parol license to use road and owned an easement therein and would be granted injunction against interference with such use.

Earl C. Berger, San Francisco, for appellants.

Geary, Spridgen & Moskowitz, Santa Rosa, for respondents.

SPENCE, Justice.

Defendants appeal from a judgment decreeing plaintiffs' ownershsip of an easement over defendants' land and enjoining defendants from interfering in any manner with plaintiffs' use and enjoyment thereof. The propriety of this judgment is not open to dispute upon the application of equitable principles.

In 1937 plaintiffs purchased approximately 160 acres of land in Sonoma County from one Herbert Tracy. The only usable roadway permitting access to plaintiffs' property from a public highway, the Lovell Valley Road, was a dirt and gravel road which crossed adjoining property then owned by the State of California and used as a part of the Sonoma State Home. The latter property, acquired by the state in 1920, consisted of some 200 acres; the state in the early part of 1944 conveyed it to Gerald Foster, and in August of that same year Foster conveyed it to defendants. The roadway in question, connecting plaintiffs' property with the Lovell Valley Road and crossing defendants' land, was in existence as early as 1886. It was used by plaintiffs' predecessors in interest until 1907, when Tracy acquired the property and began to use another roadway which was opened to a different public highway and was called the Tracy Road. Use of this latter road was abandoned by Tracy in 1920, about the time when the state acquired title to the property now owned by defendants, and travel over the older route, the roadway in question, was again established, and has continued, as the exclusive means of access to plaintiffs' property from the public highway. The Tracy Road has since fallen into complete disrepair and has not been used.

Just prior to plaintiffs' purchase of the property, plaintiff Charles M. Cooke addressed a letter to the Department of Institutions of the State of California inquiring as to the use of the roadway crossing the state's property. The deputy director replied that the state had never objected to the use of the roadway by the prior owner of the adjoining property and would likewise make no objection to the Cookes' use thereof. Soon after receiving such advice, plaintiffs built a small cabin an their land but did little else to improve their property for some four years. Then starting in the middle of 1941, plaintiffs constructed a 9-room home on their property, drilled a well, and made other substantial improvements in the clearing of their land, spending in excess of $15,000, all with the intent that the property should constitute their place of residence. During the process of this construction plaintiff Mary Louise Cooke called upon Dr. F. O. Butler, medical superintendent of the Sonoma State Home, and Mr. H. H. Waterhouse, business manager of the home, to inquire whether the state would bear part of the cost of improving the roadway on the state's property. These officials replied that although they believed that the state was not justified in assuming any portion of the expense, plaintiffs could make whatever improvements they desired without interference from the state. In line with this understanding, plaintiffs had

portions of the road straightened, caused scraping and surfacing work to be done and culverts to be built, all of which improvements, along with the construction of the house, were seen from time to time by the mentioned state officials.

As above noted, the state in the early part of 1944 conveyed the property upon which the roadway in question is situated to Foster. Shortly thereafter Foster and Mrs. Cooke discussed the Cookes' use of the roadway in accordance with the Cookes' previous exercise of their rights thereon, and they reached an agreement whereby Foster would bear one-third and the Cookes two-thirds of the cost of maintenance and repair of the roadway. Both parties were to have the right to use the road. Pursuant to this arrangement, plaintiffs hired a bulldozer to scrape the road, the Cookes contributing $27.50 and Foster about $15 as their respective shares of the cost.

In the fall of 1944, Foster conveyed his property to the Ramponis, defendants herein. Soon thereafter Mrs. Cooke had a conversation with Mr. Ramponi in an attempt to continue the arrangement plaintiffs had with Foster respecting the maintenance and repair of the roadway, but Ramponi stated that he was a "poor woodcutter" and refused to bear any of the expense. The conversation concluded with the agreement that plaintiffs could do what they wished about the maintenance of the road so long as they did not bother defendants in that regard. Upon that basis, plaintiffs during the winter season of 1944–1945 had the ditches cleaned and deepened, the road scraped and graded again and surfaced with oil, and culverts installed, all at substantial expense. Following these expenditures, Ramponi barricaded the road and indicated to plaintiffs that it was defendants' private roadway, that plaintiffs did not have the right to travel thereon, and their free use of it would no longer be permitted. Prior to this the parties had used the road jointly. Defendants' property was in the main unimproved and uncultivated land, with considerable tree and shrub growth thereon. Ramponi was accustomed to traveling the road in question with his truck in the process of carrying on his woodcutting operations, and from this principal road he had made some dirt roads leading into various interior portions of his property to haul out rock and firewood.

In September, 1945, plaintiffs commenced this action, seeking to establish their right to the use of the road as a means of access to their property and to enjoin defendants from interfering with their use thereof. Defendants filed their answer and cross-complaint, setting forth a damage claim of $5,000 by reason of alleged acts committed by plaintiffs on defendants' property in connection with the maintenance of the road and seeking a declaration of defendants' exclusive rights in such road. Upon the preliminary hearing of the matter, plaintiffs were granted a temporary injunction. Thereafter, in the successive years of 1946 and 1947, plaintiffs expended some $1,000 in macadamizing the road, as well as doing oiling and other maintenance work in pursuance of their agreement to keep the road in condition for vehicular travel. Following the trial of the action, plaintiffs were permitted to file an amended complaint so as to include a more specific description of of the road in question and to set forth under their general allegation of ownership of the easement the contentions of an executed oral license and estoppel, which were matters in dispute upon the preliminary proceedings in determination of the temporary injunction, as well as throughout the subsequent trial. See Cairns v. Haddock, 60 Cal.App. 83, 91, 212 P. 222. The trial court made findings favorable to plaintiffs upon all controverted issues in sustaining their claim of an easement "for road and right of way purposes" over defendants' property. The judgment which was thereafter entered decreed that plaintiffs had an irrevocable license to use the road for the purposes of ingress and egress to and from their property for so long as the nature of their use required the continuance of the license, and defendants were estopped to deny plaintiffs' rights. The court further enjoined defendants, their agents and those acting for them from obstructing plaintiffs' use of the road.

[1, 2] There appears to be ample evidence in support of the findings and judg-

ment. As stated in Stoner v. Zucker, 148 Cal. 516, at page 520, 83 P. 808, at page 810, it is well settled in this state that "where a licensee has entered under a parol license and has expended money, or its equivalent in labor, in the execution of the license, the license becomes irrevocable, the licensee will have a right of entry upon the lands of the licensor for the purpose of maintaining his structures or, in general, his rights under his license, and the license will continue for so long a time as the nature of it calls for." The principal basis for this view is the doctrine of equitable estoppel; the license, similar in its essentials to an easement, is declared to be irrevocable to prevent the licensor from perpetrating a fraud upon the licensee. Gravelly Ford Co. v. Pope & Talbot Co., 36 Cal.App. 717, 722–723, 178 P. 155; Stepp v. Williams, 52 Cal. App. 237, 256–257, 198 P. 661; 4 Cal.L.Rev. 344; 10 Cal.LRev. 96; 13 Cal.L.Rev. 166; Rest., Property § 519(4); see also § 521(4). While the doctrine of estoppel may, in exceptional cases, be applied in favor of a private person against the state or its agencies, City of Los Angeles v. Cohn, 101 Cal. 373, 377–378, 35 P. 1002; Times-Mirror Co. v. Superior Court, 3 Cal.2d 309, 328–332, 44 P.2d 547; City of Los Angeles v. County of Los Angeles, 9 Cal.2d 624, 630–631, 72 P. 138, 113 A.L.R. 370; Farrell v. County of Placer, 23 Cal.2d 624, 627–628, 145 P.2d 570, 153 A.L.R. 323, and the parties argue the propriety of invoking that doctrine against the state and its successors in interest by reason of plaintiffs' expenditures during the period of the state's ownership of the servient tenement and in reliance upon the representations and acquiescence of its responsible agents, 10 Cal.Jur. § 28, p. 650; City of Los Angeles v. Cohn, supra, 101 Cal. at pages 377–378, 35 P. 1002, the assailed judgment need not rest on that theory of estoppel. Rather the record establishes an executed, irrevocable parol license in favor of plaintiffs as the result of their respective agreements with the state's successors in interest—Foster and then defendants—and the mutual performance of the parties thereunder.

Proceeding to an examination of the facts and the circumstances surrounding the period of Foster's ownership of the servient tenement in 1944, the record shows that a bulldozer was used to scrape and level and the road and laborers were employed to remove the annual accumulation of trash and debris from the bordering ditches; that for such work Foster and plaintiffs expended respectively $15 and $27.50. In line with their joint undertaking, Foster and plaintiffs agreed that the road was subject to their mutual use and enjoyment. Then upon Foster's conveyance of the servient tenement to defendants, the same kind of agreement was made between plaintiffs and defendants as to the parties' mutual use of the road but defendants were not to bear any of the cost of maintenance. Consistent with this latter understanding and in the spring of 1945, plaintiffs at their own expense had the ditches cleaned and deepened, the road scraped and graded again and surfaced with oil, installed culverts, and carried on the usual yearly maintenance program necessitated by the winter rains. Defendants accepted the benefits of this work, using the road in question as the main artery from which they constructed various side roads furnishing the only means of access into interior sections of their property.

Defendants cite the case of McCarthy v. Mutual Relief Ass'n, 81 Cal. 584, 588, 22 P. 933, 934, for the proposition that "When a party relies upon expenditure upon the faith of a license as an estoppel," it "should not be trivial in amount." There the expenditure was only two or three dollars, and no additional costs were involved in the way of a continuing liability. But here the license rests on an entirely different basis, presenting not only plaintiffs' outlay of $27.50 as their share for one year's repair work on the road pursuant to their agreement with Foster, but further substantial expense for necessary maintenance in the succeeding year in accord with their understanding with defendants to assume the entire cost of the upkeep of the road. Plaintiffs performed their part of the agreements made with the respective owners of the servient tenement before defendants made any attempt to repudiate the license, and the additional expenditures

incurred by plaintiffs in succeeding years after the commencement of this litigation evidence further performance on their part of their agreed undertaking with defendants and in protection of their "rights under [their] license". Stoner v. Zucker, supra, 148 Cal. 516, 520, 83 P. 808, 810.

A comparable situation was presented in Ricioli v. Lynch, 65 Cal.App. 53, 223 P. 88, which also concerned a license to use a roadway. There the owner of the property on which the road in question was situated asked some of his neighboring landowners to "come over and help gravel the road, and all travel it", and the court held that when "those persons accepted the proposition" and spent considerable time in working on the road, the "license became irrevocable." 65 Cal.App. at page 58, 223 P. at page 90. Another instance of mutual benefit derived from execution of the license is the case of Clendenin v. White, 62 Cal.App. 664, 217 P. 761. There the license involved the construction and use of an irrigation ditch on adjoining land. The agreement called for joint use of the ditch by the respective parties, and the licensee performed his obligation of maintaining the ditch in proper condition over the years without objection. In declaring an irrevocable license to have been created under such circumstances, the court particularly noted that the operation and maintenance of the license was for the benefit of the licensor as well at the licensee.

The record here shows that plaintiffs have only this one road available for access to their property; that its location and use by plaintiffs were facts open to defendants at the time of their acquisition of the servient tenement, and with such knowledge defendants made their agreement with plaintiffs for the maintenance and upkeep of the road to their mutual interest in servicing their respective pieces of property. Plaintiffs have performed their part of the agreement, and to allow defendants now to repudiate the parties' agreement would work an injustice that equity should not tolerate. Miller & Lux v. Kern County Land Co., 154 Cal. 785, 788–789, 99 P. 179; Gravelly Ford Co. v. Pope & Talbot Co., supra, 36 Cal.App. 717, 737, 178 P. 155; Stepp v. Williams, supra, 52 Cal.App. 237, 255, 198 P. 661; City of Vallejo v. Burrill, 64 Cal.App. 399, 404–405, 221 P. 676. Like considerations have prevailed in cases where it has been held that "an oral agreement, if executed and based upon a valuable consideration, will convey an equitable title to the easement agreed upon", Douglas v. Lewin, 131 Cal.App. 159, 162, 20 P.2d 959, 960, and rights so created will be protected by injunction. Flickinger v. Shaw, 87 Cal. 126, 133, 25 P. 268, 11 L.R.A. 134; Irrigated Valleys Land Co. v. Altman, 57 Cal.App. 413, 426–427, 207 P. 401.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.



108 Cal.App.2d 790

PEOPLE v. JOHNSON.

Cr. 762.

District Court of Appeal, Fourth District, California.

Jan. 23, 1952.

Raymond DeForrest Johnson was convicted in the Superior Court of San Diego County, John A. Hewicker, J., for second degree burglary, and he appealed from the judgment and from an order denying his motion for a new trial. The District Court of Appeal, Barnard, P. J., held that evidence of possession of stolen property and absence of explanation of such possession was sufficient to warrant the conviction.

Judgment and order affirmed.

1. Burglary ⇐42(1)

Evidence of possession of stolen property and absence of explanation of such possession was sufficient to warrant conviction for second degree burglary.

2. Criminal Law ⇐958(1)

The refusal to grant defendant applying for new trial additional time within

which to present affidavits on matter of newly discovered evidence was not abuse of discretion, where request was belatedly made and the newly discovered evidence was a change of story which would shift blame to someone else after defendant had taken his chances on the jury's verdict and would make perjurers out of defendant and his wife and his mother. Pen.Code, § 1181, subds. 6, 7.

Riley & Ferguson, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant Johnson and one McCoy were jointly charged with burglary and with prior convictions. They admitted the prior convictions, and a jury found them both guilty of second degree burglary. Johnson appeals from the judgment and from an order denying his motion for a new trial.

Sometime after 7:00 P.M. on May 16, 1951, someone broke into the office of a construction company in San Diego and took a book of blank checks and a check protector. At 10:55 P.M. on that night two police officers were driving through a cemetery when they saw a Ford car parked with its lights out, and headed toward them. The right door of the car was open and someone standing by that door made a throwing motion toward an adjoining ditch. This person then got in and closed the door, the lights went on, and the car started ahead. The officers stopped it, finding McCoy in the driver's seat and the appellant on the other front seat. The stolen checkbook was found under the right front seat, and the car was taken to a garage. The next morning a chisel was found in that car, and the stolen check protector was found in the ditch about five feet from the point where the Ford was parked when the officers first saw it. It was conclusively shown that this chisel had been used in opening a window of the burglarized premises.

[1] It is first contended that the evidence is purely circumstantial and not sufficient to support the verdict and judgment. The appellant concedes that a burglary was committed during which the checkbook and check protector were taken; that this checkbook was found in the car in which he was riding; that this check protector was found in a ditch adjacent to the place where this car was first seen; and that the chisel found in this car was used to open the window in the burglarized premises. On the hearing of the motion for a new trial it was further conceded that the evidence was such as to compel an inference that the appellant threw the check protector into the ditch and that he did this with a guilty knowledge of what he was doing, but it was argued that while this might show that he was guilty of receiving or being in possession of stolen property, or of some other crime, it did not show that he participated in this burglary. It is here argued that there is no evidence that the appellant entered this building or in any way assisted anyone else in committing the burglary; that the appellant may be connected with the offense charged only by piling inference upon inference; and that the verdict of guilt rests entirely upon guess, conjecture and surmise.

The appellant had last worked for another construction company. A part of the stolen property, and the chisel used in the burglary, were found in the car in which he was riding. While he testified that he had never seen the checkbook and check protector prior to his arrest, the check protector was found at the point where he made a throwing motion, and it clearly appears from the evidence that he, and no one else, threw it there. Possession of the stolen property by the appellant was sufficiently shown, and no explanation of such possession was ever given or attempted. People v. Russell, 34 Cal.App.2d 665, 94 P.2d 400. Instead, the appellant denied ever having seen the property. The appellant's testimony conflicted with what he told the officers. Conflicting stories were told as to what the appellant and McCoy had been doing just prior to the time they

were seen by the officers, as to which of them was outside the car, and as to where the car was parked when it was first seen by the officers. Some of the evidence in support of an alibi was also conflicting. The evidence, with the reasonable inferences therefrom, was sufficient to support the verdict. People v. Godlewski, 22 Cal. 2d 677, 140 P.2d 381.

The only other point raised is that in denying appellant's motion for a new trial the court abused its discretion in refusing to grant him additional time within which to present affidavits on the matter of newly discovered evidence.

The verdict of guilty was returned on July 24, 1951, and on that date the appellant applied for probation and also requested that a date be set for his motion for a new trial on all statutory grounds. The hearing on the motion for new trial was set for July 30, and the hearing on the request for probation was set for July 31. On July 30, the attorney for the appellant moved for a new trial, specifically under subsections 6 and 7 of section 1181 of the Penal Code. His argument on those matters takes nine pages of the transcript. After the district attorney started to reply, the attorney for the appellant interrupted and asked for 48 hours in which to file affidavits on newly discovered evidence. Nothing was said as to the nature of such evidence, whether it could be procured or why it had not previously been presented. The court denied this request, the district attorney argued on the motion, and the motion for a new trial was denied. On the next day, when a hearing was had on the probation report, counsel for the appellant asked leave to reopen his motion for a new trial and requested "time in which to submit affidavits on newly discovered evidence." When the court asked what this newly discovered evidence was, counsel stated that he believed that McCoy "would complete an affidavit to the effect he would testify as he has already told the story to the probation officer."

[2] The court denied the request to reopen the motion for a new trial, pointing out that McCoy had told an entirely different story on the stand; that no reference to a third party had been made until after the trial; that any such change in the story told would make perjurers out of McCoy, his wife and his mother; and that he had little faith in such a change of story, to shift the blame to someone else, after taking chances on a jury's verdict. The request was belatedly made, no satisfactory showing was made, and no abuse of discretion appears.

The judgment and order are affirmed.

GRIFFIN and MUSSELL, JJ., concur.



108 Cal.App.2d 647

UCHIDA INV. CO. v. INAGAKI.

Civ. 18387.

District Court of Appeal, Second District, Division 3, California.

Jan. 15, 1952.

As Modified on Denial of Rehearing Feb. 11, 1952.

Action by Uchida Investment Company against George J. Inagaki to recover secret profits received by defendant when director and officer of plaintiff corporation. The Superior Court of Los Angeles County, William B. McKesson, J., entered judgment of dismissal after sustaining demurrer to third amended complaint, and plaintiff appealed. The District Court of Appeal, Vickers, J. pro tem., held that allegations that defendant had caused corporation to execute lease of business properties to third parties for agreed rental of $36,600, with concealed agreement by which defendant was to share in profits from business leased, when considered with allegation that just and reasonable rent under lease would have been $67,091, which was an amount equaling total of rent specified plus amount of secret profits, were sufficient to constitute allegation that said lease was unjust and unreasonable an allegation of ultimate fact and not demurrable as conclusion of law.

Judgment reversed.

1. Pleading ⊂=8(13)

Where complaint in suit by corporation against former officer and director to

recover secret profits alleged that such director had caused lease of business properties to be executed to third party for agreed rental of $36,600, with concealed agreement by which director was to share in profits from business leased, and that just and reasonable rent under lease would have been $67,091, which was amount equal to secret profits plus rents specified in lease, allegation that such lease was an unjust and unreasonable lease, when considered with other allegations, was allegation of ultimate fact that lease was not just and reasonable to corporation, and was not demurrable as conclusion of law.

2. Pleadings ⇐8(6)

Allegation that a certain lease is unjust and an unreasonable lease is ordinarily a conclusion of law.

3. Corporations ⇐319(6)

Where it was alleged in suit by corporation against former officer and director that director had caused lease of business properties to be executed to third party for agreed rental of $36,600 for three years and one month, with concealed agreement by which director was to share in profits from business lease, and that just and reasonable rent under lease would have been $67,091, even if allegation as to what would have been just and reasonable rent was arrived at upon erroneous theory, it was nevertheless allegation that just and reasonable rent would have been amount substantially in excess of $1,000 per month, and was sufficient to entitle plaintiff to go to trial on such issue.

4. War and National Defense ⇐12

Where it was alleged in suit by corporation against former director to recover secret profits received by him, that shares of minority stockholder had been vested in Alien Property Custodian who had assumed supervision and control over corporation, even if Alien Property Custodian had power to assume control as result of having become vested with shares of minority stockholder, director, when acting as such, did so in fiduciary capacity and was responsible to corporation in accordance with duties attendant to such relationship. Trading with the Enemy Act, 50 U.S.C.A.Appendix, § 1 et seq.

5. Limitation of Actions ⇐99(1)

Where count in suit by corporation against former officer and director, to recover secret profits received by him, was based on allegations that director had caused lease of business property to be executed by corporation to third party for agreed rental of $36,600, with concealed agreement by which director was to share in profits from business leased, and that such lease was not just and reasonable to corporation, count presented action for recovery of secret profits fraudulently obtained, and not action within two year statute of limitations for rent under implied contract. Code Civ.Proc. §§ 338, subd. 4, 339.

6. Limitation of Actions ⇐199(2)

Where it was alleged in suit filed on July 27, 1949 by corporation against former director to recover secret profits fraudulently received, that director's conduct was not discovered until July 31, 1946, and that corporation did not have notice or information, prior thereto, of circumstances putting it upon inquiry which would lead to knowledge thereof, and that files of plaintiff contained nothing disclosing existence of director's fraudulent arrangement it could not be said as matter of law that, in exercise of reasonable diligence, corporation could have discovered facts relied upon more than three years before filing of complaint. Code Civ.Proc. §§ 338, subd. 4, 339.

7. Limitation of Actions ⇐199(2)

In determining whether action based upon fraud is barred by three year statute of limitations, question whether plaintiff could have made discovery sooner is not question to be concluded as matter of law, when such discovery does not conclusively appear from pleadings, but it is question to be resolved by trial court in appraising weight and credibility to be accorded to evidence and witnesses on trial. Code Civ.Proc. §§ 338, subd. 4, 339.

8. Limitation of Actions ⇐193

In determining whether suit by corporation against former director for recovery of secret profits fraudulently received was barred by three year statute of limitations pertaining to fraud, court

would consider facts alleged in original verified complaint but which were omitted from last complaint in determining whether discovery of fraud should have been had prior to three year period, when no explanation for omission appeared in last complaint. Code Civ.Proc. §§ 338, subd. 4, 339.

9. Limitation of Actions ⇐179(2)

Where it was alleged in suit by corporation against former director, to recover secret profits fraudulently received by him, that director had caused lease to be executed by corporation to third party with concealed agreement by which director was to receive remuneration from third party, allegation in original verified complaint that director had previously caused corporation to execute lease to himself and such third party as partners, and that such lease had subsequently been cancelled on ground that it was wrongful, did not, as matter of law, disclose that corporation should have known of director's wrong in connection with lease subsequently executed to third party alone, and that corporation was consequently barred by three year statute of limitation with respect to actions for fraud. Code Civ.Proc. §§ 338, subd. 4, 339.

Melvin, Faulkner, Sheehan & Wiseman, San Francisco, for appellant.

J. Marion Wright, Los Angeles, Owen E. Kupfer, Los Angeles, of counsel, for respondent.

VICKERS, Justice pro tem.

Plaintiff, a California corporation, filed suit on July 27, 1949, against the defendant, one of its former officers and directors, for the recovery of secret profits alleged to have been received by him. Each of the first three complaints contained but one count. Demurrers thereto having been sustained plaintiff filed its third amended complaint seeking the same relief as before, but in two counts.

The material allegations of the first seven paragraphs of count I are as follows: The plaintiff was in the nursery business and from 1938 to 1948 defendant was a director and at times an officer; on December 11, 1942, the total issued shares were 999 of which the defendant held 451, his wife 51, and one Kitagawa 497; on that day the Alien Property Custodian of the United States, acting under the authority of the Trading with the Enemy Act, 50 U.S.C.A. Appendix, § 1 et seq., caused the Kitagawa shares to be vested in himself as such Custodian because Kitagawa was a national of Japan, an enemy country; "By his said vesting order said custodian assumed supervision and control over plaintiff corporation"; on November 25, 1947, the Attorney General of the United States, the successor to the Custodian caused to be vested in himself all of the stock of defendant and his wife; on July 1, 1943, at a stockholders' meeting, one Bergherm, an employee of the Custodian, was elected a director and defendant was re-elected a director of plaintiff; they were the only directors for some time thereafter; on the same day Bergherm became president and defendant secretary-treasurer; prior to July 1, 1943, representatives of the Custodian discussed with the defendant the advisability of having the plaintiff enter into a lease of its "nursery business, to-wit, all its real property, hothouses, equipment and other physical property" for three years and one month to one Kempton, for $36,600; such a lease was determined upon and on July 1, 1943, a resolution to that effect was adopted by the votes of Bergherm and defendant; on July 22, 1943, the plaintiff and Kempton executed a lease in conformance therewith; Kempton took possession of the property and complied with the provisions of the lease until its expiration date; while the discussions and negotiations were in progress the defendant entered into a secret arrangement with Kempton whereby the defendant would receive 50 per cent of the net profits from the operation of the nursery business and would be responsible for one-half of the rent payable under the lease, but would not be expected to actually participate in the operation of the business; this arrange-

ment was wholly concealed from plaintiff and from Bergherm and the representatives of the Custodian; Bergherm would not have voted to authorize the lease nor would have executed it if he had known that defendant was going to share in the profits; defendant did not in good faith exercise his powers as director and officer of plaintiff and should have disclosed his financial interest in the lease to the Board of Directors; defendant had a special and valuable knowledge of the nursery business conducted by plaintiff and the large profits to be made therefrom, and his conduct was a fraud on plaintiff and he had no right to secretly obtain profits that resulted from the lease.

Paragraph VIII of count I reads as follows: "That said lease was an unjust and unreasonable lease so far as plaintiff corporation was concerned, that said lease was not a just and reasonable lease as to plaintiff corporation at the time it was authorized and approved, in that the rent agreed upon was unjust and unreasonable, and that a just and reasonable rent under said lease would be and was the sum of $67,091.00 for the term of said lease, or $1,813.26 a month. That defendant Inagaki received by and through the transaction hereinabove set forth secret profits, in the sums hereinafter set forth, which should, under a just and reasonable lease, have been received by plaintiff corporation as a part of the rental for the use and occupancy of the leased premises."

The material allegations of paragraphs IX to XIV inclusive, of count I are as follows: The defendant under the Kempton arrangement received $5,000 for the balance of 1943, $14,138 for 1944, $6,353 for 1945 and $5,000 for 1946 (these total $30,491); all these payments were made secretly and without the consent of plaintiff or of the Custodian's representatives; plaintiff did not discover defendant's conduct and fraud until July 31, 1946, or prior to that date have notice or information putting it upon inquiry; there was nothing in plaintiff's records in regard to the arrangement; discovery resulted from an investigation by Custodian of a rumor in regard to the matter that first came to Custodian's agents on July 29, 1946. Paragraph XV alleges that plaintiff has received on account of rental of the leased premises only $36,600 and is entitled to recover from defendant $30,491, being the difference between the rent received and "the $67,091 hereinabove mentioned in paragraph VIII."

In count II of the complaint plaintiff incorporates by reference all of count I except paragraphs VIII and XV, and alleges that defendant received from Kempton as his part of the net profits, pursuant to the arrangement, $30,491, that their receipt was an unjust, fraudulent and illegal enrichment of defendant as an officer and director and that plaintiff is entitled to recover them.

Defendant demurred to the third amended complaint on the ground that neither count stated sufficient facts to constitute a cause of action and that if plaintiff had any cause of action the one he has attempted to allege in count I was barred by Code of Civil Procedure, section 339 and in count II by Code of Civil Procedure, section 338, subsection (4). He also included several special grounds of demurrer but in his briefs on appeal argues only the three grounds set out above. The court's ruling was expressed in the simple order "Demurrer is sustained without leave to amend."

[1, 2] It is defendant's contention that count I fails to state a cause of action because the allegations to the effect the lease was unjust and unreasonable to the plaintiff are conclusions of law and therefore must be disregarded. The allegations to which defendant refers are contained in paragraph VIII, which is set out above. We are of the opinion that those allegations, when considered with other allegations of that count, are sufficient to constitute an allegation of ultimate fact that the lease was not just and reasonable to the corporation. It is true that an allegation such as "said lease was an unjust and unreasonable lease" is a conclusion of law. See Joyce v. Tomasini, 168 Cal. 234, 237, 142 P. 67, and Lifton v. Harshman, 80 Cal.

App.2d 422, 434, 182 P.2d 222. But the plaintiff does not content itself with this allegation. It also alleges in that paragraph that a just and reasonable rent under the lease would have been $67,091 (the total of the rent specified and the amount of secret profits alleged to have been received by the defendant), and that if the lease had been just and reasonable the plaintiff would have received that sum. If, as defendant claims, the allegation as to what would have been a just and reasonable rent was arrived at upon an erroneous theory, it is nevertheless an allegation that a just and reasonable rent would have been an amount substantially in excess of $1,000 per month, which, in our opinion, was sufficient to entitle plaintiff to go to trial on that issue.

Respondent also contends that count II from which paragraph VIII of count I is omitted, does not state facts sufficient to constitute a cause of action because it does not allege that the lease was unjust and unreasonable to the corporation. It is respondent's contention that the old strict rule of accountability of a director or officer to his corporation for secret profits obtained by him in a transaction to which the corporation was a party, see Western States Life Ins. Co. v. Lockwood, 1913, 166 Cal. 185, 135 P. 496, was so modified by the adoption of Civil Code, section 311, Corp. Code, sec 820. The portion of that section upon which respondent relies reads as follows: "* * * No contract or other transaction between a corporation and * * * any corporation, firm, or association in which one or more of its directors * * * are financially interested, is either void or voidable because such director or directors are present at the meeting of the board of directors or a committee thereof which authorizes or approves the contract or transaction, or because his or their votes are counted for such purpose, if * * *.

"(c) The contract or transaction is just and reasonable as to the corporation at the time it is authorized or approved." Both counts are founded on the same transaction and it appears that the case will be tried upon the allegations of count I. It may well be that this contention of respondent will not be a material issue therein. We therefore consider it unnecessary to express an opinion thereon at this stage of the proceedings.

[4] Respondent also contends that under the allegations of the complaint there was no fiduciary relation between him and the corporation. These contentions rest largely upon that portion of paragraph III which after alleging that on December 11, 1942, the Custodian caused the 497 shares of stock of Kitagawa to be vested in himself, alleges further that "and by his vesting order said Custodian assumed supervision and control over plaintiff corporation". From this respondent urges that thereafter he exercised his powers as a director as a matter of grace, not as a matter of right, and that his powers were subordinate to those of the Custodian. We seriously doubt that the Alien Property Custodian has power, under the provisions of the Trading with the Enemy Act, to assume supervision or control of a corporation by virtue of having become vested with the shares of a minority stockholder. The allegation in question also may be a conclusion of law as urged by appellant. But be that as it may the respondent was a director and whenever he acted as such, as alleged, he did so in a fiduciary capacity whatever may have been the extent to which the Custodian attempted to or did exercise supervision or control of the corporation.

[5–7] Respondent's contentions that count I is barred by Code of Civil Procedure, section 339 and count II by Code of Civil Procedure, section 338, subsection (4) are not well taken. He contends that count I is an action for rent under an implied contract and therefore barred under the two year statute of limitations. That count is not susceptible to such a construction. It is clearly an action for the recovery of secret profits fraudulently obtained. Respondent, perforce, concedes that plaintiff's cause of action for secret profits did not accrue and the three year statute of limitations did not commence to

run "until the [in the language of subsection (4)] discovery * * * of the facts constituting the fraud * * *." However he contends that the allegations of the complaint are insufficient to show that the plaintiff should not have discovered such facts more than three years before the complaint was filed. With this we cannot agree. The allegations of paragraph XIV of the complaint are in substance as follows: Defendant's conduct and fraud and the receipt of the money by him were not discovered until July 31, 1946; plaintiff did not have notice or information, prior thereto, of circumstances putting it upon inquiry which would lead to knowledge thereof; the records and files of plaintiff contained no information referring to or disclosing the existence of defendant's arrangement with Kempton; neither Bergherm nor his successors knew of its existence until after July 29, 1946; at that time the San Francisco manager of the Custodian Office learned of an unconfirmed rumor that defendant had an interest in the lease and had received part of the profits therefrom; an investigator was then sent to Los Angeles who discovered the facts from Kempton and confirmed them through the defendant and his attorney on August 21, 1946; neither Kempton nor defendant gave any intimation of the existence of such facts to the corporation or its other officers or directors or to the Custodian or his agents at any time prior to the investigation. Under such a state of facts alleged we cannot say as a matter of law that, in the exercise of reasonable diligence, the plaintiff could have made discovery prior to three years before July 27, 1949, the date of filing of the complaint. As was said in Neet v. Holmes, 25 Cal.2d 447, at page 468, 154 P.2d 854, at page 865: "Whether the plaintiffs could have made discovery sooner is not, in view of all the facts alleged, a question to be concluded as a matter of law. It is a question to be resolved by the trial court in appraising the weight and the credibility to be accorded to the evidence and the witnesses on a trial."

[8, 9] Respondent urges that in addition to the facts alleged in the third amended complaint we should, in determining the question of discovery, also consider certain facts alleged in the original verified complaint that were omitted from the last complaint. Since no explanation for such omission appears in the last complaint, we agree that they should be considered. See Williamson v. Joyce, 137 Cal. 151, 153, 69 P. 980, and Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 716, 128 P.2d 522, 141 A.L.R. 1358. The facts so alleged are as follows: On March 31, 1942, the defendant, acting as president of plaintiff, executed a lease of all the corporate assets, for five years, to Kempton and himself as copartners under a fictitious name; on July 1, 1943, Bergherm and the defendant were elected directors and notified Kempton that the lease was void because of the interest of defendant and accepted $5,250 from the partnership in full and complete satisfaction of plaintiff's claim against the partnership and the individuals composing it. Respondent argues that under such a state of facts plaintiff's allegation of concealment and lack of knowledge are not entitled to credence and that appellant was put on notice. With this we cannot agree. As far as appears from the pleadings the 1942 lease to defendant and Kempton was executed without any attempt to conceal that defendant was a party thereto and as soon as Bergherm was elected to the board of directors he and the defendant notified Kempton that the lease was void and required the partnership to pay $5,250. Since it is apparent that the defendant admitted that that lease was wrongful and aided in the correction of the wrong, as a matter of law it can hardly be said that Bergherm, or any one connected with the corporation, was required to assume or should have suspected that defendant immediately repeated the wrong in connection with the lease made to Kempton alone.

The judgment is reversed.

SHINN, P. J., and WOOD, J., concur.

108 Cal.App.2d 638

SVISTUNOFF v. SVISTUNOFF et ux.

Civ. 14831.

District Court of Appeal, First District, Division 1, California.

Jan. 15, 1952.

Rehearing Denied Feb. 14, 1952.

Hearing Denied March 13, 1952.

Peter M. Svistunoff sued Michael Svistunoff and his wife and, upon defendants' failure to answer, was granted judgment by default. Defendants filed a motion to set aside the default judgment and the Superior Court, City and County of San Francisco, Preston Devine, J., entered an order granting such motion, and plaintiff appealed. The Superior Court thereafter set aside the order on the ground that the court had been without jurisdiction because plaintiff had not been given proper notice, and entered a second order setting aside the default and judgment, and plaintiff appealed. The District Court of Appeal, Bray, J., held, inter alia, that since the first order was void, the court could vacate it even though an appeal from such order had been taken, and held that although defendants' failure to answer was due to defense attorney's erroneous belief that his demand for a bill of particulars and plaintiff's failure to give such bill extended the time in which to answer, the default judgment was properly set aside on defendants' second motion after proper notice thereof had been given to plaintiff.

Affirmed.

1. Pleading ⇐85(4)

A demand for bill of particulars does not extend time to answer. Code Civ.Proc. § 454.

2. Judgment ⇐106(2)

Where defendants did not timely answer, they were in default, although they had filed demand for bill of particulars. Code Civ.Proc. § 454.

3. Judgment ⇐155

Where only one day notice of motion to set aside default was given, order setting aside default was void, in absence of order shortening time for notice. Code Civ.Proc. §§ 454, 1005.

4. Appeal and Error ⇐436

Where order setting aside default judgment was void for lack of proper notice and jurisdiction, court could have disregarded such order entirely and considered new motion to set aside default, or could have set order aside on its own motion or on motion of defendant, even though appeal was pending from such order. Code Civ. Proc. § 473.

5. Motions ⇐46

An order by court without jurisdiction is void and remains without effect as completely as if never entered.

6. Motions ⇐59(3)

A court may set aside a void order at any time.

7. New Trial ⇐165

Generally, when court makes valid order granting or denying motion for new trial, its jurisdiction is exhausted in that regard, and such order may not subsequently be modified or vacated by that court. Code Civ.Proc. § 473.

8. Appeal and Error ⇐439

An appeal does not deprive trial court of jurisdiction to vacate a void order. Code Civ.Proc. § 473.

9. Motions ⇐59(3)

If order is void in fact for want of jurisdiction, but is not void upon its face, a separate action of attack is preferable to motion to set aside such order. Code Civ. Proc. § 473.

10. Appeal and Error ⇐957(1)

Order setting aside default will be reversed only where trial court abused discretion. Code Civ.Proc. § 473.

11. Judgment ⇐143(3)

Under proper circumstances, a mistake of law does not bar a party from being relieved of a default caused by that mistake. Code Civ.Proc. § 473.

12. Judgment ⇐111

Where default judgment had been entered, it was duty of plaintiff's attorney, when defendants' motions to dismiss action and to preclude plaintiff from giving evidence for failure to file bill of particulars were heard, to inform court that it had no power to proceed with hearing for reason that default judgment had been entered. Code Civ.Proc. §§ 454, 473.

13. Judgment ⇐153(1)

Failure to examine record and learn that default judgment had been entered did not preclude defendants from seeking to have such judgment set aside approximately six months after entry of such judgment where defendants were not guilty of undue delay after learning of such judgment. Code Civ.Proc. § 473.

14. Judgment ⇐138(1)

It is the recognized policy of the court that trials should be had on the merits whenever possible.

15. Appeal and Error ⇐945

Generally, appellate courts will not interfere on jurisdictional grounds with trial court's reconsideration of discretionary order not based on merits of litigation. Code Civ.Proc. § 473.

16. Judgment ⇐136

Provisions of statute relating to setting aside of default judgments are to be liberally construed. Code Civ.Proc. § 473.

17. Judgment ⇐139

The discretion of lower court in ruling upon matters under statute providing for setting aside of default judgments is a legal discretion, not an arbitrary discretion. Code Civ.Proc. § 473.

18. Judgment ⇐143(10)

Where failure to answer was due to defense attorney's erroneous belief that his demand for bill of particulars and plaintiff's failure to give such bill extended time in which to answer, default judgment was properly set aside upon defendants' timely motion. Code Civ.Proc. §§ 454, 473.

Phil F. Garvey, San Francisco, James A. Himmel, San Francisco, of counsel, for appellant.

Frank J. Baumgarten, Alexander Riaboff, San Francisco, for respondent.

BRAY, Justice.

Appeals by plaintiff (1) from an order vacating an order setting aside default and judgment, and (2) from an order again setting aside the default and judgment.

Questions Involved.

1. Is the vacated order void? 2. If so, does an appeal from it deprive the trial court of the power to set it aside or to disregard it? 3. Will a mistake of law excuse a default?

Record.

It is necessary to set forth only that portion of the record bearing on the questions presented. On March 18, 1950, the complaint and summons were served on the defendants. Ten days thereafter defendants demanded of plaintiff a bill of particulars. On April 6th, the 19th day after service of summons, plaintiff requested and obtained entry of default of both defendants and a judgment against them in the sum of $19,200. On May 26th, under the mistaken belief of defendants' attorney that the demand for the bill of particulars extended their time to appear or answer, defendants filed a notice of motion to preclude plaintiff from giving evidence on the ground that plaintiff had failed to furnish a sufficient bill of particulars as demanded. The same day, defendants also filed a notice of motion to dismiss on technical grounds. Plaintiff, in opposition to the motion to dismiss filed an affidavit setting up various matters, but in no wise informing the court of the fact that a default judgment had been entered. On the hearing of these motions, again the plaintiff was silent about the default and argued the motions on the merits. The motions to dismiss and preclude giving evidence were submitted June 19th, and denied without prejudice August 29th. September 1st defendants filed a notice of motion to set aside the default and default judgment, accompanied by affidavits, on the grounds set forth in section 473, Code of Civil Procedure. One was an affidavit of merits by defendant Michael. Another was by Attorney Riaboff to the effect that as defendants' attorney he was under the mistaken belief, based upon a mistaken interpretation of Providence Tool Co. v. Prader, 32 Cal. 634, that the filing of a demand for a bill of particulars and plaintiff's failure to give it, extended defendants' time to appear; that he acted without any intention to delay the action; that about

May 16th he associated Attorney Baumgarten in the case and informed him that the time to plead had been preserved. A third affidavit was by Attorney Baumgarten to the effect that on May 15th he had been associated in the case and had been assured by Riaboff that there was time to plead; that he prepared the motion to preclude plaintiff from giving evidence; that he was lulled into security by the fact that in the opposition to this motion plaintiff's attorney did not inform the court or him of the default. Defendants' notice of motion to set aside the default was noticed for September 7th. It was not served until September 6th. There was no order shortening time. Plaintiff did not appear in opposition and on September 7th the court made its order setting aside the default and judgment. September 15th plaintiff appealed from that order.[1] On September 30, 1950, based on affidavits then on file and particularly the affidavit of Attorney Garvey and his secretary, Helen J. Murin, showing that service of the first notice of motion to set aside the default was improper to give the court jurisdiction, the court vacated its order of September 7th. Then on October 6th, on proper notice of motion and additional affidavits, the court again set aside the default and default judgment. Plaintiff appealed from both these orders.

1. The Order of September 7th Is Void.

[1, 2] To begin with, it should be pointed out that a demand for a bill of particulars made under section 454, Code of Civil Procedure, does not extend the time to answer, Steineck v. Coleman, 72 Cal.App. 244, 236 P. 962; hence defendants were properly found to be in default.

[3] Notice of the motion to set aside the default, in the absence of an order shortening time, should have been given at least five days before the time appointed for the hearing. Code Civ.Proc. § 1005; Brownell v. Superior Court, 157 Cal. 703, 109 P. 91. A sufficient notice of the hearing not having been given, the order was void. Irons v. Superior Court, 10 Cal.App.2d 523, 52 P.2d 553; see also Peters v. Anderson, 113 Cal.App. 158, 298 P. 76.

2. Effect of the Appeal From the First Order.

[4–9] Plaintiff contends that the appeal from the first order deprived the trial court of jurisdiction to act in any respect concerning that order. While this is the general rule, in this case, since the order was void for lack of proper notice and jurisdiction, a different situation exists from the usual case of mere error. The court could have either disregarded it entirely and considered the new motion to set aside the default, or could have set it aside of its own motion, or, as here, on motion of defendant. "It is said in Corpus Juris, vol. 42, p. 558: 'An order made by a court or judge wholly without jurisdiction is void and of no force or effect. * * * *A void order* * * * *remains without effect as completely as if never entered.*' (Italics ours.) The cases relied upon by appellant to sustain the second point involve situations where the first motion for a new trial had been properly made and not where the first order was a nullity. Under these circumstances the second motion for a new trial, based upon the written notice of intention, must be deemed to have been an original motion." Peters v. Anderson, supra, 113 Cal.App. 158, at page 160, 298 P. at page 77; see also 31 Am.Jur. 91. "However, a court may set aside a void order at any time. An appeal will not prevent the court from at any time lopping off what has been termed a dead limb on the judicial tree—a void order." Macmillan Petroleum Corp. v. Griffin, 99 Cal. App.2d 523, 533, 222 P.2d 69, 75. The statement in Irons v. Superior Court, supra, 10 Cal.App.2d 523, at page 525, 52 P.2d at page 554, concerning the failure to give notice on a motion for new trial answers that question and applies to the situation here. "It is undoubtedly true that, when the trial court regularly makes a valid order granting or denying a motion for new trial, its jurisdiction is exhausted in that regard, and such an order may not subsequently be modified or vacated by that court. Compton v. Northwest Engineering Co., 116 Cal.App. 523, 2 P.2d 1014, 1015;

1. This is the appeal in Svistunoff v. Svistunoff, Cal.App., 239 P.2d 655.

Lang v. Superior Court, 71 Cal. 491, 12 P. 306, 416; 20 Cal.Jur. 204, § 134. But the inadvertent making of an invalid order granting or denying a motion for new trial when the court lacks jurisdiction of the parties is a recognized exception to the general rule previously stated." "An appeal does not deprive the trial court of jurisdiction to vacate a void order. If it is void upon its face, it may be set aside at any time. If it is void in fact for want of jurisdiction, but not void upon its face, a separate action of attack is the preferable procedure, Isert v. Rieks [Riecks] 195 Cal. 569, 234 P. 371, but if there is an absence of jurisdiction and this becomes certain from an inspection of the entire record, the trial court is not precluded from taking proper action though an appeal is pending." Fallon v. Superior Court, 33 Cal. App.2d 48, 51, 90 P.2d 858, 859. In our case, that the court had no jurisdiction to make the order appears on the face of the record, as it shows that the notice required by law was not given.

Cases cited by plaintiff like Takahashi v. Fish and Game Com., 30 Cal.2d 719, 185 P. 2d 805; Swan v. Riverbank Canning Co., 81 Cal.App.2d 555, 184 P.2d 686; and Howard v. Howard, 70 Cal.App.2d 731, 161 P.2d 681, upholding the general rule that an appeal deprives the trial court of the power to set aside the order appealed from, are not in point for the reason that none of them deal with a void order, which as herein pointed out raises an exception to that rule.

3. No Abuse of Discretion in Setting Aside Default.

[10] It is only where the trial court has abused its discretion in setting aside a default that this court can reverse its action. Plaintiff contends that there was such an abuse of discretion, primarily, because, he contends, a mistake of law cannot excuse a default. It appears from defendants' affidavits, and the trial court presumably so found, that the failure to appear in the case was due to the mistake of defendants' attorney in misreading Providence Tool Co. v. Prader, supra, 32 Cal. 634, and believing that the demand for a bill of particulars extended defendants' time to appear. The cases cited by plaintiff do not support his contention. The first, Porter v. Anderson, 14 Cal.App. 716, 113 P. 345, dealt with a situation where, after the case was tried, submitted, and an opinion of the court finding in favor of defendants filed, plaintiff moved to reopen the case, to be permitted to file an amended complaint, and to have the entire case retried, upon the ground of surprise on the part of himself and his attorney, the surprise being that they had not expected the court's decision to be what it was, namely, that the complaint did not state a cause of action. The trial court denied the motion. The reviewing court held that the trial court did not abuse its discretion, pointing out among other things that the attorney who claimed to have been surprised by the court's action at the end of the case "was himself at least in grave doubt, from the time that the demurrers were overruled, whether his complaint stated a cause of action, and that entertaining such doubt, it was his duty to confirm or remove it by further investigation of the question before the cause was called for trial on the merits." 14 Cal.App., at pages 725–726, 113 P. at page 349. It further held that "an erroneous view of the requisites of a sufficient complaint * * * was a disappointment rather than the 'surprise' contemplated by" section 473, Code of Civil Procedure, and that the allowance of plaintiff's motion would result in a trial de novo. 14 Cal.App. at page 726, 113 P. at page 349. Obviously, the mistake of counsel in that case is of an entirely different nature than the one here. Moreover, there, the trial court, in the exercise of its discretion, found against the moving party, whereas here it found in their favor. The second case, Mahana v. Alexander, 88 Cal.App. 111, 263 P. 260, is not only not in point on the facts, but on the law supports the action of the trial court here. There, the trial court refused to vacate the order sustaining a demurrer to the second amended complaint without leave to amend. Plaintiff's counsel had stated in open court that he did not desire leave to amend. Thereafter new counsel moved

to set aside the order on the ground of former counsel's mistake of law. In upholding the action of the trial court, the reviewing court laid down the rule which is applicable here, 88 Cal.App. at page 126, 263 P. at page 266: "It has with no infrequency been decided that a judgment by default may be vacated and set aside on the ground that such judgment was brought about and entered through a mistake in law on the part of the moving party or through the erroneous advice given to the former by his attorney. See 14 Cal. Jur., § 99, p. 1044, and cases named in the footnotes." The court then reviewed the cases up to that time in which relief under section 473, Code of Civil Procedure, was applied for on the ground of mistake of law by a party or his attorney, and quoted from O'Brien v. Leach, 139 Cal. 220, 72 P. 1004: "'In matters of this sort the proper decision of the case rests almost entirely in the discretion of the court below, and this court will rarely interfere, and never unless it clearly appears that there has been a plain abuse of discretion. *This court will usually sustain the action of the court below upon the same facts, whether that decision is for or against the motion*; but it is much more disposed to affirm an order when the result is to compel a trial upon the merits than it is when the judgment by default is allowed to stand, and it appears that a substantial defense could be made. *This will explain what would otherwise seem to be a conflict in the decisions.*' (Italics ours.)"

In Steineck v. Coleman, supra, 72 Cal. App. 244, 236 P. 962, the attorney for defendants claimed that he had made the same mistake made by defendants' attorney here—believed that the demand for a bill of particulars extended his time to appear. The trial court refused to vacate the default, and its action was affirmed by the reviewing court. However, it pointed out that the facts showed that the defendant intentionally and for some time successfully evaded service of summons. It then said in 72 Cal.App. at page 248, 236 P. at page 964: "While such mistake of law on the part of the attorney of the defendant might under some circumstances serve as a justification for relief under the provisions of section 473, Code of Civil Procedure, nevertheless the court on the hearing of the motion was entitled to take into consideration all of the facts presented, in order to determine whether or not the default had been suffered as the result of excusable delay, *or was a part of a policy of intentional delay on the part of the defendant.* The court in acting upon the evidence in this manner did not abuse its discretion therein." (Emphasis added.)

Douglass v. Todd, 96 Cal. 655, 31 P. 623, illustrates how far the courts have gone in relieving a party from a mistake of law. There the party permitted a default judgment to be taken against him because his attorney had erroneously advised him that he had no defense. On the motion of a new attorney, who had a contrary opinion, the default judgment was set aside by the trial court and its action affirmed.

In Waite v. Southern Pacific Co., 192 Cal. 467, 221 P. 204, the Supreme Court reversed the action of the trial court in refusing to set aside a default judgment which defendant allowed to be taken due to the mistaken belief of its attorney that as defendant had filed a petition for removal of the cause to the federal court, the state court was thereby deprived of jurisdiction to proceed further.

[11] Thus it is clear from the authorities that a mistake of law does not bar a party, under proper circumstances, from being relieved of a default caused by that mistake.

Kingsbury v. Brown, 60 Idaho 464, 92 P. 2d 1053, 124 A.L.R. 149, cited by plaintiff, is of no value here. It is an Idaho case which follows the Idaho rule that a default suffered through a mistake of law will not be relieved. That is not the rule in California.

[12–18] In view of plaintiff's action in this case, it is interesting to note that plaintiff contends the trial court abused its discretion in setting side the default, because of the lapse of almost five months between the entry of the default and the proceeding to set it aside. It hardly lies in good

grace for the plaintiff to make this claim, in view of his action in concealing from the court the fact that the default had been taken. Plaintiff's attorney is an officer of the court. It was his duty when the defendants' motions to dismiss the action and to preclude plaintiff from giving evidence for failure to file the bill of particulars were heard, to inform the court that it had no power to proceed with the hearing for the reason that as the record then stood, a judgment had been entered. There can be no excuse for knowingly taking the time of a busy court on a matter which the plaintiff's attorney knew the court had no right to consider. Plaintiff contends that because the record shows entry of the default and judgment, and had defendants examined the record, they would have discovered the situation, they are precluded from being entitled to relief. If such were the law, and it is not, practically no default could be set aside, because it is always entered and would be shown by an examination of the record. Defendants' affidavits show that they were lulled into false security by plaintiff's action. The record shows, too, that as late as June 19th plaintiff argued the motions based upon plaintiff's failure to serve a bill of particulars on the merits and without mention of the default. The court did not act upon them until August 29th. About three days later defendants filed their first notice of motion to set aside the default. The court indirectly found that there was no undue delay after defendants learned of the default and that they acted diligently. As said in Key System Transit Lines v. Superior Court, 36 Cal.2d 184, 222 P.2d 867, it is the recognized policy of the courts that trials should be had on the merits whenever possible. "In giving effect to that policy appellate courts have generally refrained from interfering on jurisdictional grounds with the trial court's reconsideration of a discretionary order not based on the merits of the litigation." 36 Cal.2d at page 187, 222 P.2d at page 869. "The foregoing conclusion is further supported by the well established rules that the provisions of section 473 of the Code of Civil Procedure are to be liberally construed and sound policy favors the determination of actions on their merits. 14 Cal.Jur. 1012. The discretion of the lower court in ruling upon matters under section 473 is a legal discretion, not an arbitrary one, and from the circumstances appearing we believe it is clear that the default judgment should have been set aside." Riskin v. Towers, 24 Cal.2d 274, 279, 148 P.2d 611, 614, 153 A.L.R. 442.

The orders appealed from are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



108 Cal.App.2d 646

SVISTUNOFF v. SVISTUNOFF et ux.

Civ. 14830.

District Court of Appeal, First District, Division 1, California.

Jan. 15, 1952.

Rehearing Denied Feb. 14, 1952.

Hearing Denied March 13, 1952.

Peter M. Svistunoff sued Michael Svistunoff and his wife and was granted judgment by default. The Superior Court, City and County of San Francisco, Preston Devine, J., entered an order setting aside the default judgment, and plaintiff appealed. The District Court of Appeal, Bray, J., held that since the order had been properly vacated after the appeal, the question raised by the appeal was moot.

Appeal dismissed.

Appeal and Error ⇐781(4)

Where order setting aside default and judgment had been properly vacated by trial court's subsequent order, question raised by appeal from such prior order was moot.

Phil F. Garvey, San Francisco, James A. Himmel, San Francisco, of counsel, for appellant.

Frank J. Baumgarten, Alexander Riaboff, San Francisco, for respondent.

BRAY, Justice.

Appeal by plaintiff from an order dated September 7, 1950, setting aside a default and judgment.

As pointed out in our opinion this day filed in Svistunoff v. Svistunoff, Cal.App., 239 P.2d 650, this order is void on the face of the record and was properly vacated by the order of October 6th. Therefore, the appeal is moot, and is hereby dismissed.

PETERS, P. J., and FRED B. WOOD, J., concur.



108 Cal.App.2d 669

DAVIS v. CITY OF SANTA ANA et al.

Civ. 4420.

District Court of Appeal, Fourth District, California.

Jan. 15, 1952.

Hearing Denied March 13, 1952.

Thomas E. Davis, on behalf of himself and all other taxpayers of the City of Santa Ana, etc., brought action against the City of Santa Ana, etc., and others to enjoin defendants from paying or receiving any money under terms of contract and supplemental agreement for disposal of city trash and garbage, and to enjoin city from selling or transferring any equipment used by the city in garbage disposal operations, and for a declaratory judgment. The Superior Court, Orange County, Robert Gardner, J., entered an order for judgment on the pleadings in favor of the defendants, and the plaintiff appealed. The District Court of Appeal, Griffin, J., held that city was not obligated under statute to advertise and give notice inviting bids to let contract for disposal of trash and garbage to the lowest responsible bidder.

Judgment affirmed.

1. Municipal Corporations ⇐241

Statute providing that when expenditure required for a "public project" exceeds $1,000, it shall be contracted for and let to lowest responsible bidder after notice, did not include a contract for disposal of garbage by city, in view of statute defining a "public project" as a project for erection, improvement, and repair of public buildings and works, work in and about streams, bays, waterfronts, embankments, or other work for protection against overflow, street or sewer work except maintenance or repair, and the furnishing of supplies or materials for any such project. Government Code, §§ 37901–37903.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Project".

2. Municipal Corporations ⇐607

The collection and disposal of garbage and trash by a city constitutes a valid exercise of police power and a "governmental function" which city may exercise in all reasonable ways to guard the public health. Government Code, § 38793; Health and Safety Code, § 4250.

See publication Words and Phrases, for other judicial constructions and definitions of "Governmental Function".

3. Municipal Corporations ⇐226, 607

A city may elect to collect and dispose of garbage itself or city may grant exclusive collection and disposal privileges to one or more persons by contract, or city may permit private collectors to make garbage contracts with private citizens. Government Code, § 38793; Health and Safety Code, § 4250.

4. Municipal Corporations ⇐236

In absence of some specific charter or statutory requirement, municipal contracts need not be let under competitive bidding.

5. Municipal Corporations ⇐236

A city of the fifth class could let a contract for collection of trash and garbage without competitive bidding. Government Code, § 38793; Health and Safety Code, § 4250.

6. Municipal Corporations ⇐225(1, 2)

Council of city of the fifth class was the ultimate judge, both under ordinance and statute authorizing sale of personalty without bid, to determine whether property was or was not surplus and whether a sale made by city under either theory was or was not for common benefit of city, and such au-

thority could not be delegated to any other municipal office. Government Code, §§ 37350, 37351.

7. Municipal Corporations ⇐225(5)

Where equipment sold by city of the fifth class was never declared by city to be a surplus property within meaning of ordinance providing that surplus property cannot be sold until council approves the report that property is surplus property and declares the property surplus, presumption was that city council determined that the equipment was not surplus and that compliance with ordinance was not necessary. Government Code, §§ 37350, 37351.

8. Municipal Corporations ⇐225(1)

A legislative body of city of fifth class is vested with the free and unrestricted discretionary power to determine what personalty of city shall be disposed of, and when and how that disposition shall be made. Government Code, §§ 37350, 37351.

9. Municipal Corporations ⇐63(1)

In absence of some pleading or showing of fraud or that council of city of the fifth class exceeded its authority, acted arbitrarily, oppressively, and unjustly in exercise of its discretion in selling garbage disposal equipment to one with whom council entered into contract for collection of trash and garbage, courts should not interfere. Government Code, §§ 37350, 37351.

10. Declaratory Judgment ⇐313

A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to legal rights and duties of the respective parties under written instrument and requests that those rights and duties be adjudged by the court, but pleadings must set forth facts which show an actual controversy.

11. Declaratory Judgment ⇐252

Where complaint sought injunction and also declaratory judgment, and questions presented with respect to the injunction were the same as the questions presented with respect to prayer for declaratory relief, and those questions were fully presented with respect to prayer for injunction and plaintiff suffered an adverse ruling on those questions, court did not abuse its discretion in refusing to entertain portion of complaint dealing with declaratory relief.

12. Pleading ⇐350(3)

Where a general demurrer is incorrectly overruled, and such fact is called to attention of trial court by presentation of additional authorities, trial court is authorized to grant judgment on pleadings, if proper, and ruling on demurrer may be deemed an irregularity.

13. Pleading ⇐343, 350(3)

A motion by defendant for judgment on the pleadings operates as a general demurrer to the complaint, and averments of the complaint, for purpose of the motion, must be treated as true.

14. Pleading ⇐343, 344

A motion by defendant for judgment on the pleadings, which operates as a general demurrer to the complaint, should be granted where no material issue is joined, which it is necessary to prove.

15. Judgment ⇐570(5)
Trial ⇐163

A motion for non-suit should be made as provided in statute, and, if granted, such judgment operates as an adjudication upon the merits unless court, in order for judgment, otherwise specifies. Code Civ. Proc. § 581.

16. Appeal and Error ⇐1073(1)

The granting of judgment for defendants on the pleadings when motion before court was for judgment of non-suit on ground that plaintiff had not sufficiently proved his case, so that judgment, in effect, operated as an order granting dismissal of complaint, was an irregularity that did not prejudicially injure plaintiff, where Supreme Court might well have ordered that trial court enter a judgment on the pleadings, since same result would have been obtained had motion been for judgment on the pleadings rather than for nonsuit. Code Civ.Proc. § 581.

Forgy, Reinhaus & Forgy, Santa Ana, Mark A. Soden, Santa Ana, of counsel, for appellant.

Z. B. West, R. M. Crookshank, Harvey, Rimel & Johnston and Jack J. Rimel, Santa Ana, for respondents.

GRIFFIN, Justice.

Plaintiff, on behalf of himself and other taxpayers of the City of Santa Ana, brought this action against the defendants, City of Santa Ana, a municipal corporation of the fifth class, its mayor, councilmen, city clerk and city treasurer (hereinafter referred to as defendant City), and against defendants Paul M. Johnson and associates (hereinafter referred to as the Johnsons) to enjoin the defendant City and defendants Johnson from paying or receiving any money from the City Treasurer under the terms of a contract and supplemental agreement for the disposal of the City trash and garbage, and enjoining the City from selling or transferring to defendants Johnson any equipment used by said City in such operation.

In the second count of the complaint, wherein plaintiff repeats and realleges the allegations set forth in the first count, he asks that the rights of the respective parties be declared.

The complaint sets up the contract (Exhibit A) entered into on November 2, 1950 (a copy of which is incorporated therein by reference) which recites generally that:

"Whereas * * * the City has handled garbage and trash collections within its exterior boundaries as a corporate function and now wishes to relieve itself of said duty by granting to private persons * * * a contract for said collections and,

"Whereas, second parties have filed with the City their bid and proposal in writing to perform said functions for and on behalf of the City, as a private operation upon certain terms and conditions.

"Now, Therefore, * * * it is agreed * * *

"That the City shall grant to the second parties the right, privilege and duty to collect and dispose of all trash and garbage * * * for a period of four (4) years * * *

"That as consideration * * * the City agrees to pay to the second parties ninety cents (90¢) per month for each water meter record * * *

"* * * the second parties shall have the right to sell or otherwise dispose of garbage collected * * *

"The second parties further agree to purchase from the City the equipment now being used by the City in its trash and garbage operations consisting of some ten (10) pieces of rolling stock at the Blue-Book value, or at the valuation set by a board of appraisal * * *

"That should either party to this agreement fail or refuse to carry out the terms of this contract * * * the other party may cancel the same * * *

"In the event of cancellation of this contract by either party, * * * the City shall have the right to repurchase from the second parties all rolling stock sold to said second parties, still in use, under the same terms and conditions as said rolling stock was sold to second parties."

On November 6, 1950, a supplemental agreement (Exhibit B) was executed by the parties, modifying the terms of the first agreement to the extent that the City would allow the Johnsons to continue storing the garbage trucks at the City yard at a fixed rate and that they would pay $100 per month to a City employee for accepting complaints regarding failure of garbage collection.

The complaint further alleges that the purported contract was entered into by the City, without notice inviting bids, and that the contract was not let to the lowest responsible bidder after notice; that the contract provides for an expenditure of City funds exceeding $1,000 and that by reason thereof the contract and supplemental agreement were illegal and void; that the City did not comply with a certain specified City ordinance No. 1296, in respect to the sale of the equipment. This ordinance, set forth in the pleadings, provides generally that when a department head deter-

mines that there is personal property in his department which has "no present or prospective use to which the City of Santa Ana may put said property" and is "surplus", he must report that fact to the City Council. Reports of surplus property must be read at council meetings and the property cannot be sold until the council approves the report and declares the property surplus. The property is not to be sold if another department has a use for the personal property for a City purpose. When the council determines that sufficient surplus has accumulated it shall fix the date for the sale, which shall be at public auction for cash.

It is then alleged that since the City did not comply with the provisions of this ordinance, it had no power to sell the City-owned equipment to the Johnsons, and for this additional reason that portion of the contract relating to the sale was illegal and void.

General demurrers were filed on behalf of all defendants (except two councilmen who were not present and voting when the contracts were authorized) claiming that the complaint did not state a cause of action on either count. These demurrers were overruled. Answers were filed by the demurring defendants in which they denied generally that the contract or subsequent agreement was invalid for the reasons claimed. They set up the official minute entries of the City Council which recited that the mayor and clerk were "authorized to execute the agreement" dated November 2, 1950, with the Johnsons, as well as the minutes of November 6, 1950, authorizing the mayor and clerk to execute the supplemental agreement. They admitted that these contracts were entered into and executed by the City "without notice inviting bids" and that the expenditures involved exceeded $1,000. They set out Ordinance No. 1296 in its entirety, admitted the sale of the rolling stock equipment provided for in the contract was not made in accordance with the procedure prescribed in that ordinance; claim that the City was not required to follow such procedure; and that at the time of the execution of the contracts the City did have and still has a "prospective use" for such equipment. They deny that the contract of sale was void or illegal or in violation of law. As to the second count, they reallege the allegations set forth in their answer to the first count and deny the remaining allegations of that count. The case came on for trial. Three witnesses were sworn on behalf of plaintiff. At the conclusion of plaintiff's case defendants move to strike all of the testimony offered by plaintiff upon the ground that the complaint did not state a cause of action, and moved for a "judgment of nonsuit" upon the "ground set forth in sec. 581 Code of Civil Procedure". The court granted defendant's motion to strike and granted a "motion for judgment on the pleadings", after stating that defendants had erroneously "entitled" it "a motion for a nonsuit".

The principal question to determine upon this appeal is whether the City was obligated, under secs. 37901–2–3 of the Government Code to advertise and give notice inviting bids to let the contract for disposal of rubbish and garbage to the lowest responsible bidder. Sec. 37902 provides that: "When the expenditure required for a *public project* exceeds one thousand dollars ($1000), it shall be contracted for and let to the lowest responsible bidder after notice." (Italics ours.)

Section 37901 defines a "public project" as:

"(a) A project for the erection, improvement, and repair of public buildings and works.

"(b) Work in or about streams, bays, water fronts, embankments, or other work for protection against overflow.

"(c) Street or sewer work except maintenance or repair.

"(d) Furnishing supplies or materials for any such project, including maintenance or repair of streets or sewers."

As will be noted, there is nothing in the section which states that the letting of a contract for the collection of City rubbish and garbage is a "public project". Counsel for plaintiff insists that the historical background of these sections indicates that such a contract was intended by the legislature to be classified as a "public project", and cites Stats.1883, Chap. VI, art. III, sec.

777, p. 258. This section contained the marginal note: "Public work to be contracted for". It provided in part that: "In the erection, improvement, and repair of all public buildings and works, in all street and sewer work, and in all work in or about streams, bays, or water fronts, or in or about embankments, or other works for protection against overflow, and in furnishing any supplies or materials for the same, when the expenditure required for the same exceeds the sum of one hundred dollars, the same shall be done by contract, and shall be let to the lowest responsible bidder, after due notice * * *"

Also cited is the amendment to that section in Stats.1915, chap. 663, sec. 1, p. 1304, wherein the amount was increased to $300, and the caption or preamble in that amendment referred to contracts "for public works" in cities of the fifth class. Also cited is Stats.1941, chap. 741, sec. 2, page 2260, where the amount was raised to $1,000, with a similar preamble in the title. It is therefore argued that when the legislature used the term "public project" in section 37902, it meant "public work"; that since the collection of garbage is a governmental function, citing Glass v. City of Fresno, 17 Cal.App.2d 555, 558, 62 P.2d 765; Pittam v. City of Riverside, 128 Cal. App. 57, 62, 16 P.2d 768; 18 Cal.Jur. p. 1096, sec. 345; and 7 McQuillin, Municipal Corporations, 3d Ed. p. 77, sec. 24.242, one can assume that to perform such function constitutes the doing of work, and that the doing of that governmental work, being for a public purpose, it is, as a matter of fact and law, "a public work". In this connection plaintiff cites McKim v. Village of South Orange, 133 N.J.L. 470, 44 A.2d 784, 786; and State v. Butler, 178 Mo. 272, 77 S.W. 560, and relies on these out of state cases for the proposition that a contract for the removal of the City's garbage is a "public work" under the statutes there involved. He also cites 35 Words and Phrases 435; 43 Am.Jur. p. 744, sec. 3; 92 A.L.R. 837; and 50 C.J. p. 867, sec. 97; 73 C.J.S., Public. Therein, the above-mentioned cases are cited as authority for this statement.

[1] Statutes of 1949, chap. 79, sec. 1, p. 165, codifies sec. 777, supra, into the present code sections above indicated. Therein, the words "public work" are no longer mentioned. The term "public project" is used in all instances and the new section clearly defines this term. This definition is not inconsistent with the provisions of the original act or the amendments thereto. The better argument would be that the legislature intended to remove any doubt as to the meaning of the previous enactments on the subject and intended to exclude from that definition a contract for the disposal of garbage.

Lelande v. Lowery, 26 Cal.2d 224, 227, 157 P.2d 639, 175 A.L.R. 1109, relied upon by plaintiff, is not opposed to this construction. Under Art. XI, sec. 11 of the California Constitution, "Any * * * city * * * may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws". Section 38793 of the Government Code provides: "In addition to other powers, the legislative body of a fifth class city may provide for the prevention and summary removal of all filth and garbage in the city."

Section 4250 of the Health and Safety Code provides: "The legislative body of any incorporated city may contract for the collection or disposal, or both, of garbage, * * * under such terms and conditions as may be prescribed by the legislative body of any such city by a resolution or ordinance."

[2, 3] The accumulation of garbage and trash within a city is deleterious to public health and safety. The collection and disposal of garbage and trash by the City constitutes a valid exercise of police power and a governmental function which the City may exercise in all reasonable ways to guard the public health. It may elect to collect and dispose of the garbage itself or it may grant exclusive collection and disposal privileges to one or more persons by contract, or it may permit private collectors to make private contracts with private citizens. The gathering of garbage and trash is considered to be a matter which public

agencies are authorized to pursue by the best means in their possession to protect the public health. In re Santos, 88 Cal.App. 691, 264 P. 281; Miller v. City of Palo Alto, 208 Cal. 74, 280 P. 108; Manning v. City of Pasadena, 58 Cal.App. 666, 209 P. 253.

[4, 5] In the absence of some specific charter or statutory requirement, municipal contracts need not be let under competitive bidding. (McQuillin, Municipal Corporations, 3d Ed. Vol. 10, p. 272, sec. 29.31.) The only statutory requirement in California brought to our attention pertaining to competitive bidding on contracts by a city of the fifth class consists of the provisions of the Government Code mentioned. It is obvious from the mere reading of these sections that not all public contracts are included, but only those which constitute "public projects" as that term is therein defined and limited. This point is well illustrated in the case of Electric Light & Power Co. v. City of San Bernardino, 100 Cal. 348, 34 P. 819, where the City, without following any competitive bidding procedure, entered into a contract with the plaintiff light company wherein the light company agreed to install and furnish street lighting to the City for one year at a cost of over $500. The question involved was the construction to be placed upon section 777, supra, which section then required competitive bidding procedure where the expenditure was to exceed $100 "In the erection, improvement and repair of all public buildings and works, in all street and sewer work, and in all work * * * in or about embankments or other works for protection against overflow, and in furnishing any supplies or materials for the same * * *." The Supreme Court, in construing this section, held that the contract in question was not within the statute and that competitive bidding was not required. It said, 100 Cal. at pages 351–352, 34 P. 819: "Does the lighting of streets, as here described, come with the term 'street work', as used in the foregoing provision of the statute? * * * The provision, fairly construed by all rules of construction, does not bring the subject of this litigation within the term 'street work', * * *. There can be no question as to the sound policy of a law requiring municipal corporations to enter into contracts for the payment of money only after full notice and opportunity for competition, but that is not a matter for our consideration here. We must take the statute as we find it. We can neither add to it nor subtract from it. It is our duty alone to construe it as it stands enacted."

In Swanton v. Corby, 38 Cal.App.2d 227, 100 P.2d 1077, 1078, a sixth class city, without any competitive bidding procedure, purchased materials, labor and supplies in the open market and had constructed for the city a two-way short wave radio. The complete cost was over $900. The statute then in effect required competitive bidding procedure by sixth class cities where the expenditure exceeded $500 "In the erection, improvement, and repair of all public buildings and works. * * *" St.1933, p. 1334. The question on which that case turned was the construction of the phrase quoted. This court held that the erection of the radio did not constitute a public work within the meaning of the statute, and said that: "It is well settled in California that a municipality may purchase supplies and materials and hire labor without advertising for bids if the law or charter under which it is organized and exists does not require the contract for such supplies, materials or labor to be let to the lowest bidder after advertising for bids." (Citing cases.) See, also, 22 Cal.Jur. p. 74, sec. 2; and Matthews v. Town of Livermore, 156 Cal. 294, 104 P. 303.

As pointed out by the trial judge, this attack is made purely on the question of the procedure followed, and there is no allegation of fraud or dishonesty. The question of the wisdom or discretion of the City Council in awarding the contract without accepting bids is not before the court. In the absence of some legislative authority indicating that such a contract as here involved comes within the definition of a "public project", the courts are powerless to include it therein, no matter how reasonable plaintiff's argument of justification may seem.

[6] The second question is whether ordinance No. 1296 was applicable under

the facts pleaded and established. It is defendant's contention, in this respect, first, that from a mere reading of the contract here in controversy and as pleaded by plaintiff, it shows on its face that the garbage and trash collection equipment was not surplus property within the intended meaning of the ordinance; second, that the City Council, which was the ultimate judge of the fact whether the equipment was or was not surplus, did not consider it to be such; and third, that since the pleadings do not allege fraud or abuse of discretion in connection with said determination, the courts are powerless to disturb such determination by that body. There is merit to the argument. Under the terms of the ordinance in question only *surplus property* need be sold at public auction. The ordinance itself defines surplus property as property for which the City has no present or *prospective use*. As will be noted, the City Council is not precluded by the ordinance from selling or disposing of *any* of its personal property without obtaining bids therefor. The provision applies only to surplus property for which the City has no present or prospective use. The City Council was the ultimate judge, both under the ordinance and under the statute authorizing the sale of its personal property without bid, to determine whether said property was or was not surplus and whether a sale made by it under either theory was or was not for the common benefit of the City. Such authority cannot be delegated to any other municipal officer. 19 R.C.L. p. 896, sec. 195, 37 Am. Jur. p. 667, sec. 53; Bolton v. Gilleran, 105 Cal. 244, 38 P. 881; Truckee & T. T. Road Co. v. Campbell, 44 Cal. 89, 91.

[7] The record conclusively shows that the sale was made without resort to bid, and the equipment was never declared to be surplus property by the head of any department or by the City Council. The presumption is that the City Council made a determination that it was not surplus; that it should be sold; and that the contemplated sale was for the benefit of the City. Truckee & T. T. Road Co. v. Campbell, supra; sec. 1963, C.C.P. subds. 15 and 33.

In Southlands Company v. City of San Diego, 211 Cal. 646, 297 P. 521, our Supreme Court held that where the City Council had the power to exercise a discretion as to whether the building of a bridge or causeway was reasonably necessary in the construction of a highway, in the absence of fraud, its finding that such a bridge was necessary was conclusive and not subject to review. See, also, In re Sumida, 177 Cal. 388, 170 P. 823; Odd Fellows' Cemetery Ass'n v. City & County of San Francisco, 140 Cal. 226, 73 P. 987. The discretionary powers of municipal authorities will not be interfered with in a suit by a taxpayer for an injunction in the absence of fraud or palpable abuse. Matters in which questions as to judgment, wisdom or policy alone are involved are not subject to control by injunction. 64 C.J.S., Municipal Corporations, § 2142, p. 958; 64 C.J.S., Municipal Corporations, § 2147c, p. 969.

California Reduction Co. v. Sanitary Reduction Works of San Francisco, 9 Cir., 126 F. 29, involved a suit in equity by a third party (as here) to obtain an injunction against defendant company testing the validity of an exclusive contract for the removal of garbage in the City of San Francisco, for a period of fifty years. The court held that since the Consolidation Act, Stats.1863, p. 540, chap. 352, empowered the board of supervisors "by regulation or order" to provide for the prevention and summary removal of all nuisances, etc. the board, having power under such provisions, to itself regulate the removal and disposition of all garbage and refuse matter, the municipality had the power to contract with others for such removal or disposition, and that an order granting an exclusive franchise or privilege to a person to receive and destroy the garbage and refuse collected in the City for a term of fifty years was within the authority granted, as well as within the police power of the state. It then held that the validity of the grant of such privilege, which amounts to a contract, and under which the grantee is acting, cannot be collaterally attacked by a private party in a suit in equity on the ground of *irregularity* in the exer-

cise of its power by the municipality, nor because of the alleged failure of the grantee to perform the conditions imposed, the nonperformance of which it was provided would work a forfeiture, such matters being determined only at suit of the granting authority. Although defendants do not raise the point on this appeal, an action to test the question as to whether a city council errs in exercising its rightful authority in awarding an exclusive franchise for the removal of garbage must be by quo warranto. Gurtz v. City of San Bruno, 8 Cal.App.2d 399, 48 P.2d 142. Continuing further, the court, in the California Reduction Company case, then said, 126 F. at page 38: "The question as to the reasonableness of granting the exclusive franchise for 50 years is one upon which there may be honest differences of opinion. Courts cannot in the determination of this question, run a race of opinion upon points of reason and expediency with the law-making power. No iron-clad rule can be laid down to determine where the discretion of the board ceases and where the power and authority of the court to declare the action of the board unreasonable begins. The border line must be ascertained by the facts, conditions, and circumstances surrounding the subject-matter in every particular case. * * * It was authorized by the laws of the state to make the contract in question. It was required to act with sound discretion as to the methods and terms. With the honest and reasonable exercise of this authority a court has no right to interfere, although the board may not have chosen the best method or made the most advantageous contract in relation to the subject-matter. It is only in cases where it clearly appears that the board has exceeded its authority, or acted arbitrarily, oppressively, and unjustly in the exercise of its discretion, that a court is called upon to act."

In the instant case it appears that the contract carried a cancellation clause permitting the City to cancel the contract by giving thirty days written notice if the service was not satisfactory. It was entered into in November, 1950, at which time the existing conflict with Korea and Red China was in progress. The City Council might well have recognized that a shortage of critical materials, such as specialized garbage and trash equipment existed, and that if it did not provide for a means of collecting garbage itself in case the service should prove to be unsatisfactory and the contract was cancelled, it would be derelict in its duty. It clearly appears from the agreement itself that there might well have been a prospective use for the equipment by the City. Under such circumstances the City Council was justified in not classifying it as surplus.

Defendants present the additional argument that the City Council could not, by ordinance, limit, restrict, nor otherwise divest itself of the discretionary power vested in it by the general law to dispose of City-owned property. McQuillin, Municipal Corporations, Vol. 10, 3rd Edition, sec. 29.37, p. 284, recites: "Where the statutes governing a municipality do not require that its contracts be let under competitive bidding but the manner of awarding them is left to the discretion of the mayor and council, it is held that such officials cannot restrict their future conduct nor limit the discretion vested in them by passing an ordinance requiring competitive bidding for subsequent contracts. Such ordinance will not prevent them from contracting in good faith in the future in some other manner." (Citing cases.)

However, in connection with this statement there is a statement which reads: "While there is authority which apparently points to a contrary conclusion, it has frequently been held that although neither charter nor applicable statute prescribes competitive bidding, or a method for letting contracts, an ordinance providing for such bidding must be observed, otherwise the contract cannot be enforced against the municipality."

Several Missouri and Pennsylvania cases are cited in support of this latter rule. See City of Kirksville ex rel. Eggert v. Harrington, 225 Mo.App. 309, 35 S.W.2d 614; Flinn v. City of Philadelphia, 258 Pa. 355, 102 A. 24; Bunker v. City of Hutchison, 74 Kan. 651, 87 P. 884; and Cimarron Utilities Co. v. City of Guymon, 171 Okl. 344, 43 P.2d 143.

Plaintiff concedes under the general rule that the City Council was given power to purchase and sell personal property, but argues that any such sale must be for the "benefit of the City" and that since the City Council attempted to set up a standard procedure or policy relating to the selling of its property by ordinance, it was bound to follow that procedure. In this connection it is also argued that ordinances passed by a City Council, within the scope of its authority, have the same force and effect within the limits of the City as a statute has throughout the State, citing Wheeler v. Gregg, 90 Cal.App.2d 348, 370, 203 P. 2d 37; Monterey Club v. Superior Court, 48 Cal.App.2d 131, 137, 119 P.2d 349; and Marculescu v. City Planning Commission, 7 Cal.App.2d 371, 373, 46 P.2d 308.

It is also contended by plaintiff that in executing the contract pertaining to the sale of the equipment, the City Council was acting in an *administrative* capacity; that when it adopted the ordinance, it was acting in a *legislative* capacity; that when acting in an administrative capacity, the City Council was bound by those ordinances passed when acting in a legislative capacity and must conform to the procedure outlined therein. There is authority for this latter statement in Hopping v. City Council of the City of Richmond, 170 Cal. 605, 615, 150 P. 977; Earl v. Bowen, 146 Cal. 754, 761, 81 P. 133; and Strauch v. San Mateo Junior College Dist., 104 Cal.App. 462, 464, 286 P. 173.

There is neither pleading nor showing made by the plaintiff that the actions of the City Council were not made "for the benefit of the City".

As distinguished from a charter city, the general basic law of a fifth class city is to be found in the Constitution and in the laws and codes adopted by the State legislature. Government Code sections 37350–51 provide that: "A city may purchase * * * real and personal property, and control and dispose of it for the common benefit", and "The legislative body may purchase * * * such personal property * * * as is necessary or proper for municipal purposes. It may control, dispose of, and convey such property for the benefit of the city. * * *"

[8] It therefore appears that the legislative body of the City is vested with the free and unrestricted discretionary power to determine what personal property shall be disposed of, and when and how that disposition shall be made. The only restriction imposed by the general basic law is that such disposition shall be for the benefit of the City and its constituents. The basic law does not require the City to follow competitive bidding procedure. It does not require the City Council to establish any rules, regulations or procedure for the disposal of personal property as a condition precedent to the exercise of the power of disposal.

While it may appear that there are several California cases affirming the rule that the City Council cannot, by adopting an ordinance, divest itself of, or restrict itself in, the free exercise of the broad discretionary power and duty which the general basic law has imposed upon and delegated to the City Council, Briare v. Matthews, 202 Cal. 1, 258 P. 939; Higgins v. Cole, 100 Cal. 260, 34 P. 678; and Thompson v. Board of Trustees, 144 Cal. 281, 77 P. 951, yet some exception seems to be indicated when such ordinance applies to acts which may be classified as administrative functions. (See 18 Cal.Jur. p. 893, secs. 188–189, and cases cited.) Since we have concluded that the City Council was within its rights in disposing of the trucks and equipment under the first theory, it becomes unnecessary to determine this last question.

[9] It should be kept in mind that we are here dealing with a contract for the collection and disposal of garbage of a City. The City Council has the responsibility of protecting the health of the inhabitants of the City by collecting and disposing of such garbage, either with its own equipment or by letting contracts for that purpose. The agreement for the conditional sale of the equipment to the defendants Johnson was a part of the consideration of the contract and was an integral part of the agreement for, in all probability, without

the use of the equipment, the Johnsons would have been unable to obtain other equipment or perform their agreement. To subject such specialized equipment to a forced sale, to the highest bidder, for cash, may well have defeated the purpose of the agreement, and may have created a serious unhealthy condition in the City. We conclude that in the absence of some pleading or showing of fraud or that the City Council exceeded its authority, acted arbitrarily, oppressively and unjustly in the exercise of its discretion, the courts should not interfere with the discretionary power vested in the City Council in this respect.

Plaintiff next contends that since the prayer of the complaint also seeks declaratory relief, based on the same allegations heretofore mentioned, the court erred in its ruling ordering judgment for defendants on the pleadings. He cites such cases as Essick v. City of Los Angeles, 34 Cal.2d 614, 624, 213 P.2d 492; and Maguire v. Hibernia Savings & Loan Society, 23 Cal.2d 719, 728, 146 P.2d 673, 151 A.L.R. 1062.

[10, 11] It is true that a complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court. Maguire v. Hibernia Savings & Loan Society, supra. However, the pleadings must set forth facts which show an actual controversy. Under the statement of facts here presented the only controversy claimed is whether the contract for the handling of garbage was void because bids were not called for, and whether the conditional agreement to sell the equipment was void because such sale was not made at public auction. These questions were fully presented by the pleadings and plaintiff has suffered an adverse ruling on these subjects. He is not prejudiced by the ruling of the trial court which, in effect, denies declaratory relief. No abuse of discretion appears in the action of the court in refusing to entertain such complaint. Orloff v. Metropolitan Trust Co., 17 Cal.2d 484, 489, 110 P.2d 396; Ermolieff v. R. K. O. Radio Pictures, 19 Cal.2d 543, 549, 122 P.2d 3; Chas. L. Harney, Inc. v. Contractors' State License Board, Cal.App., 238 P.2d 637; 16 Am.Jur. p. 288, sec. 14; C.C.P. Sec. 1061; City of Alturas v. Gloster, 16 Cal.2d 46, 48, 104 P.2d 810.

[12] Complaint is made that the court's ruling on the demurrer that the complaint stated a cause of action was inconsistent with its ruling granting a judgment on the pleadings. When a general demurrer is incorrectly overruled and this fact is called to the attention of the trial court by presentation of additional authorities, as was done here, the court is authorized to grant a judgment on the pleadings, if proper. In such case the ruling on the demurrer may be deemed an irregularity. Electric Light & Power Co. v. City of San Bernardino, 100 Cal. 348, 34 P. 819; De Courcey v. Cox, 94 Cal. 665, 30 P. 95; 21 Cal.Jur. 241, sec. 166.

The final complaint is that the court committed prejudicial error in granting a judgment on the pleadings when the motion before the court was for a "judgment of nonsuit" under "Section 581 C.C.P." because "the plaintiff has not sufficiently proved his case". The court endeavored to account for this discrepancy upon the theory that defendants erroneously denominated the motion a motion for nonsuit. The language of the motion does not so indicate. The only question is whether plaintiff suffered prejudicial error by the judgment entered.

[13–15] A motion by defendant for judgment on the pleadings operates as a general demurrer to the complaint, and the averments of the complaint, for the purpose of the motion, must be treated as true, and the motion should be granted where no material issue is joined which it is necessary to prove. (21 Cal.Jur. 234, sec. 163.) A motion for nonsuit should be made as provided in sec. 581, C.C.P., and if granted, such judgment operates as an adjudication upon the merits unless the court, in its order for judgment, otherwise specifies.

The City Engineer testified that actually, 13 trucks were transferred to the Johnsons under the contract; that after the letting of the contract the Sanitary Department, he "imagined * * * would have no use for them" except for two or three that might be used for "stand-by purposes"; and that if the contract with the Johnsons were terminated, the City would have immediate need for the trucks. Thereafter, the court sustained an objection to an offer of plaintiff to prove that the City would suffer damage by the sale of the trucks to the Johnsons because they could have been sold for more if sold at public auction to the highest bidder. Thereafter, plaintiff rested his case. A motion to strike all of the evidence was granted upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The motion for nonsuit followed. The judgment on the pleadings was ordered. For the reasons stated, the motion to strike the testimony was proper since there was no allegation of fraud in connection with the transaction, and for the further reason that there was no showing that the City Council acted illegally, arbitrarily, or that it abused the discretionary power with which it was vested.

[16] If the judgment, as entered, may be considered as a ruling on the motion for nonsuit it did, in effect, operate as an order granting a dismissal of plaintiff's complaint, and since it did not otherwise specify, it operated as an adjudication upon the merits. The same result would have obtained had the motion been for a judgment on the pleadings. This court might well have ordered that the trial court enter a judgment on the pleadings. Electric Light & Power Co. v. City of San Bernardino, supra. We conclude that plaintiff was not prejudicially injured by the irregularity mentioned.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; SCHAUER, J., dissenting.

PEOPLE v. EVANS.*

Cr. 2765.

District Court of Appeal, First District, Division 2, California.

Jan. 16, 1952.

Hearing Granted Feb. 14, 1952.

John W. Evans, Jr., was convicted in the Superior Court, County of Alameda, Charles W. Snook, J., of violation of statute prohibiting lewd or lascivious acts with children, and he appealed from order denying new trial. The District Court of Appeal, Nourse, P. J., held that rule declaring affidavits of jurors incompetent to impeach verdict of jury is applicable to situation in which jury has received some evidence out of court other than that resulting from view of premises, and that evidence sustained conviction.

Order affirmed.

1. Criminal Law ⇐957(1, 5)

Rule declaring affidavits of jurors incompetent for purpose of impeaching their verdict, is applicable to situation in which affidavits are used to show that jury has received some evidence out of court other than that resulting from view of premises, and only exceptions recognized are those contained in statute relating to chance verdicts, and situation in which misconduct of jury occurs before impaneling of jury, or constitute false swearing by juror on his voir dire examination. Pen.Code, §§ 1181, subds. 2, 3; Code Civ. Proc. § 657, subd. 2.

2. Criminal Law ⇐1159(4)

Without physical impossibility or evidence so clearly false that reasonable minds may not differ in that regard, appellate court cannot reverse conviction under statute prohibiting lewd and lascivious acts with children on ground of inherent improbability of testimony of complaining witness. Pen.Code, §§ 288, 288a.

3. Criminal Law ⇐1159(4)

In prosecution under statute prohibiting lewd or lascivious acts against children, wherein ten year old victim testified that whole encounter with defendant, during which different illicit acts were said to

* Subsequent opinion 246 P.2d 636.

have taken place successively, had taken about five minutes, jury was entitled to conclude that events described had happened, but that child had made her time estimate too short, and there was no physical impossibility or evidence so clearly false as would warrant court to reverse conviction on ground of inherent improbability of testimony.

4. Criminal Law ⇐1159(4)

In prosecution under statute prohibiting lewd or lascivious acts with children, wherein ten year old victim with exceeding accuracy described age, height and weight of defendant despite but brief encounter with defendant, such evidence, even though suspect and indicative that victim was introducing data which she had heard from others, went to credibility of witness and was for jury, and had nothing to do with inherent improbability of evidence.

5. Criminal Law ⇐1160

Where trial court on motion for new trial has approved finding of jury, appellate court may not disturb such finding and action of trial court unless it can say, as matter of law, that there was no evidence to support conviction.

6. Criminal Law ⇐741(2)

In prosecution under statute prohibiting lewd or lascivious acts with children, wherein brother of defendant testified that victim had on one occasion identified brother as perpetrator of offense, and it appeared that complaining witness and another had positively identified defendant, testimony by brother as to mistaken identification, even if believed, was merely a discrepancy in testimony of complaining witness to be resolved by jury.

7. Criminal Law ⇐739(2)

In prosecution under statute prohibiting lewd or lascivious acts with children, in which witnesses for defendant gave evidence on alibi which, allowing difference of some minutes in time of events to which they testified, would have permitted defendant to be at place of crime at time at which it took place, such testimony merely operated to produce conflict in evidence on issue of defendant's presence at scene of attack, and was for jury to resolve.

8. Infants ⇐20

Evidence sustained conviction under statute prohibiting lewd or lascivious acts with children. Pen.Code, §§ 288, 288a.

Popper & Burnstein, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant was found guilty by a jury of violation of section 288 and 288a Penal Code. The court granted a new trial as to the conviction under section 288a, but with respect to the conviction under section 288 denied a new trial, suspended judgment and placed appellant on probation conditioned among other things on a nine month confinement in the county jail. After hearing appellant had been determined not to be a sexual psychopath. The appeal is from the order denying a new trial as to the conviction under section 288. Pending the appeal appellant was granted bail.

The conviction relates to facts which occurred on August 12, 1950, around 6 p.m. Neva Heckman, aged 10, the prosecuting witness, testified that she had been swimming at the Dimond Park swimming pool in Oakland, which she left about closing time (about 6 p.m.); that she then made a purchase at the candy store in the park and that on the way out of the park she met on a trail the defendant, whom she had seen somewhere before (but not on that day); that she went off the trail with him to look for squirrels, that he pulled her over a hill into a sort of little cup and that he there did the acts alleged during which he twice stuck his finger up her private parts; that she screamed, that he threatened to kill her if she screamed, that she was crying very much so that she could not see well but that she saw an open pocket knife in his hand, that he pointed in the direction of the store down Fruitvale and ordered her to walk straight without turning around or he would kill her. She did and from the store phoned the police and her mother. She did not know how long the encounter with defendant took, probably about five

minutes, to go to the store about one or two minutes. The witness Fredericks, employed at the store, testified that he verified on an electric clock that the call to the police was completed at 6:06 p.m. The little girl arrived two or three minutes before that.

At 7:30 that evening she was examined at Highland Hospital by Dr. McAllister who testified that there were no marks on her clothing or body except a bruise and reddening at the opening of the vagina and that by microscopy he found some red blood cells which indicated injury caused by entry into the vaginal region. No spermatozoa were found.

With respect to the identification of defendant Neva testified that the aggressor wore a yellow cable knit sweater, short sleeved, tan khaki pants with a zipper and buttons at the top and a belt with a "W" on it; he was about five feet eleven inches tall, not only five feet ten and not six feet; about 187 pounds, had goo on his hair, slicked down; he was about 21. Three days after the event she identified defendant as the aggressor when she saw him alone in the office of police sergeant Brown; about an hour before the police had shown her a picture of defendant on top of a pile of pictures. However a brother of defendant testified that Neva affirmed that she was sure that he himself was the right man when she saw him with defendant's attorney at the courthouse. This was denied by Neva and her mother who was present at the time.

The witness Darlene Hatton testified that she had seen defendant on that Saturday at maybe a quarter after five, maybe later, before the ringing of the bell at 5:40. She was in her bathing suit and walking along the pool and he was standing outside the fence some 15 feet away. The fence consists of criss-cross thick wire in diamond pattern about 1½ or 2 inches across. He attracted her attention by whistling at her; his hair was plastered down slick. She had seen him at Dimond Pool before probably twice. Later the lady employed in the candy store near the pool showed her and other children a picture of defendant and asked her whether she had seen him before; she said yes. That same day she was brought to a line-up in which she recognized defendant as the man of the picture and the one she had seen on Saturday. That was on August 17.

Police Sergeant Keith W. Brown testified that on August 15 he had interrogated defendant in the Juvenile Division, City Hall, Oakland. Defendant denied that he had been in Dimond Park on Saturday; he had not been there for months but in the past had gone there often. When the witness told him the accusation and asked him to tell the truth of what happened on August 12, he said "he would rather not, that he wanted to talk to his father first, that his father had always told him never to admit anything." He said to had been wearing suntan pants and a yellow sport shirt with sleeves. Defendant was then booked pending investigation. Police officer John F. Ferguson testified that he searched defendant when he was put in custody and found concealed under the arch of the sole of defendant's right shoe a knife with the blade wedged into the heel. Appellant testified that when he received a telephone call to come to the Oakland City Hall on that Tuesday he poked the knife in the heel of his shoe because he was so nervous, he did not know exactly what they had him accused of, and he thought it was assault with a deadly weapon or something like that. He had been working with the knife on his radio when he was called.

At the trial the position of defendant was that the prosecuting witness had made an honest mistake of identity and he tried to prove an alibi and that another person answering somewhat the girl's description had been seen in the neighborhood. He himself testfied that he lives at 1031 Glendore Avenue, Oakland, together with his mother, his grandmother and his brother Robert, aged 19. The house is nine or ten blocks from the westerly entrance of the park. He had not been in any part of the park on August 12, or within two or three weeks before that. On that Saturday afternoon he had been

away from home with his father and brother until after 4:15 p. m. He did something to his father's car together with his father until a little after 5 when his father drove away. He then did some painting to the side of the house. At about 5:30 he left the house to get some meat for dinner. His grandmother gave him a ten dollar bill to pay for it. He went direct to the Glenview Meat Market, four or five blocks from his home. He made his purchases there, cashed a check there, and then went home directly and brought the purchases and the change from the ten dollars to the kitchen. He went to the market and back in a 1936 Chevrolet. The kitchen clock said 5 to 6 when he came back. He never used any hair oil and there was no hair oil in the house. On August 12 he was 21, about six feet tall. His weight was somewhere between 175 and 190, between which point it varies. The expedition to the meat market, the time at which it took place, and some other parts of his testimony were corroborated by his grandmother and his brother. Clarence Richardson, the butcher at the market, who according to defendant had cashed the check, did not remember it. Richard Withoff, bookkeeper of the market testified that on the deposit slip which he made out for the bank on Monday morning August 14 there appears a check of $20 written by J. W. Evans which must have been received at the market sometime on Saturday, August 12. The witness did not know at what time on Saturday the check had been cashed or defendant had been at the market.

The following are defendant's contentions on appeal:

1. It was error to deny defendant's motion for a new trial since a street map of the city of Oakland not received in evidence in court was produced in the jury room by one of the jurors during the discussion of the jury.

[1] The only evidence introduced in support of this allegation at the hearing of the motion for a new trial were two affidavits of jurors other than the one said to have produced the map. The prosecution objected because of the rule against impeachment of verdicts by affidavits of jurors. The court refused to admit the affidavits in evidence but ordered them filed. Appellant's main argument is that the rule declaring affidavits of jurors incompetent applies where the affidavits are introduced to show misconduct of jurors, mentioned as a ground for new trial in sec. 1181, subd. 3, Penal Code, but not where they are used to show that the jury has received some evidence out of court other than that resulting from a view of the premises, mentioned as a separate ground for granting of a new trial in sec. 1181, subd. 2, on which latter subdivision the motion was based.

The California cases do not support appellant's contention. Whether the affidavits show misconduct of jurors or receiving of evidence out of court they are introduced to impeach the verdict. The only exceptions recognized in California to the rule excluding impeachment of a verdict by jurors' affidavits are the ones as to chance verdicts contained in sec. 657, subd. 2, Code of Civil Procedure, and one initiated by this court in Williams v. Bridges, 140 Cal.App. 537, 35 P.2d 407, where the misconduct of a juror occurred before empanelment of the jury, or constituted false swearing on his voir dire examination. See People v. Gidney, 10 Cal.2d 138, 146, 73 P.2d 1186, 1191, where it is expressly stated that affidavits of jurors showing misconduct out of court "or evidence received by them from outside sources" have been refused admission, citing People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435 (prejudicial statement by the bailiff to the jurors) and People v. Wong Loung, 159 Cal. 520, 114 P. 829 (reading of a prejudicial newspaper article by jurors out of court or during jury deliberations). See also People v. Long, 15 Cal.2d 590, 608, 103 P.2d 969. As the exclusionary rules differ in different jurisdictions the cases from other jurisdictions, e. g., federal cases cited by appellant, carry no weight here. The desirability of the ex-

clusionary rule is debatable, 8 Wigmore on Evidence, sec. 2353, but the argument "that public policy requires that the sanctity and stability of judicial determinations shall not be subject to the evidence of jurors who may be tampered with," Saltzman v. Sunset Tel. etc. Co., 125 Cal. 501, 504, 58 P. 169, 170, whatever its validity, applies equally in the case of sec. 1181, subd. 2 and sec. 1181, subd. 3, Penal Code.

As there was no competent evidence of receiving evidence out of court we need not go into the question whether such evidence, had it been produced, would have availed appellant without proof that he had suffered injury from the production of the map out of court.

2. The testimony of the complaining witness is so incredible and inherently improbable that it is not entitled to any weight.

[2–4] This contention is based on two grounds: *First* the testimony of the complaining witness that the whole encounter with defendant, during which different illicit acts were said to have taken place successively, had taken "probably about five minutes." No physical impossibility that these acts could have been completed during approximately that time appears, and it may be doubted whether all events testified to could not very well have been completed in approximately that time. Moreover the jury was entitled to conclude that the events described had happened but that the girl, who had originally answered that she did not know how long it took, made her estimate somewhat too short. Without physical impossibility or evidence so clearly false that reasonable minds may not differ in that regard, an appellate court cannot reverse on the ground of inherent improbability. People v. O'Moore, 83 Cal.App.2d 586, 189 P.2d 554; People v. Fisher, 86 Cal.App.2d 24, 194 P.2d 116. *Second* because of the too great accuracy with which the prosecuting witness described age, height and weight of defendant evidently introducing data which she had heard from others. Although the testimony that the aggressor was 21, 5 feet eleven, not more nor less, and weight 187 pounds is certainly suspect, such goes to the credibility of the witness which is for the jury only, and has nothing to do with inherent improbability of the evidence.

3. The evidence identifying the defendant as the aggressor is insufficient to sustain the verdict.

[5–8] The contention is without merit. In People v. McCoy, 25 Cal.2d 177, 184, 153 P.2d 315, 318, the Supreme Court said: "The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, and the uncertainties of witnesses in giving their testimony were matters solely for the observation and consideration of the jurors in the first instance, and for the consideration of the trial court on motion for a new trial. It has approved the finding of the jury, and on appeal this court may not disturb such finding and the action of the trial court unless we can say, as a matter of law, that there was no evidence to support the conviction." Such is certainly not the case here. The identification of defendant by the complaining witness and the witness Darlene Hatton may be somewhat weakened by the fact that they had been shown a portrait of defendant prior to the identification and because of the circumstances under which they had seen him on the day of the act but it was evidence, certainly when we take into consideration that the witnesses declared that they had seen defendant before the day of the act, so that they could recognize him. The asserted mistaken identification of the brother of defendant as the culprit, to which said brother testified, is, even if believed, only a discrepancy to be solved by the jury. The alibi evidence was given solely by defendant and two of his nearest relatives and was such that a difference of some minutes in the time of the events to which they testified would have permitted appellant to be at the place of the crime at the time at which it took place. "(T)his line of testimony

merely operated to produce a conflict in the evidence on the point of the appellant's presence at the scene of the attack, and it was for the jury to resolve." People v. McCoy, supra.

The order is affirmed.

GOODELL, J., and JONES, J. pro tem., concur.



108 Cal.App.2d 749

FREITAS v. PEERLESS STAGES, Inc.

Civ. 14756, 14959.

District Court of Appeal, First District, Division 1, California.

Jan. 18, 1952.

Dorothy Freitas brought an action against Peerless Stages, Inc., for injuries plaintiff passenger in defendant's bus received when plaintiff got out of seat and started walking to front end of bus so as to get off of bus at intersection bus was approaching, and bus allegedly came to a sudden and violent stop which caused plaintiff to fall down in aisle of bus. The Superior Court of the State of California in and for the County of Santa Clara, Leonard R. Avilla, J., rendered a judgment for plaintiff and plaintiff appealed from the judgment and from an order after judgment purporting to correct the language of an instruction as the instruction appeared in the reporter's transcript. The District Court of Appeal, Peters, P. J., held, inter alia, that allegation of complaint was either a general allegation of negligence or a mixture of general and specific allegation of negligence, and that allegation did not preclude application of doctrine of res ipsa loquitur.

Judgment and order affirmed.

1. Carriers ⇐316(3)

In action against bus company for injuries, allegation that at time and place of accident bus was so negligently and carelessly operated that bus was caused suddenly and violently to jerk, bump and stop, and that as a proximate result of negligent and careless operation of bus plaintiff bus passenger was violently knocked to floor of bus and suffered severe injuries, was either a general allegation of negligence or a mixture of general and specific allegation of negligence, and allegation did not preclude application of doctrine of res ipsa loquitur.

2. Negligence ⇐121(2)

Proof of specific acts of negligence does not preclude application of doctrine of res ipsa loquitur except where proof dispels inference of negligence as a matter of law.

3. Carriers ⇐316(3)

In action for injuries plaintiff passenger in defendant's bus received when plaintiff got out of seat and started walking to front end of bus so as to get off of bus at intersection bus was approaching, and bus allegedly came to a sudden and violent stop which caused plaintiff to fall down in aisle of bus, evidence relative to speed of bus, that bus was late, that speed of bus was increased just before bus was stopped, and that traffic light at intersection was yellow just before bus stopped, did not dispel inference of negligence as matter of law, and evidence did not preclude application of doctrine of res ipsa loquitur.

4. Appeal and Error ⇐216(2)

Where defendant made no request to trial court for clarification of given instruction which allegedly improperly assumed existence of an accident although defendant bus company denied that plaintiff bus passenger had been injured in accident, defendant could not make such complaint on appeal.

5. Carriers ⇐316(1)

Mere proof of injury to a plaintiff while riding on defendant's train or bus does not alone give rise to inference of negligence on part of bus owner or railroad.

6. Carriers ⇐321(21)

In bus passenger's personal injury action against bus company based on negligence, instructions on res ipsa loquitur were not required, within themselves, to

be qualified by reference to doctrine of contributory negligence.

7. Carriers ⇐320(1)

In bus passenger's injury action against bus company based on negligence, weight to be given inference of negligence under doctrine of res ipsa loquitur was for jury.

8. Carriers ⇐280(1)

Carrier owes highest duty of care towards its passengers.

9. Trial ⇐296(9)

In action for injuries plaintiff passenger in defendant's bus received when plaintiff got out of seat and started walking to front end of bus so as to get off of bus at intersecton bus was approaching, and bus allegedly came to sudden and violent stop which caused plaintiff to fall down in aisle of bus, instruction reciting in part that from happening of accident, as established by evidence, inference arose that proximate cause of occurrence was negligent conduct of defendant, was not error as directing jury to infer negligence rather than permitting jury to draw such inference, in view of its qualification by other instructions.

10. Trial ⇐122

Where party can call witness who can corroborate or disprove testimony, failure to call such witness is legitimate subject of comment to jury, provided counsel acts in good faith with no desire to make an unwarranted appeal to passion or prejudice.

11. Trial ⇐122

In action for injuries plaintiff bus passenger in defendant's bus received when plaintiff got out of seat and started walking to front end of bus so as to get off of bus at intersection bus was approaching, and bus allegedly came to sudden and violent stop which caused plaintiff to fall down in aisle of bus, wherein bus driver testified he saw another bus passenger fall and that he took name and address of such other passenger, plaintiff's counsel in argument to jury could comment on failure of defendant to produce as a witness such other bus passenger.

12. Trial ⇐122

In action for injuries plaintiff passenger in defendant's bus received when plaintiff got out of seat and started walking to front end of bus so as to get off of bus at intersection bus was approaching, and bus allegedly came to sudden and violent stop which caused plaintiff to fall down in aisle of bus, wherein bus driver testified he saw another bus passenger fall and that he took name and address of such other bus passenger, refusal of trial court to allow counsel for defendant to state his information as to present residence of such other passenger who defendant failed to call as a witness was discretionary.

13. Appeal and Error ⇐648

Instruction in reporter's transcript which read "when all those conditions are found to exist, the inference of negligence to which they give birth will support a verdict for plaintiff, in the event of a showing by defendant which offsets the inference" was properly corrected under evidence by substituting word "absence" for "event", as against contention that instruction as actually given in bus passenger's action against bus company for injuries contained the word "event" rather than the word "absence."

14. Appeal and Error ⇐648

Order of trial court correcting instruction as it appeared in reporter's transcript, so as to reflect what instruction as given actually stated, will not be disturbed on appeal if order is supported by substantial evidence or by reasonable inferences from that evidence. Rules on Appeal, rule 12(c).

Campbell, Hayes & Custer and Daniel M. Feeley, all of San Jose (Edward J. Niland, Santa Clara, of counsel) for appellants.

Edward M. Fellows, Emery J. Delmas, San Jose, for respondent.

PETERS, Presiding Justice.

These two appeals have been consolidated. One (1 Civ. 14,756) is from a judgment in favor of the plaintiff in a negligence action, and the other (1 Civ. 14,959)

from an order after judgment purporting to correct the language of a certain instruction as that instruction appears in the reporter's transcript.

Appeal No. 14,756; Facts:

Dorothy Freitas lives in Santa Clara and works in Milpitas. She is a regular rider of defendant's bus. On September 5, 1947, she was a paying passenger on the bus riding from Milpitas to San Jose. Her husband had got on the bus at Centerville. At Centerville the bus was fifteen minutes late. At Milpitas it was twelve minutes late.

Mr. and Mrs. Freitas customarily got off the bus at First and Santa Clara Streets in San Jose, the intersection at which the accident giving rise to this action occurred. First Street runs north and south; Santa Clara Street runs east and west. The bus was travelling west on Santa Clara Street. The northeast corner of the intersection is occupied by a Roos Bros. store; the northwest corner by a J. C. Penney store. Traffic at the intersection is controlled by traffic lights. It had long been the admitted practice of the drivers of this bus line, when travelling west, to allow passengers to alight either in front of Roos Bros. or in front of the J. C. Penney store, depending upon the traffic signal; that is, if the light was red when the bus arrived, the bus would stop in front of Roos Bros. and allow the passengers to get off, but if the light was green when the bus arrived it would proceed across the intersection and allow the passengers to get off in front of the J. C. Penney store.

Mr and Mrs. Freitas were sitting on a double seat about a third of the way from the front of the bus, with Mrs. Freitas next to the aisle. One of the other passengers signalled the driver to stop at the intersection, and Mrs. Freitas, as the bus approached the intersection, got up and started towards the front of the bus holding on to the aisle seat. She testified that when she was about five rows from the front of the bus it came to a "terrific" stop, which whirled her around and threw her backward; that the jerk threw her down in the aisle; that she bumped her knee on the floor and struck the back of her head on the coin box; that she estimated the speed of the bus just before it stopped at twenty or twenty-five miles per hour; that before she fell she could not see the traffic light at the corner; that when she first arose from her seat the bus was just entering the east crosswalk of the intersection; that she did not notice traffic near the bus; that she was not carrying any bundles and had her purse under her arm.

Most of this testimony was corroborated by Mr. Freitas. He testified that when his wife started forward he got up intending to follow her; that before he got out from between the seats the bus came to a sudden stop; that when he arose, and while the bus was still in motion, he noticed that the controlling traffic light was yellow; that at that moment the bus was at the beginning of the Roos Bros. building, about the length of the bus from the intersection; that the bus came to its sudden stop after it had proceeded into the marked east crosswalk about two feet; that when he saw the yellow light he did not see any automobile in front of the bus, but that when the bus stopped he observed an automobile in front of the bus; that the bus driver stated that he "had to stop cold to avoid hitting the car ahead of me." He estimated the speed of the bus just before it came to a sudden stop at twenty miles per hour. He testified that after his wife got up from her seat the bus speeded up, and that she had only taken a half step forward before the bus stopped.

The driver of the bus was Alvin Still. He testified that as he approached the intersection in question there were three automobiles in front of him; that these cars stopped because the light was red; that when the light changed to green the three automobiles proceeded across the intersection safely; that he proceeded to follow them; that as he came into the crosswalk an automobile made a left-hand turn in front of him and that he had to stop suddenly to avoid hitting that car; that he was then about six feet into the intersection; that just before he stopped he was in low gear and not going over nine miles an hour; that he came to a stop within "inches" of the car that was turning in front

of him. He stated that he had no recollection of the make or age of this car, nor did he remember the number of its occupants. He had no recollection of whether or not he was late or on time at the time of the accident, but did admit arriving late at the depot, after the accident. He testified that the bus in question was new, was equipped with air brakes, and, at a speed of nine miles per hour, could be stopped in six to eight inches.

The driver denied knowledge of the fact that Mrs. Freitas had fallen. He testified that when he stopped, one woman, a Mrs. Bell, did fall near the front exit, but that was the only person he saw fall. Mrs Freitas had testified that she was thrown forward and hit her head on the coin box right beside the driver. Both she and her husband testified that after the accident the driver just sat there, and that Mr. Freitas picked up Mrs. Freitas and Mrs. Bell from the floor. The driver testified that he started to help Mrs. Bell, but that Mr. Freitas got there first. He also testified that he took Mrs. Bell's name and address and tried to ascertain if she was hurt. He stated that neither Mr. nor Mrs. Freitas said a word to him as they got off the bus, and made no complaint. Admittedly neither Mr. nor Mrs. Freitas then reported to the driver that Mrs. Freitas had been hurt, but several days later reported the injuries to the manager of the bus company.

On this appeal no contention is made that the jury award of $6,500 was excessive, so that the extent and nature of the injuries need not be discussed except to say that respondent suffered a contusion on the back of her head, and a neck and back sprain that aggravated an existing arthritic condition. No contention is made that the evidence is not sufficient to sustain the judgment.

Did the Allegations of the Complaint Preclude the Application of the Doctrine of Res Ipsa Loquitur?

The trial court instructed on the doctrine of *res ipsa loquitur*. Appellant argues that the complaint alleges negligence specifically, and that such fact precludes the application of the doctrine. The challenged allegation is as follows: "That at said time and place defendant Doe One so negligently and carelessly drove and operated said Peerless bus that the same was caused suddenly and violently to jerk, bump and stop; that as the proximate result of the negligent and careless operation of said bus by defendant Doe One, plaintiff was violently knocked to the floor of said bus and suffered severe personal injuries * * *"

[1] The California cases are in hopeless conflict as to what constitutes a general and what a specific allegation of negligence for the purpose under discussion, and as to the legal effect of pleading negligence specifically. See cases collected by Prosser, Res Ipsa Loquitur in California, 37 Cal.L.Rev. 183, 214. As a matter of logic it would seem that, if the above allegation be deemed to be specific, the only legal result that would follow would be that the inference of negligence would be limited to the sudden stopping of the bus and the respondent would be precluded from relying upon other acts of inferred negligence. Wills v. Price, 26 Cal.App.2d 338, 79 P.2d 406; Phillips v. Southern California Edison Co., Ltd., 23 Cal.App.2d 222, 72 P.2d 769; Mintzer v. Wilson, 21 Cal.App.2d 85, 68 P.2d 370; Atkinson v. United Railroads of San Francisco, 71 Cal.App. 82, 234 P. 863. Independent of this reasoning, the cases in California clearly establish that pleading negligence in the fashion above set forth does not preclude the plaintiff from relying upon the doctrine. Within the meaning of the cases the above is either a general allegation or a mixture of general and specific. In either event, the doctrine is applicable. Leet v. Union Pac. R. R. Co., 25 Cal.2d 605, 155 P.2d 42, 158 A.L. R. 1008.

Appellant places its main reliance upon the case of Pellegrino v. Los Angeles Transit Lines, 79 Cal.App.2d 40, 179 P.2d 39. There the challenged allegation was as follows, 79 Cal.App.2d at page 43, 179 P.2d at page 41: "the defendant Los Angeles Railway Corporation through and by its agents and servants did carelessly, and unskillfully operate said street car, and not using the proper degree of care and [sic] caused said street car to start up and as a direct and proximate cause of the negli-

gence of the defendants as aforesaid plaintiff sustained an injured shoulder. * *"

The appellate court held that this constituted a specific allegation of negligence and that for that reason the doctrine of *res ipsa loquitur* was not applicable. No hearing in the Supreme Court was requested. The case is contrary to a long line of other cases, and is not supported by the main authority relied upon in the opinion—the case of Davidson v. American Liquid Gas Corp., 32 Cal.App.2d 382, 89 P.2d 1103. In that case an allegation that the defendant negligently allowed gas to escape and ignite was held not to preclude the application of the doctrine. The court stated, 32 Cal.App. 2d at page 386, 89 P.2d at page 1104: "No attempt was made to describe the negligence in detail or charge why or under what circumstances it occurred. Such an allegation is analogous to a complaint of an injury by a guest in an automobile who alleges that the operator so negligently and carelessly drove and operated the car as to strike an obstruction, causing the injury complained of, or of a brick falling from a building upon a passerby below and inflicting damage. We are of the opinion, therefore, that the form of the complaint is not such as to prevent the application of the doctrine."

One of the most recent cases demonstrating that allegations of the type here involved do not prevent the application of the doctrine is Gish v. Los Angeles Ry. Corp., 13 Cal.2d 570, 90 P.2d 792. In that case the challenged allegation was as follows, 13 Cal.2d at page 571, 90 P.2d at page 793: "That on or about the 30th day of July, 1936, while plaintiff, Katherine M. Gish, was riding as a passenger for pay on the 'L' car of said defendant at or near Ninth and Westlake in the City of Los Angeles, County of Los Angeles, State of California, defendant, without regard to the rights of plaintiff, so negligently, carelessly and recklessly suddenly stopped said car with a tremendous jolt and shock as to throw plaintiff, Katherine M. Gish, against the inner portion of said railway car, severely and seriously injuring said plaintiff physicaliy in such a manner as to cause her severe and grevious physical and mental suffering."

After analyzing many decisions as to what are general and specific allegations the court stated, 13 Cal.2d at page 583, 90 P.2d at page 799:

"Again, in the instant case, referring to the language which was employed by the plaintiffs in their allegation of the negligent act of the defendant, to-wit, that the street car was negligently and suddenly stopped 'with a tremendous jolt and shock', it is apparent that plaintiffs merely alleged the *effect* [emphasis by the court] of the act of the defendant in causing the street car to be suddenly stopped. The particular conditions which may have been the inducing cause of the 'tremendous jolt and shock' which occurred to the street car on the sudden stopping thereof were omitted from the allegations that were contained in the complaint. Not a word was used by plaintiffs to describe in detail or otherwise any assumed negligent act of the defendant, or to narrate any facts with reference to the control by it of the street car, which either immediately or ever preceded the happening of the accident. In other words, no attempt in any way was made by plaintiffs to account for the sudden stop, or to explain the cause thereof. All that was disclosed by the facts which were alleged by plaintiffs in their complaint was the result which ensued from some apparently unknown primary cause.

"It becomes manifest, therefore, that notwithstanding the fact that by their pleading both general and special negligence was alleged, plaintiffs should not have been deprived of the benefits to which they were entitled in the application of the doctrine of *res ipsa loquitur.*"

Did the Evidence Offered by Respondent Preclude the Application of the Doctrine of Res Ipsa Loquitur?

Appellant next refers to the evidence produced by respondent of the speed of the bus, that it was late, that its speed was increased just before it was stopped, that just before it stopped the traffic light was yellow, etc., and contends that respondent

thus produced specific proof of the act or acts of negligence which caused the accident. This, so it is urged, prohibited the application of the doctrine of *res ipsa loquitur*.

[2, 3] The California cases on this subject are not as clear as might be desired. See discussion and collection of cases, Prosser, Res Ipsa Loquitur in California, 37 Cal.L.Rev. 183, 212–214. The more recent and better reasoned cases hold that proof of specific acts of negligence does not preclude the application of the doctrine except where the proof dispels the inference of negligence as a matter of law. Except in this limited situation the inference of negligence may be drawn in support of the specific proof. In the instant case no contention is or can be made that the specific proof dispelled the inference as a matter of law.

This problem was discussed at length in Leet v. Union Pac. R. R. Co., 25 Cal.2d 605, 155 P.2d 42, 158 A.L.R. 1008. There the plaintiff had alleged that defendant negligently maintained its tracks and right of way, thereby causing a train travelling thereon to become derailed, and resulting in a collision with the train upon which decedents were riding as members of a train crew. Plaintiff proved an improperly maintained roadbed caused a rail to break, which was followed by derailment. Under these facts, the opinion holds that the plaintiff was still entitled to an instruction on *res ipsa loquitur*. After a long discussion of the problem the court concluded, 25 Cal. 2d at page 622, 155 P.2d at page 51: "Hence, we conclude that evidence of specific acts of negligence does not deprive plaintiff of the benefit of the doctrine, unless the case is one where the inference would be dispelled as a matter of law under the same rules that apply in cases generally." While there were three dissenting justices in the Leet case, no one dissented on the point now under discussion. The holding in that case is controlling here.

Did the Instructions Improperly Assume the Occurrence of an Accident to Respondent?

In its answer appellant denied that Mrs. Freitas had been injured in an accident. The driver did not deny that Mrs. Freitas fell, but he did testify that the only person he saw fall was Mrs. Bell. Neither respondent nor her husband complained to the driver about respondent being injured. There is no doubt that, under the evidence, the testimony of the driver, if believed, would have supported an inference that respondent was not involved in any accident on the bus.

The court instructed on *res ipsa loquitur*. It first instructed: "If, and only in the event, you should find that the plaintiff suffered injury proximately resulting from the accident in question, you will be guided, in determining the issue of liability, by the following instruction:" and then gave the following: "From the happening of the accident involved in this case, as established by the evidence, there arises an inference * * *"

Appellant argues that, by this last quoted instruction, the trial court did not submit to the jury the question of whether or not the accident to respondent occurred at all, but improperly assumed the existence of such an accident. It is argued that the court should have given an instruction to the effect that only if the jury found that an accident had occurred to plaintiff should it indulge in the inference, and appellant quotes the type of instruction that it believes should have been given on the subject.

[4] While the instructions complained of could undoubtedly have been clearer, the difficulty is that appellant failed to request that the instruction he now claims it was error to omit should have been given to the jury. In the absence of a request for clarification, appellant is in no position to complain. See cases collected and commented upon 24 Cal.Jur. p. 796, § 74.

Did the Court give Proper Instructions on the Doctrine of Res Ipsa Loquitur?

[5] Appellant next challenges the instructions on the ground that they told the jury that it could draw the inference of negligence from the mere fact that an injury occurred to respondent while she was on a vehicle operated by appellant. It is undoubtedly the law that mere proof of

injury to a plaintiff while riding on defendant's train or bus does not alone give rise to the inference, and Mudrick v. Market Street Ry. Co., 11 Cal.2d 724, 81 P.2d 950, 118 A.L.R. 533, so held. But here the court did not give the broad instruction which, if given, would have been error. After giving the instructions already quoted the court instructed that those instructions were based on a special doctrine which may be applied "under special circumstances," those circumstances being: "First: The fact that some instrumentality, such as the bus, by which injury to the plaintiff was proximately caused, was in the possession and under the exclusive control of the defendant at the time the cause of injury was set in motion, it appearing on the face of the event that the injury was caused by some act or omission incident to defendant's management."

This instruction completely answers the contention of appellant. It is quite similar to the instruction held to be proper in the Mudrick case, supra. In other words, while appellant's statement of the law is undoubtedly correct, the instructions simply do not state what it claims they state.

[6] It is also contended that the instructions on *res ipsa loquitur* should have stated that the doctrine only applies if the jury should first find that the plaintiff had not been guilty of contributory negligence. The jury was instructed clearly and properly on the doctrine of contributory negligence. There is no requirement that the instructions on *res ipsa loquitur* must, within themselves, be qualified by a reference to the doctrine of contributory negligence. The instructions on contributory negligence clearly and correctly expressed that doctrine to the jury.

Appellant also argues that the following instruction directed the jury to draw the inference of negligence rather than permitting it to draw it: "From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that it did, in fact, exercise the utmost care and diligence or that the accident occurred without being proximately caused by any failure of duty on its part."

[7, 8] Of course the weight to be given the inference of negligence under the doctrine is for the jury. What weight should be given differs according to the facts of each case and the relationship of the parties. See Prosser, Res Ipsa Loquitur in California, 37 Cal.L.Rev. 183, 231. We are dealing with the relationship of carrier and passenger where the carrier owes the highest duty of care towards its passengers. In such cases, even if the burden of proof to disprove negligence is not shifted to the carrier, certainly the inference of negligence is much stronger than in cases where the relationship of carrier and passenger does not exist.

[9] The above instruction is not worded as clearly as might be desired. The words "there arises an inference" might be interpreted to mean that the inference is compulsory and that the jury had no choice but to accept it. But that construction is not the only reasonable construction of the words used. The jury was correctly instructed on the burden of proof, and correctly told that the defendant could overcome the inference. Under the circumstances, while the instruction is not the best that could be given, the giving of it is not error, at least where qualified by other instructions.

Was there Prejudicial Misconduct by Counsel for Respondent?

The last major point raised by appellant on the main appeal is that counsel for respondent in his argument to the jury insinuated that appellant had wilfully suppressed evidence. It is urged that these remarks constituted reversible and prejudicial error.

During the course of his argument counsel for respondent pointed out that the

driver of the bus admitted that he saw Mrs. Bell fall and that he had taken her name and address. Counsel then pointed out that Mrs. Bell had not been produced by appellant, or her absence explained, and then stated that the jury could infer that, had she been produced, she would have corroborated the story told by respondent and her husband. He elaborated on this theme at some length. No objection was made to this portion of the argument when it was made, but at the conclusion of the argument the following occurred:

"Mr. Hayes: If your Honor please, I want to assign Mr. Delmas' remarks about Mrs. Bell as prejudicial misconduct. There is no evidence that Mrs. Bell was available to us. She wasn't in fact available.

"Mr. Delmas: I'm going to object to counsel testifying, and I ask that remark be stricken from the record. There is no such evidence of that, and if they could have produced it, they should have produced it at the proper time.

"Mr. Hayes: Your Honor, there is no evidence that Mrs. Bell was available here.

"Mr. Delmas: That is up to them to prove since they had it within their power to present it.

"Mr. Hayes: There is no evidence that we had it within our power.

"The Court: Counsel, I think that is a matter that ought to be heard out of the presence of the Jury. I'll take a short recess and listen."

In chambers, counsel argued over the propriety of the challenged remarks and counsel for appellant stated that Mrs. Bell was in the Philippine Islands, and requested permission to make a statement to the jury as to where Mrs. Bell was then living. This request, opposed by respondent, was denied by the court, the judge stating that he would have granted it had it been made before the case was closed. The court thereupon denied the motion based upon the claimed misconduct.

The counsel then returned to the courtroom and counsel for appellant proceeded to argue to the jury. In spite of the court's ruling in chambers denying permission to counsel for appellant to explain where he had been informed Mrs. Bell was, counsel made two references to the subject. They are as follows:

"The driver knew of only one person being hurt, Mrs. Bell. At that time three—what is it, about three and a half years ago from today he took her name and address, he hadn't seen her since."

"Now, the driver got the name of Mrs. Bell in September 5, 1947, which is two and a half years ago, a little bit more—not three and a half. He got her name and address. Now, much to do has been made about that, and it has been said that we had her name and address three and a half years ago. Why don't we produce her here in Court today? One very good reason: We can't find her."

During the course of the arguments no request to admonish the jury to disregard the remarks or to strike them was made, but in its instructions the court stated: "You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts."

[10, 11] Appellant makes much of the above incidents and contends that such argument to the jury was erroneous and prejudicial. It must be remembered that it was the driver of appellant's bus that testified that he saw Mrs. Bell fall, and that he took her name and address. During the trial appellant made no explanation of why Mrs. Bell was not produced. Under such circumstances, it would seem to be a reasonable and permissible inference that Mrs. Bell was not produced because her testimony would have been adverse. In fact, under such circumstances such is not only a possible and reasonable inference but it is made, in this state, a statutory presumption. Section 1963, subd. 5, Code Civ.Proc., provides that it is a rebuttable presumption "That evidence wilfully suppressed would be adverse if produced". See, also, § 1963, subd. 6, Code Civ.Proc. Thus it was proper for respondent's counsel to comment on the appellant's failure to produce Mrs. Bell in his argument to the jury. The proper rule, supported by the citation of many cases, is stated as follows in 10 Cal.Jur. p.

781, § 87: "The failure of a party to call a witness may, under some circumstances, give rise to adverse presumptions. And it is within the legitimate range of argument for an attorney, in his closing speech to the jury, to comment upon the failure of the opposing party to produce certain persons as witnesses." See, also, Leenders v. California Hawaiian Sugar Refining Corp., 59 Cal.App.2d 752, 139 P.2d 987; In re Estate of Moore, 65 Cal.App. 29, 223 P. 73; Dahl v. Spotts, 128 Cal.App.133, 16 P.2d 774; Simpson v. Bergmann, 125 Cal.App. 1, 13 P.2d 531; Guckstein v. Lipsett, 93 Cal.App.2d 391, 209 P.2d 98. The same rule is stated as follows in 24 Cal.Jur. p. 745, § 28: "Where it is in the power of a party to call a witness who can corroborate or disprove testimony, the failure to call such witness is a legitimate subject of comment to the jury, providing counsel acts in good faith with no desire to make an unwarranted appeal to passion or prejudice." See, also, Winkie v. Turlock Irr. Dist., 24 Cal.App.2d 1, 74 P.2d 302; 2 Wigmore on Evidence (3rd ed.), p. 166, § 286.

[12] The court likewise acted within its discretionary powers in refusing to allow counsel for appellant to state as a fact what his information was as to the present residence of Mrs. Bell. No motion to reopen was made. If counsel had such evidence it should have been properly introduced during the course of the trial.

The Order Made After Judgment Correcting the Language of an Instruction—Appeal No. 14,959.

After the appeal from the judgment had been perfected, appellant requested respondent to stipulate that certain instructions had been given at her request. Respondent refused so to stipulate unless appellant would stipulate that the language used in a certain instruction as it appears in the reporter's transcript should be changed to reflect what the judge actually stated. Appellant refused so to stipulate, and filed a motion in this court to augment the record to show at whose request the various instructions had been given.

In the meantime, and some six months after the appeal had been perfected, respondent moved the trial court to correct the language of the instruction in question "to conform with the instruction as actually given by the Court." This motion was supported by affidavits, was then heard by the same judge that had tried the case, evidence was taken, argument had, and the trial court entered its order granting the motion "as prayed for, and ordered that the transcript be corrected accordingly." Thereupon respondent moved this court to augment the record on appeal in accordance with the order of the trial court.

The two motions to augment the record were heard by this court on its January, 1951, calendar. By stipulation appellant's motion was granted. On respondent's motion it was argued by appellant that the perfecting of the appeal deprived the trial court of the power to correct the transcript, and that therefore the order correcting the transcript was void. Although it is quite possible that a trial court possesses the power to correct a transcript and make it speak the truth even though an appeal has been taken, out of an abundance of caution this court, acting under Rule 12(c), Rules on Appeal, ordered the entire record on appeal returned to the trial court with instructions to the trial judge to ascertain whether the challenged instruction had been correctly transcribed. On February 1, 1951, this matter came before the trial judge, who was the same judge that had tried the case and who had made the original order of correction. On stipulation the parties agreed to submit the matter on the record of the prior hearing. The court thereupon entered its order correcting the challenged word by substituting another word "as the word actually used and spoken by the trial court in instructing the jury." It is from this order that the present appeal has been taken.

The change in the instruction in question was to change the word "event" therein appearing to the word "absence." As it originally appeared in the reporter's transcript the instruction read: "When all these conditions are found to have existed, the inference of negligence to which they give birth will support a verdict for the plaintiff, in the *event* of a showing by the

defendant which offsets the inference." The challenged word has been underlined. As it reads above the instruction is confusing, incorrect and meaningless. With the word "absence" substituted, the instruction is clear and correct. Respondent contended before the trial court that the transcription by the reporter was in error and that the instruction as actually given contained the word "absence."

There was considerable evidence before the trial court on this issue. The reporter at the trial was a stenotype operator. He was not available at the hearing of the motion to correct the transcript, but it was stipulated that, if present, he would have testified that he accurately reported all the instructions given, that he had reread his notes of the trial, that they correctly presented what the trial judge stated, and that the word in his notes was "event" and not "absence." His partner reporters presented the notes and demonstrated that the word appearing therein was "event." They admitted that which is somewhat obvious, namely, that reporters sometimes make mistakes and sometimes "mishear" a word.

[13] There was considerable evidence in support of the finding of the trial court that the word used by it was "absence." First, there is the fact that the trial judge who gave the instructions made the order correcting the transcript to make it reflect what he found to be what he actually said. Although the judge was not called as a witness at the hearing, his recollection, as evidenced by the order, is entitled to some weight. In addition, one of the counsel for respondent testified that he followed the instructions as given, carefully checking them with the proposed instructions of defendant and plaintiff, copies of which were before him; that he thus checked this instruction; that had the trial court used the word "event" it would have registered in his mind, and that it was his best recollection, to a moral certainty, that the word "event" was not used, and that the word "absence" was used. It was stipulated that co-counsel, if called, would have testified similarly. The court clerk, a law student, testified in substantially similar vein.

[14] Appellant concedes that this court under Rule 12(c), is authorized to submit differences of the parties over the correctness of the record to the trial court, but contends that the trial court acted arbitrarily in making the order because, so it is claimed, the evidence does not support it. Of course, if that order is supported by any substantial evidence or by reasonable inferences from that evidence, it cannot and should not be disturbed by an appellate court. See discussion and cases collected 2 Cal.Jur. p. 939, § 553. It is quite apparent that the evidence above summarized amply supports the questioned order.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.



108 Cal.App.2d 784

GLENN et al. v. COOK et al.

Civ. 4407.

District Court of Appeal, Fourth District, California.

Jan. 23, 1952.

As Modified on Denial of Rehearing Feb. 18, 1952.

Hearing Denied March 20, 1952.

Action to quiet title by Grady Glenn and Ethel W. Glenn against Earl J. Cook, Irene G. Cook, Addie M. Cook, and others. The Superior Court of Orange County, Kenneth E. Morrison, J., rendered judgment in favor of the plaintiffs, and the defendants appealed. The District Court of Appeal, Barnard, P. J., held that the evidence relating to location of essential points was sufficient to permit location of boundary line.

Affirmed.

1. Boundaries ⇨37(3)

Evidence relating to location of essential points was sufficient to permit location of boundary line.

2. Adverse Possession ⇐114(1)

Evidence was insufficient to show that defendants acquired title to disputed strip by adverse possession.

3. Appeal and Error ⇐1048(3)

Sustaining objection to question asked of witness was not prejudicial where the question was purely argumentative and in practical effect was one which the court was required to determine for itself from all of the evidence.

Harvey, Rimel & Johnston, Santa Ana, for appellants.

Forgy, Reinhaus & Forgy, Santa Ana, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title to a part of the easterly portion of lots 6 and 7 of the Rancho Canada de los Alisos, as shown on a recorded map. The property is in a mountainous area of Orange County, and the action was brought for the purpose of settling the easterly boundary line of plaintiffs' property, which is also the westerly line of defendants' property. The southern portion of that line would also be the westerly border of the northerly portion of Rancho Trabuco. The effect of the judgment appealed from was to fix this boundary line, and to quiet the title of the plaintiffs to a strip of land about 3600 feet long and varying in width from a few feet to about 350 feet.

The Alisos Rancho was first surveyed and platted by John C. Hays in 1858. His survey was approved by the land office and in 1871 a patent based on that map was issued to Jose Serrano. In 1874, a part of the line in dispute was again surveyed by William Minto, a government surveyor. In 1876, the Alisos Rancho was subdivided into lots through a recorded map prepared by Baldwin & Bridger at the request of Serrano. Another survey, material to the line in dispute, was made by William Minto in 1882.

The plaintiffs purchased their property in 1945 from the daughter of James McFadden, who acquired it in 1881. The defendants inherited the southerly part of their property from their father, who first acquired it in 1884, and acquired the northerly part by purchase in 1919.

In the fall of 1922, W. W. Hoy made a survey for the defendants Earl J. Cook and his sister Addie M. Cook, which they accepted and used for the purpose of dividing the old Cook ranch between them. In the same year Hoy made another survey for James McFadden. In 1946, the defendants sold a portion of their property to one West, and Hoy and his son were again employed to make a survey and to prepare the description used in conveying that property. Later, in 1946, Hoy made another survey for the plaintiffs in connection with this litigation.

In their answer the defendants pleaded, among other things, that corners T-6 of Rancho Trabuco and A-10 of the Alisos Rancho had been adopted as a common corner; that plaintiffs' title was derived through a conveyance based on the recorded subdivision map prepared by Baldwin & Bridger in 1876; and that plaintiffs had no title to any land east of a line projecting north at a certain angle from corner T-6 of Rancho Trabuco.

The Hays map of 1858 and the Minto maps of 1874 and 1882, with the field notes for all three, were introduced in evidence. The Baldwin & Bridger map of 1876 was introduced in evidence, but the field notes in connection therewith could not be found. The Hoy maps were introduced in evidence and Hoy and his son testified with respect thereto, an with respect to the relation of their survey findings to the earlier surveys. A number of old time residents testified concerning various facts and common reputation as to this boundary, running back as far as 1880 or earlier. The trial judge spent an entire day in viewing the premises, accompanied by the clerk, the parties, counsel for both sides, and at least one surveyor. The defendants employed another surveyor to examine certain markers and to search for others, and he testi-

fied. The defendant Earl Cook testified that he did not have a survey made for the purposes of this action because he was told by the county surveyor "You can spend your whole ranch on the survey and you won't know any more when you finish than when you started." There were many conflicts in the evidence, and some inconsistencies between the various surveys, which seems natural in view of the rough nature of the country, changes wrought by the years, and an undisputed difference in the accuracy of the instruments used in earlier years. The respondents agree with appellants' statement that "No absolutely accurate survey ever was or ever will be made."

The defendants have appealed from the judgment, their main contention being that the controlling finding, fixing the easterly boundary line of plaintiffs' property, is not supported by the evidence. It is argued that in attempting to find the line of the Alisos Rancho the Hoys did not follow Hays' survey of 1858, but used the Minto notes, and that certain stones found by the Hoys varied in size from those described by Minto; that the Hoys' measurements in the vicinity of T-6 and A-10 were not the same in 1946 as in 1922, and are not the same as those given by either Hays or Minto; that while Hays and Minto placed A-10 330 feet northerly of T-6, Hoy fixed this distance at 370 feet in 1922 and 383 feet in 1946; that the sycamore tree marked A-11 by Hays in 1858 and by Minto in 1882 was not in the same spot as that selected by Hoy for this point; that there were various inconsistencies between the Hays and Minto surveys and the later Hoy surveys; and that Hoy improperly used the "proportional" method in locating one quarter section corner.

The appellants state that the basic issue is the location of corners A-10 and A-11 according to the Baldwin & Bridger subdivision map. It is then contended that respondents' title stems from that subdivision map; that since the field notes of Baldwin & Bridger cannot be found this map constitutes the only basis of the respondents' title, and must be taken as controlling; that this map shows corners T-6 and A-10 as being in the same place; and that this necessarily places the easterly boundary line of the Alisos Rancho about 300 feet west of that found by the court, thus entitling the appellants to most or all of the disputed strip awarded to the respondents. It is also argued that point A-11 was not satisfactorily established since the fallen sycamore tree found near that point was not shown to be the same tree as that referred to in the surveys of Hays and Minto.

Point T-6 is the northwest corner of Rancho Trabuco. While the appellants concede that both Hays and Minto put points A-10 and T-6 five chains apart (some 330 feet), they explain the fact that the Baldwin & Bridger map puts these points together by saying: "The probable reason is that the northerly boundary of the Trabuco Rancho was, at some time unknown but before 1876, pushed northward to what was supposed to be the former location of A-10". There is no evidence of any change in the northerly boundary of the Trabuco Rancho, and Minto, in 1882, still placed these points five chains apart, placing a sandstone marker at each point. Moreover, if T-6 had been pushed northward, A-10 would still correspond with the court's findings.

The appellants state that the length of Course 9, which leads to point A-10, is identical on the Hays map and on the Baldwin & Bridger subdivision map, being 68.50 chains. The Hays map, which was used in the patent, shows 63.50 chains to point T-6 and goes on another five chains to point A-10, all a part of Course 9. If point A-10 was intended to be moved back to point T-6 by the subdivision map, the length of Course 9 is not identical with that course in the Hays map. Hoy testified that if anyone tried to follow the course and bearings given on that subdivision map he would not come within 1000 feet of point T-6, and that this 1000 feet could be in almost any direction.

The subdivision map (Exhibit B) shows a large dot marked "A.N. 10. T.N. 6". The map is scaled to one mile to 1¾ths inches and this dot would scale to nearly 300 feet, which is somewhere near the distance between these points given by Hays

and Minto. Baldwin & Bridger were subdividing the Alisos Rancho at the request of Serrano, who had recently received a patent, on which A-10 was the most easterly point and very important. T-6 was a point on the survey of the Trabuco Rancho to the east, and it seems more probable that Baldwin & Bridger were mainly concerned with the location of A-10, and only incidently with that of T-6. Point A-10 was farther east than T-6 and somewhat north of the northerly boundary of the Trabuco Rancho. In subdividing the Alisos Rancho Baldwin & Bridger clearly intended to go to A-10, as shown on the Hays map followed in the patent, and it is reasonable to believe that they must have intended to subdivide that ranch as it was patented and not leave a narrow strip on the east. This appears more reasonable than to suppose they intended to indicate that point A-10 had been moved westerly some 300 feet in some unknown manner. The Baldwin & Bridger map, without any supporting field notes is the only evidence that points A-10 and T-6 might be considered as one point. The great weight of the evidence is that they are not, and never were, at the same point and it may reasonably be inferred from the evidence, as a whole, that the subdivision map was based upon the real location of point A-10, and not upon any supposition that it should be considered as having been moved down to T-6.

The subdivision map clearly shows that Baldwin & Bridger went on beyond T-6 and used the points A-10 and A-11 named in the previous government surveys which had been fixed by Hays and Minto. They show a sycamore tree as marking A-11, which is the other end of Course 10. This sycamore tree, marked A-11, is referred to by Hays in 1858 and by Minto in 1882 as marking A-11. In the Hoy survey in 1946, and at the time of the trial, a sycamore tree of the same size was found fallen across a creek channel. No old markings were found on it, so far as could be observed, but there is ample evidence that the place where it had stood was approximately where the tree marked by Hays and Minto had been. Hoy, after checking on the position from other determinable positions, fixed A-11 near the point where this fallen sycamore had stood and set an iron stake, which was accepted by the court as A-11.

[1] The Baldwin & Bridger map was incomplete with respect to essential courses and distances, and regardless of what it purports to show it was necessary that it be interpreted with respect to how it lay on the ground. It referred to points fixed in the Hays map of 1858, adopted for the purpose of the patent, which points were confirmed by the other survey made by Minto in 1882. It was necessary to use these earlier surveys and maps in interpreting the subdivision map, in order to ascertain the easterly boundary of respondents' property as it had been conveyed to them. This was done with the added assistance of the recent surveys and the testimony of the surveyors who had made them. There was a great deal of technical testimony by the Hoys and another surveyor produced by the appellants. The evidence, as a whole, rather clearly locates essential points and explains how and why it was necessary to use the best available means to determine the location of some monuments which could not be found. While inconsistencies and conflicts appear in the evidence the official surveys and records, with the testimony of the surveyors, indicate that the boundary line in question, as located by the court, is approximately correct and is as nearly correct as is possible under existing conditions. The court's view of the premises, and its assistance to the court in interpreting the evidence, is an added factor in support of the judgment. The testimony of the old settlers, while not without conflict, insofar as it has any effect at all tends to support the conclusion of the court as to the true location of this boundary. While the evidence is conflicting, in many respects, it sufficiently supports the findings complained of.

[2, 3] Most of the other points raised depend upon the findings already considered, and require no further discussion. Some claim is made that the appellants had acquired title to the disputed strip by adverse possession. The court found against this contention and the evidence supports

that finding. The only error assigned in connection with the admission of evidence is the sustaining of an objection to a question asked of W. W. Hoy on cross-examination. The question was purely argumentative, and in practical effect was one which the court was required to determine for itself from all of the evidence. No possible prejudice appears in this connection.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



108 Cal.App.2d 713

In re HASTINGS' ESTATE.

In re HASTINGS et al.

Civ. No. 14899.

District Court of Appeal, First District, Division 2, California.

Jan. 16, 1952.

Rehearing Denied Feb. 15, 1952.

Hearing Denied March 13, 1952.

In the matter of the estate of Harry C. Hastings, deceased. From an order of the Superior Court, City and County of San Francisco, Thomas M. Foley, J., denying a motion by Harry C. Hastings, Jr., as administrator of the estate, to vacate an order awarding a specified sum to Samuel M. Samter, William H. MacKay, and Helen B. Treat, widow of A. J. Treat, deceased, as attorneys' fees for effecting a compromise of conflicting claims of the estate and others against a trust fund held by a bank in escrow, and to order the administrator to pay half of the sum so awarded to Samter, and directing the administrator to deposit the amount payable to the estate under the compromise agreement in the bank and pay therefrom one-third of such sum to each claimant thereof, the administrator and Samter appealed. The District Court of Appeal, Nourse, P. J., held that a previous order of the Superior Court, approving a contingent claim of A. J. Treat and Samter to a lien of 40 per cent of so much of the money in escrow as might be recovered for the estate, was void as for payment of an indefinite and uncertain amount, not a fixed amount as required by the statute, and was not binding on the court because the attorneys' original contingent fee contract was terminated by operation of law on Treat's death, so that the court was free to make a just and reasonable distribution of the attorneys' fee allowed.

Order affirmed.

1. Executors and Administrators ⇐237

An order of Superior Court, approving attorneys' claim against decedent's estate to lien of 40 per cent of so much of trust fund held by bank in escrow as might be recovered for estate, was void as for payment of indefinite and uncertain amount, not fixed amount as required by Probate Code. Probate Code. §§ 910, 911.

2. Executors and Administrators ⇐237

Under probate code sections, requiring that administrator's attorneys be allowed from decedent's estate, as fees for conducting ordinary probate proceedings, same amounts allowed administrators, and such further amount as court deems reasonable for extraordinary services and that court order administrator to pay his attorney from estate such compensation for services rendered as court deems proper, allowance for attorneys' fees should be definite, fixed and certain cash amount, not percentage of value of assets recovered for estate. Probate Code, §§ 910, 911.

3. Executors and Administrators ⇐236

The probate court may not approve a contingent fee contract, found contrary to public policy, between administrator of decedent's estate and attorney, whether on attorney's or administrator's petition. Probate Code, §§ 910, 911.

4. Attorney and Client ⇐134(2)
Executors and Administrators ⇐237

A contract between claimant of share of trust fund, held by bank in escrow, and two attorneys for payment of fee of 40 per cent of any recovery effected, was terminated by operation of law on death of one of attorneys, so that Superior Court was free to disregard its order approving attorneys' claim against deceased client's estate to lien of 40 per cent of portion of fund recovered for estate and to make just and reasonable distribution of attorneys' fees allowed, whether order was void because

of its allowance of indefinite and uncertain amount or because contract was terminated by operation of law. Probate Code, §§ 910, 911.

5. Appeal and Error ⇐762

Appellants, informally tendering disputed fact issue by argument in their reply brief, cannot contend that they are not bound by trial court's finding on such issue.

6. Executors and Administrators ⇐256(6)

An administrator and his attorney, petitioning superior court for division of fee allowed such attorney, his associate attorney, and deceased attorney's widow for effecting compromise of decedent's and others' conflicting claims to trust fund held by bank in escrow, and requesting informal hearing, oral application for division, and submission of issue on unsworn statements, had no standing to complain, on appeal from court's order directing different division of fee among attorneys, that there was no petition on which to base such order and that hearings were informal.

Samuel M. Samter, San Francisco, J. Delmore Lederman, San Anselmo, of counsel, for appellants.

William H. MacKay, San Francisco, for respondents.

NOURSE, Presiding Justice.

On January 18, 1943, Harry C. Hastings employed A. J. Treat as his attorney to represent him in relation to a trust that had been set up by his grandfather and which was then the subject of litigation in an action pending in the superior court in San Francisco. Treat associated appellant Samter as co-counsel in the matter, with the approval and ratification of Hastings, on a contingent basis, counsel to receive 40% of any recovery effected from the trust. The sum of $73,827.23 was then on deposit in escrow in a bank to await the judicial determination of the conflicting claims of Hastings and other claimants. On October 7, 1947, Harry C. Hastings died. His son, Harry C. Hastings Jr., hereinafter referred to as Hastings Junior, was appointed administrator with the will annexed of his father's estate.

Attorneys Treat and Samter filed a contingent claim of creditors in the estate of Harry C. Hastings, claiming a lien of 40% of that part of the money in escrow that might be recovered for the estate of Hastings. On July 20, 1948, Hastings Junior petitioned the superior court to accept this contingent claim of creditors Treat and Samter and to continue their employment in the matter. The remaining sole heirs of Harry C. Hastings consented to the approval of the claim, and on August 10, 1948, the court issued its order approving the claim and the continued employment of attorneys Treat and Samter. Apparently no action has ever been taken to have this order modified, amended, vacated or set aside.

Treat died before he and Samter had made any substantial progress toward the recovery of any part of the escrowed fund. After Treat's death, Samter, with the consent and approval of Hastings Junior, requested the respondent MacKay to become associated with him as attorney for Hastings Junior in the attempt to recover for the Hastings' estate any interest in this fund. Samter and MacKay further agreed that any contingent fee recovered by them as a result of their efforts on behalf of the Hastings estate should be divided in three equal shares, one each to Helen B. Treat, Samter and MacKay. Helen B. Treat is the widow and sole heir of the attorney A. J. Treat.

As a result of the cumulative efforts of Treat, Samter and MacKay the claims against the fund in escrow were compromised with approval of the superior court, the estate of Hastings to receive by the terms of the compromise the sum of $7500. In addition to this order granting leave to Hastings Junior to compromise the claim, the court on August 19, 1950, ordered him to pay to Samter, MacKay and Mrs. Treat $3000 in full discharge of the estate's obligation for attorneys' fees in the litigation with the other parties to the compromise.

Hastings Junior moved the superior court to vacate that portion of the order of

August 19, 1950, which awarded the $3000 to Samter, MacKay and Mrs. Treat, and petitioned the court to order him to pay the sum of $1500 to Samter as Samter's share of the $3000 fee, but the court, after hearing the oral arguments of counsel and receiving their unsworn statements, denied the motion and ordered Hastings Junior to deposit the $7500 in the bank and immediately pay therefrom $1000 each to Samter, MacKay and Mrs. Treat. Hastings Junior and Samter are appealing from this order.

Appellants contend only that the superior court had no jurisdiction to make the order appealed from because:

1. The court had no jurisdiction to change a confirmed contingent contract between Treat and Samter as attorneys and Harry C. Hastings and make an entirely new and different contract with other parties;

2. There was no petition, complaint or pleading filed upon which the order appealed from could have been based;

3. There was no petition filed herein to set aside the order approving the contingent claim for attorneys' fees filed by Treat and Samter in this estate and said order approving said contingent claim remains in full force and effect. It is a quasi judgment against Hastings estate in favor of Treat and Samter;

4. There was no evidence under oath taken by the court at the hearing when the order appealed from was made.

The substance of appellants' first and third arguments is that the court was bound to award attorneys' fees in the manner provided for in the court's order of August 10, 1948, in the absence of some new order modifying that originally made. They argue that the order of August 10, 1948, was in the nature of a quasi judgment. In support of this line of reasoning appellants have cited Tomsky v. Superior Court, 131 Cal. 620, 63 P.1020. In that case, decided in 1901, an executrix had paid her attorney a retainer fee, but the probate court allowed as an expense to the executrix only a part of that fee and ordered the attorney to repay the balance. On appeal the Supreme Court held that the attorney could not be required to repay a fee received under a valid contract with the executrix. The effect of this decision was not to increase the charge upon the estate, but only to cause the executrix to be personally liable under her contract with the attorney. In the present case the only effect of the order appealed from is to determine the charge upon the estate and the division of the fee allowed, hence the Tomsky case is no authority for appellants' position.

Section 910 of the Probate Code provides: "Attorneys for executors and administrators shall be allowed out of the estate, as fees for conducting the ordinary probate proceedings, the same amounts as are allowed * * * to executors and administrators; and such further amount as the court may deem just and reasonable for extraordinary services." Section 911 of the Probate Code provides: "Any attorney who who has rendered services to an executor or administrator, at any time after six months from the issuance of letters testamentary or of administration, * * * may apply to the court for an allowance upon his fees; and on the hearing the court shall make an order requiring the executor or administrator to pay such attorney out of the estate such compensation, on account of services rendered up to that time, as the court shall deem proper * * *."

[1, 2] The order of August 10, 1948, was for the payment of an indefinite and uncertain amount, not a fixed amount as required by the Probate Code, and it was therefore void. In Estate of Rowe, 66 Cal. App.2d 594, 152 P.2d 765, 768, the court quoting from Estate of McDonald, 37 Cal. App.2d 521, 99 P.2d 1115, said: "It seems obvious from the wording of these sections of the Probate Code [referring to sections 910 and 911 above mentioned], however, that the allowance for attorneys' fees to be made by the court under the code provisions should be a definite, fixed and certain cash allowance, and not a percentage of the value of assets recovered or to be recovered for the estate, particularly of assets which are not yet finally a part of the estate and which might not become or remain a part of the estate, which was the situation in the instant case at the time the

order was made. The order appealed from did not actually allow or fix a fee or an amount of compensation as provided in sections 910 and 911 of the Probate Code, but rather adopted a formula or gauge or measure for determining the amount of the fee to be allowed at some future time * * *."

As pointed out by the court in the Rowe case, the McDonald case involved an order regarding attorneys' fees that in substance entitled the attorneys to 35% of the net value of assets recovered for the estate.

Again in Estate of Rowe, the court, 66 Cal.App.2d at page 605, 152 P.2d at page 770 said: "The authority of the court to allow fees for extraordinary services was derived as above shown, from sections 910 and 911 of the Probate Code. In allowing or 'establishing' such fees upon a percentage basis, rather than fixing such fees in a definite 'amount' or sum of money, as required by said section 910, the court acted in excess of its authority. The order of August 10, 1932, was void. The court therefore, in considering the petition of respondent, filed June 14, 1943, whereby respondent sought an interpretation of the order of August 10, 1932, was not bound by said order of August 10, 1932, insofar as the fees for extraordinary legal services were concerned."

In both the Rowe and McDonald cases the court made the order awarding fees on a contingent basis upon a petition of the attorneys, and in the Rowe case the court by way of dictum said, 66 Cal.App.2d at page 603, 152 P.2d at page 770: "Our opinion is not to be construed as holding that an executor or administrator may not, with the approval of the court, make a contract upon a contingent fee basis for legal services to be rendered in the future. That question is not involved in the present appeal."

[3] On principle there seems no reason why the probate court should be allowed, upon petition of the executor to approve a contingent fee contract between the executor and an attorney, while the same court may not make such an order upon petition of the attorney. Such contracts, having been found contra to public policy in the one case, should be so found in the other since the same considerations are present in each.

[4] In appellants' reply brief they have introduced a new argument that seems to be inconsistent with the position taken in the opening brief. In their opening brief they argue that Samter fully performed the original contract and is therefore entitled to recover his share of the fee allowed by the terms of that contract whereas, in their closing brief, they argue that the contract is no longer of any force and effect. They point out that the original contract, which respondents argue is void, was terminated by operation of law upon the death of Treat. Baxter v. Billings, 8 Cir., 83 F. 790, cited by appellants in their closing brief, supports this theory, and we have found no California case in point. That being the case, it seems even more certain that the court was free to disregard the order of August 10, 1948, whether because it was void or because the contract was terminated by operation of law.

[5] The substance of this second point in the reply brief is that Samter was reemployed by Hastings Junior after Treat's death, but that MacKay was employed by Samter merely in his, Samter's, individual capacity. The trial court found otherwise, deciding that MacKay was employed by and with the consent of Hastings Junior. The question was disputed and, since appellants tendered the issue in the informal manner herein noted, they cannot now contend that they are not bound by a finding on a disputed question of fact.

Since the court was not bound by the terms of the Treat-Samter contract either because the court order of August 10, 1948, was void or because the contract was terminated by operation of law, the court was free under section 910 of the Probate Code to make a just and reasonable distribution of the total attorneys' fee allowed. This has been done.

[6] Appellants have cited no authority for their second and fourth points that there was no petition upon which the order could have been based and that the hear-

ings were informal. They are foreclosed by the record. Appellants themselves petitioned the court for a division of the $3000 fee. They requested that the hearings be informal, that the application for division be oral, and that the issue be submitted on unsworn statements. They have, therefore, no standing to complain that the court followed the requested procedure. In Estate of De Barry, 43 Cal.App.2d 715 at page 731, 111 P.2d 728 at page 736, the court, when faced with a similar issue, said: "But it could not be contended that Coyne [Samter's counterpart] was the victim of a summary proceeding. Far from it; he created the issues by his own pleading and he submitted his person to the jurisdiction of the court by appearing, pleading, giving his testimony in full and by demanding judgment in his favor. He was thereby given his day in court and had the privilege of presenting all evidence available to him to establish the affirmative of his contentions. At the trial all of the facts surrounding his services and the moneys deducted by him from the funds of the estate were fully developed. He thus nominated the probate court to determine the validity and merit of his objections to the accounts. That court having ruled upon them, appellant is in no position now to question the jurisdiction of the probate court to adjudicate the issue."

Order affirmed.

GOODELL, J., and JONES, J., pro tem., concur.



108 Cal.App.2d 705

MANNING v. WATSON et al.

Civ. 14851.

District Court of Appeal, First District, Division 2, California.

Jan. 16, 1952.

Hearing Denied March 13, 1952.

Joseph William Ellis Manning brought a mandamus proceeding to require D. D. Watson, the real estate commissioner of the state of California, to annul a decision and order suspending petitioner's license as a real estate broker. The Superior Court, City and County of San Francisco, Theresa Meikle, J., rendered a judgment favoring petitioner, and respondent appealed. The District Court of Appeal, Nourse, P. J., held that the evidence before the hearing officer had not supported the suspension order.

Affirmed.

1. Brokers ⇐3

Where accusation, charging violation of business and professions code subsection regarding conduct constituting fraud or dishonest dealing and of code subsection regarding conduct which would have warranted denial of real estate license application, contained, over and above specification of those code sections allegedly violated, as factual statement of basis of proceeding nothing but charge and conviction of specified misdemeanor in federal court, and there was no allegation that offense of which licensee had allegedly been convicted involved moral turpitude, accusation did not state acts or omissions upon which real estate commissioner could proceed. Government Code, §§ 11503, 11506(a)(2, 3), (b); Business and Professions Code, § 10177(b).

2. Brokers ⇐3

Failure of accusation in real estate license suspension proceeding to state acts or omissions upon which commissioner may proceed is a defense not waived by failure to object in administrative proceeding, and such defect may be raised at any time during pendency of proceedings before hearing officer, Superior Court, or appellate court. Code Civ.Proc. § 1094.5(b); Business and Professions Code, § 10100; Government Code; § 11500 et seq.

3. Brokers ⇐3

A judgment of conviction in federal court is "sort of evidence on which responsible persons rely" within purview of government code subsection making evidence of that sort admissible in administrative hearings, and therefore federal court judgment convicting real estate licensee of conspiracy, with regard to false statement in home loan report presented to Veterans' Administration was admissible, in license

suspension proceedings, as proof of conduct of licensee on which such judgment was based, but being a determination of guilt by third persons upon evidence not before administrative agency in which such judgment was offered, evidence of such judgment was hearsay. Government Code, § 11513(c).

4. Evidence ⇐207(4)

In civil actions, a judgment of conviction in criminal case is not admissible, over objection, to establish truth of facts upon which criminal action was predicated, but evidence of guilty plea entered in criminal case is admissible as admission.

5. Brokers ⇐3

In real estate license suspension proceeding, federal court judgment, convicting licensee of conspiracy with regard to false statements made in home loan report presented to Veterans' Administration, was only admissible for purpose of supplementing or explaining direct evidence in proceeding. Business and Professions Code §§ 10176(i), 10177(f), 38 U.S.C.A. § 715; Servicemen's Readjustment Act of 1944, § 1500, as amended, 38 U.S.C.A. § 697.

6. Brokers ⇐3

In real estate license suspension proceeding, where federal court judgment of conviction, received in evidence, was admissible only for purpose of supplementing or explaining direct evidence, but no direct evidence of licensee's conduct was offered by prosecutor and hearing officer did not reach question as to whether testimony of licensee and his attorney could be considered as direct evidence, suspension order was not supported by findings. Business and Professions Code, §§ 10176(i), 10177(f), Code Civ.Proc. § 1094.5(c).

7. Brokers ⇐3

In real estate license suspension proceedings, evidence did not support suspension order. Business and Professions Code, §§ 10176(i), 10177(f); 38 U.S.C.A. § 715; Servicemen's Readjustment Act of 1944, § 1500 as amended, 38 U.S.C.A. § 697.

8. Mandamus ⇐172

In mandamus proceedings brought to require real estate commissioner to annul license suspension order, where no new evidence was offered, Superior Court was authorized to exercise its independent judgment on evidence adduced before hearing officer without being finally bound by findings made after administrative hearing. Business and Professions Code, §§ 10176(i), 10177(f); Code Civ.Proc. § 1094.5(c).

9. Mandamus ⇐187(9)

On appeal by real estate commissioner from judgment granting peremptory writ of mandate ordering said commissioner to annul his decision and order suspending license of a real estate broker, question before District Court of Appeal would be whether evidence, viewed in light most favorable to broker, sustained finding of trial court to effect that charges against broker were not supported by weight of evidence. Business and Professions Code, §§ 10176(i), 10177(f); Code Civ.Proc. § 1094.5(c).

Edmund G. Brown, Atty. Gen., Carl W. Wynkoop, Deputy Atty. Gen., for appellant.

Samuel D. Hamburg, San Francisco, for respondent, Manning.

NOURSE, Presiding Justice.

This is an appeal by the Real Estate Commissioner from a judgment granting respondent Manning a peremptory writ of mandate ordering said commissioner to annul his decision and order of suspension of respondent's license as a real estate broker for a thirty-day period and annulling the proposed decision of the hearing officer adopted in said order of the commissioner.

In so far as here relevant, the accusation which opened the disciplinary action charged respondent with violation of sections 10176, subd. (i) and 10177, subd. (f) of the Business and Professions Code, in that on or about May 2, 1947, in the Southern Division of the United States District Court for the Northern District of California respondent was charged with violation of sections 715 and 697 of Title 38 U.S.C., 38 U.S.C.A. §§ 715, 697, and it further alleged that on December 2, 1949, respondent having been convicted of violation of said

sections 715 and 697 of Title 38 U.S.C., 38 U.S.C.A., sentence was suspended and respondent placed on probation for a period of six months. Section 10176, subd. (i) mentions as a ground for suspension or revocation of a real estate license any professional conduct of the licensee "which constitutes fraud or dishonest dealing" and sec. 10177, subd. (f) as an additional ground that the licensee "acted or conducted himself in a manner which would have warranted the denial of his application for a real estate license." 38 U.S.C. sec. 715, 38 U.S.C.A. § 715, penalizes as a misdemeanor the making or conspiring to be made false statements concerning claims for benefits and sec. 697 makes said provision applicable to 38 U.S.C., Chapter 11C, World War II Servicemen's Readjustment Benefits, 38 U.S.C.A.

The only evidence introduced by the commissioner at the trial before the hearing officer to prove facts as a basis for disciplinary action against respondent was a certified copy of the indictment, judgment and order of probation in the criminal proceedings referred to in the above accusation, which evidence was received over respondent's objection to the effect that it was inadmissible hearsay. Said records show that respondent Manning was indicted in two counts, to both of which he pleaded not guilty and that he was found guilty as to one of these counts (Count II), which charged in substance that he knowingly conspired with the two co-defendants to have certified in a home loan report, presented to the Veterans Administration, that the price paid by a veteran for property as to which government loan guaranty was sought was $6400 and did not exceed the appraised reasonable value of $6400, whereas they knew and concealed that the total price which they received from said veteran for the property was $7400. (The co-defendants were realty brokers in whose office respondent worked; they were accused in the disciplinary proceedings together with respondent but they are not involved in this appeal.) The probation order shows that respondent was placed on probation for six months and that because he and the seller had made restitution of the $1000 overcharge he was, upon compliance with the terms of probation, at the end of the probation period to be released from all further liability. When after the introduction of said records the prosecution rested, respondent moved to dismiss on the ground that there was no competent evidence of the alleged violations of the Business and Professions Code before the hearing officer. The officer reserved his ruling and it was expressly understood that testimony could be offered by respondent without waiver of the motion. Respondent thereafter testified in substance, that prior to the appraisal a contract of sale had been drawn for a price of $8500. After the appraisal was made for an amount of $6400 a new contract was drawn for that price. The seller, a contractor who was remodeling the house, would for that price sell the house only in the incomplete condition in which it was. The buyer wanted him to do additional work and to put in additional material and equipment and agreed to pay $1000 for said extra work, material and equipment, $500 in cash and $500 in a personal note. Respondent received these from the buyer and turned them over to the seller. Respondent did not get any part of it and was not paid commission on the $1000. The difficulties arose because the seller did not do everything he said he was going to do. Respondent had not advised the payment of the extra $1000. He did not deliver any papers to the title company or accompany the buyers to the bank. They put in their application themselves. Respondent's attorney testified that respondent contributed $250 to the restitution of the $1000 paid by the buyer, the balance being restituted by the seller. He had explained earlier that the judge had ordered the restitution.

The findings of fact made by the hearing officer contained with respect to respondent, over and above a finding as to his status as licensee, only the charge made against him in the federal court and that after having pleaded not guilty he was found guilty of one violation, was given a suspended sentence and placed on probation for a period of six months. Pursuant to these findings the hearing officer determined that respond-

ent had been guilty of violations of sections 10176, subd. (i) and 10177, subd. (f) of the Business and Professions Code in that he participated in conduct which constitutes dishonest dealing, and acted in a manner which would have warranted the denial of his application for a real estate broker's license in that he was convicted of a crime involving moral turpitude. The penalty proposed and the adoption of the proposed order by the commissioner have been stated before.

Respondent's petition for a writ of mandate brought up all the questions mentioned in sec. 1094.5, subd. (b), Code of Civil Procedure except lack of jurisdiction and moreover insufficiency of the evidence and insufficiency of the facts alleged in the accusation to justify proceedings against respondent. The court found, among other things, in substance: that the accusation charged respondent Manning with the violations of the alleged sections of the Business and Professions Code only by reason of a conviction of a misdemeanor and does not plead any specific acts of dishonesty or other misconduct by respondent and that the hearing officer's determination that respondent was guilty of violations of said sections was reached solely on the basis of the record of aforesaid conviction after a plea of not guilty and that as a result respondent did not have a fair trial; appellant did not proceed in a manner required by law before the hearing officer; the decision against respondent was not supported by the finding and the evidence did not support the decision.

Appellant urges that the accusation was not founded on respondent's conviction of a misdemeanor but on the conduct of respondent in violating sections 715 and 697 of Title 38 U.S.C., 38 U.S.C.A. §§ 715, 697, as charged in the federal court; that the records in the federal court admitted in evidence were competent and sufficient evidence of said conduct, which evidence was supplemented by the evidence introduced by respondent and that the court in the mandate proceeding independently judging the weight of the evidence, giving considerable weight to the findings of the hearing officer, should have found that the weight of the evidence favored the decision.

[1, 2] Appellant's contentions cannot be sustained. Section 10100 of the Business and Professions Code makes Chapter 5 of Title 2, Div. 3, Part 1 of the Government Code, regulating Administrative Adjudication, applicable to proceedings for suspension of licenses by the Real Estate Commissioner. Section 11503 of said chapter requires initiation of said proceedings by filing of an accusation and further provides: "The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules." Over and above the specifications of the sections of the code allegedly violated the accusation in this case contains as factual statement of the basis of the proceedings nothing but the charge and conviction of a misdemeanor in the federal court; the court below correctly so found. These allegations do not set forth as a fact any action or conduct of respondent as required for suspension proceedings under the sections cited as violated. Violation of section 10177, subd. (b), Bus. & Prof. Code, which mentions as ground for suspension or revocation of licenses conviction of a felony or a crime involving moral turpitude was not specified and there was no allegation that the violations of which respondent was alleged to have been convicted in federal court involved moral turpitude. The accusation therefore did not state acts or omissions upon which the commissioner may proceed. Such defect, mentioned as a defense in § 11506, subd. (a) (2), Government Code, is not waived by failure to object in the administrative proceedings, as contrasted with objections to the form of the accusation mentioned in section 11506, subd. (a) (3) which are waived by failure of timely objection, § 11506, subd. (b). The defect here involved may be raised at any

time during the pendency of the proceedings before the hearing officer, the superior court or the appellate court. Compare Stuck v. Board of Medical Examiners, 94 Cal.App.2d 751, 755, 211 P.2d 389, where the same was held with respect to jurisdiction of the administrative agency over the subject matter. It supports the superior court's finding that the appellant did not proceed before the hearing officer in the manner provided by law.

[3–7] The records introduced into evidence by appellant were insufficient to prove any conduct of respondent violative of the sections of the Business and Professions Code specified. It was not contested that they sufficiently proved the charge and conviction alleged but it was contended that they were inadmissible to establish the conduct of respondent on which the judgment was based. The matter is governed by the following provisions of section 11513, subd. (c), Government Code: "The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

A judgment of conviction in a federal court is the sort of evidence on which responsible persons rely as proof of the conduct of the defendant on which the judgment is based and therefore the record of the judgment of conviction was admissible for that purpose in the administrative procedure here involved. However such conviction is a determination of guilt by a third person or persons from evidence not before the court or administrative agency before which the judgment is offered in evidence and is clearly hearsay. Compare Rowe v. Such, 134 Cal. 573, 576, 66 P. 862, 67 P. 760 and Olson v. Meacham, 129 Cal.App. 670, 675, 19 P.2d 527 which stamp verdicts in other causes hearsay. In civil actions a judgment of conviction in a criminal case is not admissible over objection to establish the truth of the facts upon which the criminal action was predicated. Board of Education v. King, 82 Cal.App.2d 857, 187 P.2d 427; Cope v. Goble, 39 Cal.App.2d 448, 457, 103 P.2d 598; Burbank v. McIntyre, 135 Cal.App. 482, 485, 27 P.2d 400; Risdon v. Yates, 145 Cal. 210, 213, 78 P. 641. No plea of guilty which is admissible in civil actions as an admission is here involved. The judgment of conviction was therefore only admissible for the purpose of supplementing or explaining some direct evidence.

The commissioner did not offer any direct evidence of respondent's conduct. The question is therefore presented whether the testimony of respondent and his attorney could be considered as such. The hearing officer did not reach this question at all, because he erroneously held that his finding of a charge and conviction after plea of not guilty in federal court of a misdemeanor which he, without any allegation or hearing as to that point, determined to involve moral turpitude, was in itself sufficient to support a suspension under sections 10176, subd. (i) and 10177, subd. (f), Bus. & Prof.Code. As we have seen, suspension under these sections requires allegation and finding of certain conduct of respondent; the court below therefore correctly found that the decision was not supported by the findings.

Also the finding of the court below that the evidence before the hearing officer does not support the decision must be sustained.

[8, 9] No new evidence was offered in the mandamus proceedings. On the evidence before the hearing officer the superior court was authorized to exercise its independent judgment without being finally bound by the findings made after the administrative hearing. § 1094.5, subd. (c), Code of Civil Procedure; Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P.2d 20; Dare v. Board of Medical Examiners, 21 Cal.2d 790, 801, 136 P.2d 304. The question before us as to this point is solely whether the evidence, viewed in the light most favorable to respondent sustains the finding of the trial court to the effect that the charges against

respondent were not supported by the weight of the evidence. Moran v. State Board of Medical Examiners, supra, 32 Cal.2d at page 309, 196 P.2d 20. Even if we do not consider the specific understanding under which the evidence of respondent was offered and assume that the court below had to consider said evidence together with the judgment in the same manner as if it were offered by appellant for the purpose of deciding whether the weight of the evidence favored the decision, we find a conflict in which the weight was for the trial court and not for us. The general tenor of respondent's evidence was to deny all knowledge of the falsity of the statement that the price to be paid for the real property was not more than $6400 or that the $1000 paid over and above that price was anything but a separate payment for extra work and material desired by the buyer and further to deny any part in the bringing about of the report concerning the price. In so far as our function is concerned respondent's evidence favorable to himself must prevail, even if the fact testified to that respondent contributed to the restitution of the $1000 might possibly be considered some direct evidence that might be supplemented and explained by the judgment of conviction in the federal court.

Judgment affirmed.

GOODELL, J., and JONES, J. pro tem., concur.



108 Cal.App.2d 662

REDNALL et al. v. THOMPSON et al.

Civ. 7987.

District Court of Appeal, Third District, California.

Jan. 15, 1952.

Action by Charles F. Rednall and Margaret M. Rednall against James Robert Thompson and others for damages sustained in automobile accident. The Superior Court, Yuba County, Ben R. Ragain, J., entered judgment for the named defendant and plaintiffs appealed. The District Court of Appeals, Third District, Peek, J., held that the verdict was not contrary to the evidence.

Judgment affirmed.

1. Appeal and Error ⇐201(2), 719(1)

Where harmful result of alleged misconduct of trial court could have been obviated by appropriate instruction of trial court, error could not be predicated in District Court of Appeal, in absence of assignment of such misconduct as error, and request to trial court to instruct jury to disregard it.

2. Appeal and Error ⇐1046(5)

Trial judge's remarks to plaintiff's attorney in connection with ruling on admissibility of evidence did not constitute prejudicial misconduct as indicating that judge was partial towards defendants, especially where jury were specifically instructed that, if judge had said or done anything which indicated that he had opinion on merits of case or some fact or issue involved, it should be disregarded.

3. Evidence ⇐207(4)

Plea of guilty in criminal proceedings is admissible in civil action, not as a judgment establishing fact but as an admission of party to action.

4. Judgment ⇐648

In absence of plea of guilty in criminal proceeding, neither judgment in criminal action nor proceedings in connection therewith, such as arrest, is admissible in civil proceeding.

5. Automobiles ⇐243(3)

In action for damages arising out of automobile collision, where plaintiff struck rear of defendant's jeep while it was parked without lights, plaintiff could not show fact that defendant was arrested for illegal parking. Code Civ.Proc. § 2055.

6. Appeal and Error ⇐1050(1)

In action arising out of automobile collision, testimony of one of traffic officers who investigated accident that he had been subpoenaed by defendant did not constitute prejudicial error.

7. Automobiles ⇐245(17, 78, 83)

In action arising out of automobile collision caused by plaintiff's automobile striking rear of defendant's jeep while defendant was parked without lights, where evidence of defendant's negligence was conflicting and there was evidence that plaintiff was traveling between 50 and 55 miles an hour at time of collision and had made no attempt to turn his automobile to avoid collision, questions of negligence and contributory negligence were for jury.

8. Appeal and Error ⇐1002

Where parties presented conflicting evidence, a factual question was presented to jury and its determination thereof under proper instructions would not be disturbed on appeal.

9. Automobiles ⇐150

Failure of motorist to keep vigilant watch and to see that which is plainly visible, may constitute negligence.

10. Automobiles ⇐246(58)

In an action arising out of automobile collision caused by plaintiff's automobile striking rear of defendant's jeep parked without lights, where there was evidence that plaintiff's automobile was equipped with headlights which could pick up objects at a minimum distance of 150 feet ahead and that defendant's automobile was equipped with tail reflectors visible as far as 500 feet to rear, instruction to effect that where there is evidence that one looked but did not see that which was in plain sight, it follows that either there is an irreconcilable conflict in such evidence or that person was negligently inattentive was authorized by evidence.

11. Trial ⇐194(15)

In action arising out of automobile collision caused by plaintiff's automobile striking rear of defendant's jeep parked without lights, refusal of proposed instruction of plaintiff that plaintiff had lawful right to drive his automobile at a speed not to exceed 55 miles per hour was proper, since proposed instruction invaded exclusive province of jury to determine rate of speed which would be lawful under particular circumstances of case. Vehicle Code, §§ 510, 511.

12. Appeal and Error ⇐882(1)

A party cannot successfully take advantage of error committed by court at his request.

13. Appeal and Error ⇐882(12)

In an action arising out of automobile collision caused by plaintiff's automobile striking rear of defendant's jeep parked without lights, plaintiff could not attack instruction on distances within which driver should be able to stop at certain specific speeds when instruction was proposed by plaintiff.

14. Trial ⇐260(1)

Where instruction given by trial court fully and fairly instructed on matter covered by plaintiff's requested instructions, refusal of plaintiff's requested instruction was not error. Vehicle Code, § 582.

Manwell & Manwell, Marysville, for appellants.

Russell A. Harris, Sacramento, for respondents.

PEEK, Justice.

This appeal is from a judgment in favor of the defendant James Robert Thompson in an action arising out of an automobile collision, and from the order denying plaintiffs' motion for a new trial.

The testimony, viewed in the light most favorable to respondent, shows that plaintiffs, while driving north on the Feather River Boulevard at a point a few miles south of the city of Marysville, struck the rear of respondent Thompson's jeep. Thompson also had been driving north and had stopped because of ignition trouble which resulted in the failure of the lights on his car. From then until the time of the collision no lights were burning. The jeep was equipped with two tail lights and what one of the witnesses, a highway patrol officer, referred to as two Class One reflectors capable of picking up a beam of light from a distance of 500 feet. The spot where the jeep was stopped was variously described as being entirely on the highway and as partly on and partly off the right hand portion of the pavement. According to plaintiff Charles Rednall, he did not see

the jeep until he was approximately 60 feet away. He was then traveling between 50 and 55 miles per hour. He made no attempt to turn his car to avoid striking the jeep but he did apply his brakes immediately, skidding his tires approximately 48 feet. Rednall further testified that the lights on his car were on high beam and would pick up any object at a distance of 150 to 200 feet. There was testimony by one of Thompson's companions that when he saw Rednall's car approaching he walked to the rear of the jeep and waved a flashlight at the oncoming car. The point of impact was variously described as being from 270 feet to 375 feet north of an "S" turn in the highway. At that point the highway is from 20 to 21 feet in width and the dirt shoulders along both sides were 7 feet in width. The testimony concerning the condition of the right shoulder was also conflicting. There was some testimony that it sloped gradually away from the pavement to where it dropped off into a drainage canal. Other testimony was that it would have been "difficult" if not "hazardous" to park off the highway at that point.

[1, 2] Included in the contentions made by appellants are certain enumerated errors alleged to have been committed by the trial court during the course of the trial, to-wit: remarks of the trial judge directed to counsel in connection with rulings on the admissibility of evidence and in the examination of witnesses as well as the conduct of the trial judge with respect to one of the witnesses indicating partiality on the part of the judge and tending to prejudice the jury against appellants. None of the remarks or conduct now complained of was assigned as error at the trial. It is well established that error cannot be predicated upon the alleged misconduct of the trial court in the absence of (a) assignment of such misconduct as error, and (b) a request to the trial court to instruct the jury to disregard it, unless the alleged harmful result of such misconduct is such as cannot be obviated by proper instructions of the trial court. Church v. Payne, 36 Cal.App. 2d 382, 400, 97 P.2d 819. Not only does it appear from an examination of the entire record that the alleged misconduct was not such as would warrant a reversal in the absence of appropriate instructions, but also the record shows that the court on its own motion admonished the jury to disregard statements made by the court to counsel in connection with objections and motions, when such statements indicated to them that the court had an opinion on the merits of the case or some fact or issue involved. See Loper v. Morrison, 23 Cal.2d 600, 610, 145 P.2d 1.

[3–5] Appellants also urge as error the action of the trial judge in sustaining respondents' objection to a question directed to Thompson who, while being examined under Code of Civil Procedure, Section 2055, and in particular regarding a conversation he had with traffic officers at the scene of the collision, was asked, "Did they give you a ticket that night?" Following his ruling the judge admonished the jury that any inference "which you might deduct therefrom will be eliminated from your consideration." Appellants now charge that the sustaining of the objection was error, that they had a right to show everything which occurred during the investigation of the traffic officers following the accident including the fact that Thompson was arrested for illegal parking. While a plea of guilty in a criminal proceeding is admissible in a civil action, not as a judgment establishing the fact but as an admission of a party to the action, Olson v. Meacham, 129 Cal.App. 670, 675, 19 P.2d 527, it is well established that in the absence of a plea of guilty, neither the judgment in a criminal action nor the proceedings in connection therewith, such as arrest, is admissible in a civil proceeding. Burbank v. McIntyre, 135 Cal.App. 482, 486, 27 P.2d 400.

[6] The next of appellants' contentions in this regard is that the trial court erred in permitting (over their objection) one of the traffic officers who investigated the accident to testify that he had been subpoenaed by respondents. Although we perceive of no materiality to the question and while it would appear that it could have been asked for no purpose other than to show defendants' complete disdain of whatever the traffic officer might testify to,

yet it cannot be said to have been so prejudicial as to warrant a reversal of the judgment.

[7, 8] Appellants further contend that the verdict is contrary to the evidence, that is, that respondents' negligence was established as a matter of law, and that the record is void of any evidence of contributory negligence. We cannot agree with appellants' interpretation. Not only was there conflict on the question of respondents' negligence but facts were shown from which the jury might well have inferred, as it did, that appellant Charles Rednall was contributorily negligent. Under such circumstances a factual question was presented to the jury and its determination thereof under proper instructions will not be disturbed on appeal. Wilkerson v. Brown, 84 Cal.App.2d 401, 405, 190 P.2d 958.

[9, 10] Appellants also charge as error an instruction given at respondents' request to the effect that where there is evidence that one looked but did not see that which was in plain sight, it follows that either there is an irreconcilable conflict in such evidence or that person was negligently inattentive. Appellants assert that the instruction was improper because the accident happened at night and there were no lights burning on the jeep. However, there was evidence that appellants' car was equipped with headlights which could pick up objects at a minimum distance of 150 feet ahead and that the jeep was equipped with tail reflectors visible as far as 500 feet to the rear. In short, there was evidence from which the jury might have concluded that the jeep was visible to appellant Charles Rednall for a distance of at least 100 feet before he actually saw it. Failure to keep a vigilent watch and to see that which is plainly visible may constitute negligence. Berlin v. Violett, 129 Cal.App. 337, 340, 18 P.2d 737.

A further contention of appellants is that the trial court erred in failing to give their proposed instruction Number 5, which concluded with the statement that "Charles Rednall had the lawful right to drive his automobile at a speed not to exceed fifty-five miles per hour." Instead the jury was instructed by the court of its own motion that whether a "rate of speed is a negligent one is a question of fact, the answer to which depends on all the surrounding circumstances" and that the basic speed law is as follows: "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property."

Furthermore they say said instruction was not alone inadequate but was made confusing by the instruction which followed: "*A* vehicle being operated upon a dry asphalt or concrete paved surface on which the grade does not exceed 1 percent should be able to stop within the following distances:

"Miles per hour	Stopping distances
"10	9.3 feet
15	20.8 feet
20	37.0 feet
25	58.0 feet
30	83.3 feet
35	113.0 feet
40	148.0 feet
45	188.0 feet"

Stated otherwise, their argument appears to be that the court was doubly in error, first, because it refused to give their proposed instruction Number 5 and instead gave an inadequate instruction of its own on the question of the basic speed law, and secondly, the court erred by immediately following that instruction with an instruction on the distances within which the driver of a car should be able to stop at certain specific speeds, since the instruction only sets forth speeds up to 45 miles per hour and therefore the jury might well have concluded that 45 miles per hour was the maximum permissible speed at which Rednall could have operated his car at the time of the collision.

[11] The court properly refused appellants' proposed instruction No. 5 since it failed to state all of the qualifications of Section 511 of the Vehicle Code, namely,

that compliance with the basic speed law set forth in Section 510 of that code is a prerequisite of the lawfulness of speeds within the prima facie limits set forth in Section 511. To that extent it is apparent that the proposed instruction invaded the exclusive province of the jury "to determine the rate of speed which would be lawful under the particular circumstances of the case." Soda v. Marriott, 118 Cal.App. 635, 641, 5 P.2d 675, 678.

[12, 13] If, as appellants argue in the remaining portion of their contention, the court, in giving the instruction on stopping distances which immediately followed, thereby confused the jury, such confusion was the result of appellants' own conduct since the instruction they now attack was proposed by them. Thus they are confronted by the well established doctrine of "invited error" under which a party "cannot successfully take advantage of error committed by the court at his request." Jentick v. Pacific Gas & Electric Co., 18 Cal.2d 117, 121, 114 P.2d 343, 345.

[14] Finally appellants contend that the trial court erred in refusing to give an instruction offered by them based on Vehicle Code, Section 582 and relating to the manner of stopping or parking a car on a highway. The record shows that the court on its own motion gave an instruction similar to that requested by appellants which instruction was substantially as that set forth in Baji 143. As the court stated in Luis v. Cavin, 88 Cal.App.2d 107, 115, 198 P.2d 563, 569, "* * * it is not error for a court to refuse a requested instruction if the subject matter thereof is substantially incorporated in the instructions given. A party is not entitled to have the jury instructed in any particular phraseology, and may not complain on the ground that his requested instructions are [were] refused if the court, of its own motion or otherwise, correctly announces the substance of the law applicable to the case."

The judgment and order appealed from are affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

108 Cal.App.2d 739

PEOPLE v. PROCTOR.

Cr. 910.

District Court of Appeal, Fourth District, California.

Jan. 16, 1952.

Troy Raymond Proctor was charged by information with murder, and from an order of the Superior Court, Orange County, Kenneth E. Morrison, J., granting defendant's motion to strike the information on the ground that he was committed without a showing of reasonable or probable cause, the People appealed. The District Court of Appeal, Mussell, J., held that the evidence at preliminary examination was sufficient to establish the corpus delicti for the purpose of introducing in evidence defendant's statements and admissions that he beat deceased during the night of the alleged homicide.

Order reversed.

1. Criminal Law ⇐234

In murder prosecution, deputy coroner's death certificate, stating that condition directly leading to victim's death was a massive subdural hematoma, due to trauma to head, and that death was due to homicide, was inadmissible as prima facie evidence of homicide on defendant's preliminary examination. Health and Safety Code, §§ 10427, 10551.

2. Criminal Law ⇐234
Indictment and Information ⇐137(5)

Evidence on preliminary examination of one charged with murder was sufficient to establish corpus delicti for purpose of introducing in evidence defendant's statements and admissions that he beat deceased during night of homicide, so that his motion to strike information on ground that he was committed without showing of reasonable or probable cause should have been denied. Pen.Code, § 995.

3. Criminal Law ⇐406(1)

To justify reception of evidence of defendant's extrajudicial statements or admissions, prosecution is not required to establish corpus delicti by clear and convincing proof necessary to support conviction, but slight or prima facie proof thereof is sufficient.

4. Criminal Law ⇐535(2)

The requisite preliminary element of corpus delicti may be proved by circumstances shown in evidence or by inferences drawn from proven facts, and direct or positive evidence is not essential.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., James L. Davis, Dist. Atty. of Orange County, and J. Parley Smith, Asst. Dist. Atty., Santa Ana, for appellant.

Head, Jacobs & Corfman, Santa Ana, for respondent.

MUSSELL, Justice.

The defendant Troy Raymond Proctor was accused in an Information filed by the District Attorney of Orange county of the murder of one Dorothy Stewart Schindler. After the filing of the information, the defendant moved that it "be stricken under Penal Code section 995 on the ground that the defendant was committed without a showing of reasonable or probable cause." The People appeal from the order of the trial court granting defendant's motion and the only question presented is whether or not the defendant was committed without reasonable or probable cause.

The evidence at the preliminary examination upon which the order of commitment is based is as follows: Roger Burnham, a deputy coroner of Orange county, who was also an embalmer and mortician by profession, testified that as a part of his official duties he had occasion to inquire into the death of one Dorothy Stewart Schindler; that he examined the body and was present when several photographs of it were taken at the mortuary; that he observed the bruises shown in the photographs and that they appeared to be of recent origin; that there was found to be a "massive subdural hematoma, so-called, or a very enlarged clot in the brain on the left side."

A certified copy of a death certificate was admitted in evidence, which certificate contained, among other things, the statements that the name of the deceased was Dorothy Stewart Schindler, aged 37; that she was divorced; that she died about 10:00 A.M., August 25, 1951, at 114 22nd Street, Newport Beach, Orange County; that the disease or condition directly leading to death was "Massive subdural hematoma, left cerebral hemisphere, due to trauma to the head;" that the injury occurred through external violence occurring on "8–24/25–1951." The certificate specified that the death was due to homicide. This document was signed by "E. R. Abbey, coroner, by R. S. Burnham, Deputy, on 8–26–51, by C. Lewis Baltz, embalmer on 8–27–51, and by Edw. Lee Russell, MD IMA, local registrar, on 8–25–51."

A motorcycle officer, employed by the city of Newport Beach, testified that he went to 114 22nd Street in Newport Beach on August 25, 1951; that he arrived at the apartment house at 10:51 A.M. and went to apartment No. 5, which was the apartment of the defendant Troy Proctor; that he found Dr. Tohill there and that the body of Dorothy Proctor was on the bed in the apartment; that he did not know who she was at that time but that the doctor told him it was Mrs. Proctor. The officer testified that photographs of the body were taken in his presence and that they were true representations of the appearance of the body and the scene at that time. These photographs were admitted in evidence. The officer also testified that he had a conversation with the defendant concerning the body on the bed; that the conversation occurred at about 11:20 that morning, in apartment No. 3 of the same building and that he, the defendant, Henry Goff and Mrs. Gould were present. The officer was asked to relate the conversation and an objection was interposed upon the ground that no corpus delicti had been established. The objection was overruled and the officer then testified as follows: "I asked Mr. Proctor if he had struck his wife on the night previous and he said that he had. He said he pulled her from a couch to the floor and then he took her to his room and beat hell out of her. I asked him how many times he hit the woman and he said he didn't remember how many

times he hit her." When asked if he had any conversation with the defendant concerning the time that the beating occurred, the officer stated that he (defendant) was uncertain as to the time, only that it was the night before.

[1–4] The defendant contends that the death certificate was inadmissible as prima facie evidence of a homicide for the reason that the statement "homicide" is not such a fact as is contemplated by Health and Safety Code, section 10551, which section provides as follows: "Any photostatic copy of the record of a birth, death, or marriage, or a copy, properly certified by the State or local registrar to have been registered within a period of one year from the date of the event is prima facie evidence in all courts and places of the facts stated in it."

It is also contended that the death certificate is not prima facie evidence of a homicide for the reason that it fails to comply with Health and Safety Code, section 10427, which provides that:

"The coroner or other proper officer whose duty it is to hold an inquest on the body of any deceased person, and to make the certificate of death required for a burial permit, shall:

"(a) State in his certificate the name of the disease causing death, or if from external causes (1) the means of death; and (2) whether (probably) accidental, suicidal, or homicidal."

Both of these contentions are valid. The statutory requirement that a death certificate must include the word "probably" before the words "accidental", "suicidal" or "homicidal" clearly indicates the intent of the legislature that only an opinion or conclusion as to whether or not a death is homicidal shall be stated. We conclude, therefore, that the objection to the introduction of the certificate in evidence to show that the death was "homicidal" should have been sustained. However, the evidence (excluding the certificate) was sufficient to establish the corpus delicti for the purpose of introducing the statements and admissions of the defendant. As was stated in People v. Bausell, 18 Cal.App.2d 15, 19, 62 P.2d 774, 776: "It is settled in California by a long line of decisions that, to justify the reception of evidence of extrajudicial statements or admissions of a defendant, the prosecution is not required to establish the corpus delicti by proof of the clear and convincing character which is necessary to support a conviction, but that slight or prima facie proof of the corpus delicti is sufficient. (Citing cases) It is also settled that the requisite preliminary element of corpus delicti may be proved by circumstances shown in evidence or by inferences drawn from proven facts. (Citing cases) Direct or positive evidence is not essential. (Citing cases)"

The evidence clearly supports a reasonable inference that the deceased died from a beating that was administered to her shortly before she was found dead in the defendant's bed and that her death was not accidental or suicidal. Under the circumstances shown by the record, the motion of the defendant to set aside the information should have been denied.

The order is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.



108 Cal.App.2d 771

MEGUIAR et al. v. UNIVERSAL DIE CASTING CO. et al.

Civ. 18594.

District Court of Appeal, Second District, Division 3, California.

Jan. 21, 1952.

Action by Malcolm F. Meguiar and Carl H. Lortz against Universal Die Casting Co., a limited copartnership of which Samuel S. Yedor, and others, were general partners, and against others to recover money paid pursuant to a contract to build a die to fabricate garden hose nozzles. The Superior Court, Los Angeles County, Clarence M. Hanson, J., rendered a judgment for plaintiffs, and defendants appealed. The District Court

of Appeal, Vallée, J., held that under the contract, defendants did not agree to make a die that would cast nozzles in the finished form of the sample.

Reversed.

1. Contracts ⇐189

Under contract to build die to fabricate garden hose nozzles per sample and to supply minimum number of sets to buyer as cast, die makers were not required to make die that would cast nozzles in finished form of highly machined brass sample or to manufacture finished nozzles that did not leak water when in use.

2. Money Received ⇐18(2)

In action to recover money paid under contract to build die to fabricate garden hose nozzles, where complaint alleged and answer admitted that die was to be made according to certain plans and specifications, and there were no other plans or specifications other than those offered in evidence after defendants laid sufficient foundation, court erred in refusing to receive plans and specifications showing material of which castings were to be made.

3. Contracts ⇐236, 237(2)

Written contract may be modified by later written agreement, and covenants and agreements of one party furnish sufficient consideration to support promises and agreements of other party thereto.

4. Contracts ⇐238(2)

Executed oral agreement may be modification of written contract.

5. Parties ⇐76(5)

In action to recover money paid pursuant to contract, point that plaintiffs did not have legal capacity to sue because they did not publish a certificate that they were doing business under fictitious name or file affidavits showing such publication with county clerk should properly have been raised by demurrer.

6. Appeal and Error ⇐174

Where point that plaintiffs had no legal capacity to sue was not properly raised by demurrer nor alleged in answer, it could not be raised on appeal.

Albert H. Allen and Michael J. Fasman, Beverly Hills, for appellants.

Walter S. McEachern and B. J. Roose, Pasadena, for respondents.

VALLÉE, Justice.

Appeal by defendants from a judgment for plaintiffs in an action to recover money paid pursuant to a contract.

On March 7, 1946, plaintiffs and defendants entered into a contract which read:

"Carl Lortz

"We agree to build a 12 cavity die to fabricate garden hose nozzles per sample for the sum of $1925.00. We hereby acknowledge receipt of $642.00 down payment. You agree to pay an additional $642.00 on April 2, 1946 and the balance when die is completed and sample castings are approved. We will then supply a minimum of 10,000 sets to you at 10¢ per set, as cast.

"Very truly yours,
Universal Die Casting Co.
M. E. La Hue (s)
M. E. La Hue, Sales Mgr.
Approved (s) Carl H. Lortz"

Upon the execution of the contract plaintiffs delivered to defendants, as the sample, a machined brass nozzle, made the $642 down payment, and on April 2, 1946, paid defendants $642. Defendants completed a 12 cavity die, and made and delivered 81 sample castings to plaintiffs. The sample castings were in two parts, the body and the cone. Each was beveled. In order to obtain a water-tight fit when the cone was placed firmly in the body, both surfaces would have to be smooth and regular. Precision was required. The two parts constituted a set. Plaintiffs assembled the parts and when put together the sample castings leaked and for that reason they were not approved by plaintiffs.

Plaintiffs sued to recover the two payments of $642 with interest. Defendants cross-complained for the balance of the contract price, loss of profits, and sales tax.

The court construed the contract as requiring defendants to make a die and from it manufacture *nozzles* which did not leak

water when in use. It found that defendants did not at any time deliver or offer to deliver any nozzle which did not leak, that the 81 sample castings leaked water when in use, and rendered judgment for plaintiffs for the two $642 payments with interest. Defendants appeal.

Defendants contend the court erred in construing the contract, erred in its rulings on evidence, and that plaintiffs do not have legal capacity to sue because they did not publish a certificate that they were doing business under a fictitious name or file an affidavit showing such publication with the county clerk.

[1] In construing the contract, the court said: "I think that contract by its terms is a contract on the part of the defendant to supply a die of the type and character of the sample." A die could not possibly be of the same type and character as the machined sample. A die is a mold in which a raw casting is made. We think it manifest that the court misconstrued the contract. Defendants did not agree to make a die that would cast nozzles in the finished form of the sample or to manufacture finished nozzles that did not leak water when in use. They did not agree to manufacture machined nozzles conforming to the sample nozzle submitted. The sample nozzle had been machined on a lathe. Defendants agreed to build a die from which sample castings were first to be made; and then, if they were approved, to supply a minimum of 10,000 sets *"as cast."* The evidence is without conflict that *"as cast"* means a raw casting as it is ejected from the die of the casting machine ready for machining, or other method of finishing if required. A casting is that which is cast in a mold. It is not necessarily a finished product; if precision is desired, it usually requires tooling or machining. To machine is defined as "to plane, shape, turn, mill, or otherwise reduce, as a casting, to specified shape and dimensions by a machine or machines having a cutting tool or tools." Webster's Inter. Dict., 2d ed. Plaintiffs were machinists. Defendants were in the business of making dies and castings. They did not agree to do more. They made a die which turned out castings corresponding to the sample except for the finished surfaces of the latter. There was no evidence that if machined the nozzles would have leaked when in use. There was no evidence that defendants did not fulfill their contract.

[2–4] After the contract was entered into, defendants prepared plans and specifications of the nozzle to be cast. On March 29, 1946, plaintiffs, in writing, approved the plans and specifications. They showed that the castings were to be made of a material called "Zamak," while the sample nozzle was made of brass, showed tolerances in the two parts up to $\frac{5}{1000}$th of an inch, plus or minus, or a possible $\frac{1}{100}$th of an inch, and described the work to be done as "die casting." The sample was then returned to plaintiffs. After the plans and specifications had been approved by plaintiffs, defendants made the sample castings in conformity therewith and delivered them to plaintiffs. Defendants, after laying a sufficient foundation, offered the plans and specifications in evidence. Plaintiffs' objection thereto was sustained. The court erred. The complaint alleged and the answer admitted the die was "to be made according to certain plans and specifications." There were no plans or specifications other than those offered in evidence. A written contract may be modified by a later written contract, and the covenants and agreements of one party thereto furnish a sufficient consideration to support the promises and agreements of the other party thereto. Neher v. Kauffman, 197 Cal. 674, 683, 242 P. 713. Further, an executed oral agreement may constitute a modification of a written contract. Julian v. Gold, 214 Cal. 74, 76, 3 P.2d 1009. Under the pleadings the plans and specifications were a part of the contract. Unless they were in evidence the court could not determine whether defendant had fulfilled the contract.

[5, 6] The point that plaintiffs have no legal capacity to sue was not properly raised by demurrer nor was it alleged in the answer; it cannot, therefore, be raised on appeal.

Reversed.

SHINN, P. J., concurs.

WOOD, Justice.

I concur in the judgment and the part of the opinion wherein it is held that the court erred in not receiving the plans and specifications in evidence. Although plaintiffs alleged that the die was to be made according to certain plans and specifications, they objected to the plans and specifications when defendants offered them in evidence. If the plans and specifications constituted a modification of the agreement of March 7th, then of course the whole contract was not before the court.

With respect to the agreement of March 7th (if there has been no modification of it), I agree with the interpretation thereof made by the trial judge to the effect that defendants agreed to make a die by means of which nozzles of the same kind and character as said sample nozzle could be made. As stated by the trial judge, the object which plaintiffs had in mind was to procure a die which would make a nozzle that would be equally as effective as the sample nozzle. Defendants said in their agreement: "We agree to build a 12 cavity die to fabricate garden hose nozzles per sample for the sum of $1925.00." It seems that one of defendants' asserted defenses (to plaintiffs' claim for return of money paid) is that it is impossible to make a die from which a nozzle can be made that will be as effective as the sample nozzle. The defendants were in the business of die casting. Presumably they knew the moldability of different metals and particularly the degree of precision fitting that could be obtained by using the product known as "Zamak" in casting the nozzle. It is not to be assumed that defendants entered into the contract, and accepted plaintiffs' advance payments, in the belief that it was impossible to make the kind of nozzle that plaintiffs expected to receive. It appears, however, that their asserted defense is in effect that *plaintiffs* should have known that it was impossible to cast a nozzle as "per sample" by the use of "Zamak" or any other metal. In view of the lack of evidence as to the moldability of "Zamak" or other metals, I think the question as to the impossibility of casting a nozzle as "per sample" should not be considered in interpreting the contract of March 7th.



108 Cal.App.2d 746

HELVEY v. COACHELLA VALLEY COUNTY WATER DIST.

Civ. 4432.

District Court of Appeal, Fourth District, California.

Jan. 17, 1952.

Quiet title action by A. C. Helvey against Coachella Valley County Water District. The defendant filed a cross-complaint. The Superior Court of Riverside County, John G. Gabbert, J., rendered judgment quieting title in the defendant, and the plaintiff appealed. The District Court of Appeal, Mussell, J., held that the evidence of title produced and presented by the district was sufficient to support the judgment quieting its title to the property involved.

Judgment affirmed.

1. Estoppel ⇐39
Quieting Title ⇐44(4)

A 1946 quitclaim deed to plaintiff from grantors who acquired title to property in 1907 and who conveyed property to third persons in 1912 and who went through bankruptcy in 1932 only operated to transfer such interest as grantors had and did not carry any after-acquired title and hence was insufficient to establish a prima facie case supporting title of plaintiff instituting a quiet title action against water district which acquired title to property by collector's deeds and deed from State prior to 1946 and by judgment in quiet title action against third persons in 1949. Gen. Laws, Act 9124.

2. Quieting Title ⇐11

Where water district was owner of property by virtue of collector's deeds,

judgment in quiet title action against former owners and deed from State of California, and district's sale of property to highest bidder was canceled by bidder without a deed having been executed or delivered to bidder, default judgment obtained by plaintiff in action against bidder to which district was not made a party defendant was insufficient to support plaintiff's claim of title against district. Gen. Laws, Act 9124.

3. Quieting Title ⇐10(1)

In quiet title action, plaintiff can recover only upon the strength of his own title and not upon the weakness of the title of the defendant.

William M. Taylor, Coachella, for appellant.

Earl Redwine, Riverside, for respondent.

MUSSELL, Justice.

Plaintiff A. C. Helvey brought this action to quiet title to real property situated in Riverside County. The defendant answered and filed a cross-complaint to quiet its title to the same property. Plaintiff appeals from the judgment quieting title in the defendant district.

[1] Plaintiff claims title by a quitclaim deed executed to plaintiff by Mary E. Ellsworth and Herbert L. Ellsworth on February 19, 1946, and by a default judgment against Emily H. Day, dated July 31, 1947, and procured in the Superior Court in Los Angeles County in action No. 529060. The evidence shows that the Ellsworths acquired title to the property here involved on October 17, 1907; that in 1912 they conveyed it to Charles L. and Nellie R. White and that the Ellsworths went through bankruptcy in 1932. Under these circumstances a quitclaim deed from the Ellsworths to plaintiff in February, 1946, is not sufficient to establish a prima facie case supporting plaintiff's title. The quitclaim deed only operated to transfer such interest as the Ellsworths had and did not carry any after-acquired title. Buller v. Buller, 62 Cal.App.2d 694, 699, 145 P.2d 653; Lombardi v. Sinanides, 71 Cal.App. 272, 277, 235 P. 455; Southern Pac. Co. v. Dore, 34 Cal.App. 521, 524, 168 P. 147.

[2, 3] Plaintiff also failed to support his claim of title through Emily H. Day. The evidence shows that the Coachella Valley County Water District acquired title to the property here involved by collector's deeds executed in 1939, 1940 and 1941 under the provisions of the County Water District Act of the State of California, Gen. Laws, Act 9124, by virtue of the former owner's failure to pay district taxes for the tax years of 1935, 1936, and 1937. In addition to these deeds, the district also received a deed to the property from the State of California on December 19, 1945, the property having been previously deeded to the State by virtue of a five year period of delinquency in the payment of state and county taxes. On September 29, 1949, the district obtained a judgment in the Superior Court of Riverside County in action No. 41837, quieting its title to the real property here involved as against Charles L. and Nellie R. White. On February 23, 1946, the defendant district, at the request of Emily H. Day, offered the property for sale at public auction pursuant to the terms of a "Second Resale Plan" then in effect for the disposal of tax deeded land within the district. Emily H. Day was the highest bidder at such sale. She deposited the amount of her bid with the district, took a receipt therefor, and requested the district to withhold the execution and delivery of the deed until the district had quited title to the property in its name, in accordance with the provisions of the said "Second Resale Plan." The district then filed a quiet title action, No. 41837, against Charles L. and Nellie R. White. While this action was pending and before judgment had been entered therein, Emily H. Day filed a written request with the district that the sale of the property to her be canceled and that her deposit be refunded to her. In December, 1947, the district returned the funds to Emily H. Day which had been deposited by her and ordered that the property be withdrawn from sale. No deed was executed or delivered to Emily H. Day covering this land and the title thereto remained in the dis-

trict. Plaintiff Helvey's claim to title through the default judgment obtained against Emily H. Day on July 31, 1947, is not supported by the evidence. As noted, the district was the owner of the property by virtue of collector's deeds, the judgment in the quiet title action against the Whites and the deed from the State of California. The district was not made a party defendant to the Los Angeles Superior Court default action and the judgment therein obtained did not affect the title to the property then held by the district. Plaintiff Helvey could recover only upon the strength of his own title and not upon the weakness of the title of the district. He failed to trace his title to the government, to a grantor in possession at the time of the quitclaim deed to him or to a source of title common to himself and to the district. Under such circumstances, he cannot recover. Helvey **v.** Sax, 38 Cal.2d 21, 237 P.2d 269.

The evidence of title produced and presented by the district was amply sufficient to support the judgment quieting its title to the property involved.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



108 Cal.App.2d 804

HULL et al. v. SHEEHAN et al.

Civ. 18570.

District Court of Appeal, Second District, Division 1, California.

Jan. 24, 1952.

Rehearing Denied Feb. 18, 1952.

Hearing Denied March 20, 1952.

Roy B. Hull and another, who had purchased a motel for $77,500, sued John F. Sheehan and another, vendors of the motel, for false representations. The Superior Court, Los Angeles County, James Snell, J., found that the false representations had been made but that plaintiffs had not sustained any damages, and plaintiffs appealed from a judgment entered on such findings. The District Court of Appeal, Hanson, J. pro tem, held, inter alia, that the evidence sustained the finding as to damages.

Affirmed.

1. Fraud ⇐50

In action by purchasers against vendors for false representations, purchasers had burden of proving that property was worth less than they paid for it.

2. Evidence ⇐543(3)

In action by purchasers of motel against vendors for false representations, it was within province of trial court to reject testimony of real estate broker and appraiser as to value of motel at time of sale, where such broker had never individually or as a broker bought or sold a motel, although he had appraised a few motels.

3. Fraud ⇐58(1)

In action by purchasers of motel against vendors for false representations, purchasers failed to prove that value of motel was less than amount they paid for it.

4. Fraud ⇐58(1)

Where purchasers of motel failed to prove in action against vendors for false representations that value of motel was less than amount purchasers had paid for it, purchasers could not attack finding that property was in fact worth what purchasers had paid for it.

5. Evidence ⇐215(1)

Where purchasers of motel who had paid $77,500, within a month after purchase listed the property for sale at $85,000, such listing was an admission against interest as to the value of the property and was admissible in action by purchasers against vendors for false representations.

6. Fraud ⇐58(1)

In action by purchasers of motel against vendors for false representations, evidence sustained finding that motel was worth what purchasers had paid for it.

Thomas M. Parrington, Alhambra, for appellants.

Elmer C. Low, Pasadena, for respondents.

HANSON, Justice pro tem.

Appellants instituted the action below to recover damages for false representations made by respondents upon a sale of a motel to appellants. The trial court found that the false representations had been made but that appellants had not sustained any damages. This finding, appellants contend, is not sustained by any admissible evidence. In short, appellants contend that respondents' expert witness was not qualified to express an opinion as to the value of the motel, and second, that his testimony as to market value should have been struck out as it was based upon improper factors.

[1–6] The plaintiffs had the burden of proving that the motel was worth less than the amount which they paid for it, i. e., $77,500. The only witness tendered by plaintiffs on the subject was a real estate broker and appraiser who had appraised a few motels, but who had never individually or as a broker bought or sold a motel. He testified that the property had a value of only $45,000 at the time the plaintiffs purchased it in March, 1948, and likewise had the same value when they thereafter sold it in April, 1950, notwithstanding it then sold for $65,000. The trial court expressly rejected his opinion as to market value and affirmatively found that the property was worth what the plaintiffs paid for it. Since it was within the province of the trial court to reject the testimony of plaintiffs' expert it follows that plaintiffs failed to prove an essential ingredient of their cause of action and, accordingly, have no standing to attack the finding that the property was in fact worth what plaintiffs paid for it. Ellenberger v. City of Oakland, 59 Cal.App.2d 337, 139 P.2d 67; Benner v. Hooper, 112 Cal.App. 53, 63, 296 P. 660. Moreover, even if we were to reject the testimony of defendants' expert on value, the trial court's finding would still have to be upheld. This for the reason that the plaintiffs within a month after their purchase listed the property for sale with brokers at a price of $85,000 and continued to do so until a short time prior to their sale of the property. Such a listing is an admission against interest as to the value of the property which alone would justify the finding of the trial court. Fairchild-Gilmore-Wilton Co. v. Southern Refining Co., 158 Cal. 264, 110 P. 951; Bank of Italy Nat. Trust & Savings Ass'n v. Johnson, 7 Cal.App.2d 463, 46 P.2d 244. As stated in 20 American Jurisprudence 341, sec. 375, "* * * an offer to sell property may be proved against the owner as an admission of its value at or near the time of the offer."

The judgment is affirmed.

DORAN, Acting P. J., and DRAPEAU, J., concur.

38 Cal.2d 328

LIBARIAN v. STATE BAR.

L. A. 22063.

Supreme Court of California, In Bank.

Jan. 29, 1952.

The Board of Governors of the State Bar recommended that an attorney be suspended from the practice of law for six months, and the attorney filed a petition for a writ of review. The Supreme Court held that the attorney should be suspended from the practice of law for six months.

Order in accordance with opinion.

Carter, J., dissented.

1. Threats ⇐1(2)

The sending of a threatening letter with intent to extort money is punishable in the same manner as if such money were actually obtained. Pen.Code, § 523.

2. Extortion ⇐1

The crime of extortion involves "moral turpitude". Pen.Code, § 523; Business and Professions Code, §§ 6103, 6106.

See publication Words and Phrases, for other judicial constructions and definitions of "Moral Turpitude".

3. Attorney and Client ⇐58

An attorney who wrote and mailed a threatening letter in an attempt to secure money for his client would be suspended from practice of law for six months. Business and Professions Code, §§ 6103, 6106.

M. Stephen Libarian, Los Angeles, in pro per.

Jerold E. Weil, San Francisco and Bertram L. Linz, Beverly Hills, for respondent.

PER CURIAM.

The Board of Governors of the State Bar has recommended that Manassee Stephen Libarian be suspended from the practice of law for a period of six months. By his petition for a writ of review, the proceeding is now before this court.

The record may be summarized as follows: Libarian was attorney for Abe Siegel in an action against Louis Nadel for wages. Testimony concerning whether Siegel had broken a mirror in Nadel's shop was conflicting. The court found for Nadel on the complaint and for Siegel on the cross-complaint.

After the trial, Libarian mailed a letter to Nadel's attorneys accusing Nadel of perjury and stating: "This criminal act of your client will be a basis for a new trial and also for a criminal complaint. * * * Here is my offer. Let your client pay Mr. Abe Siegel for 2 days' work, or 16 times $2.25, the total of Thirty Six and no/100 Dollars, and his perjuries will remain unpunished. * * * I must receive your check for $36.00 plus $6.50 court costs I had advanced out of my own pocket, that is to say the sum of Forty One and 50/100 Dollars, on the 31st. day of October, 1950. If you fail to send said $41.50 until midnight of Tuesday, the 31st. day of October, 1950, on the 1st. day of Nov. 1950, I'll file a motion for a new trial, and my client will be in the District Attorney's office to file a complaint for perjury against your client."

In a notice to show cause, it was alleged that by writing this letter, Libarian threatened to permit his client to file a criminal complaint against Nadel unless Siegel received a certain amount of money. Such conduct was charged as being a violation of Libarian's oath and duties as an attorney at law and an act of moral turpitude and dishonesty within the meaning of sections 6103 and 6106 of the Business and Professions Code.

Following a hearing, a local administrative committee found Libarian guilty of unprofessional conduct and recommended that he be suspended from the practice of law for six months. The findings of the committee were adopted by the Board of Governors and it recommended that discipline be imposed as specified by the committee.

Libarian contends that the findings are not supported by the evidence. However, he admits that he wrote and mailed the letter in an attempt to secure money for his client. He also admits that the letter

constitutes a threat against Nadel and he concedes that he made a mistake in writing it. He argues, however, that he had no intention of extorting money from Nadel or his attorneys.

Concisely stated, Libarian's defense is that he wrote the letter because of his indignation over Nadel's alleged false statements as a witness. Despite the statements in the letter, Libarian says that he had no intention of carrying out any threats against Nadel or of asking Siegel to file a criminal complaint against him.

[1, 2] Although no action was taken by either Libarian or Siegel to prosecute Nadel, the record clearly shows conduct which is in violation of Libarian's oath and duties as an attorney. The threats contained in the letter indicate an attempt to commit extortion. The sending of a threatening letter with intent to extort money is "punishable in the same manner as if such money * * * were actually obtained" (Penal Code, § 523) and the crime of extortion involves moral turpitude. Matter of Coffey, 123 Cal. 522, 56 P. 448.

[3] It is, therefore, ordered that Manassee Stephen Libarian be suspended from the practice of law for a period of six months commencing thirty days after the date of the filing of this opinion.

CARTER, Justice.

I dissent.

I agree that the letter written by petitioner to Nadel's attorney constituted a technical violation of section 523 of the Penal Code, and should not, therefore, have been sent. But, considering petitioner's background and the fact that the letter was written to an attorney regarding a claim against his client involving a small sum of money, advising that petitioner's client would go to the District Attorney and seek to institute a criminal prosecution against Nadel unless the claim was paid, I do not feel that the discipline recommended is justified, and that a reprimand would be more commensurate with the nature of the conduct shown by the record. Petitioner, no doubt, mistakenly believed that the end he sought to achieve justified the means employed, and since no fraud or bad faith on his part was shown, and no detriment was suffered by any one as the result of his conduct, a suspension of six months from practice seems too severe.

I would, therefore, dispose of the proceeding with a reprimand.



38 Cal.2d 341

FLEMING v. STATE BAR OF CALIFORNIA.

L. A. 21916.

Supreme Court of California, in Bank.

Feb. 1, 1952.

Petition to review decision of Board of Governors of the State Bar. The Supreme Court held that reprimand would be sufficient punishment.

Decision in accordance with opinion.

Edmonds and Traynor, JJ., dissented.

Attorney and Client ⇐57

The findings and recommendation of the local committee and board of governors, although entitled to great weight, are not binding on Supreme Court, and Supreme Court can weigh conflicting evidence and can impose discipline other than that recommended if the recommendation is disproportionate to the misconduct or not warranted because of other mitigating circumstances.

John W. Preston, Los Angeles, for petitioner.

John S. Chapman, Los Angeles, and Jerold E. Weil, San Francisco, for respondent.

PER CURIAM.

The Board of Governors of The State Bar adopted the recommendation of the local administrative committee that petitioner be suspended from the practice of law for a period of two years because of

unprofessional conduct, moral turpitude and dishonesty in connection with a guardianship matter. Petitioner seeks review of the board's decision. The proceeding presents no question of law, but only the question whether, after weighing the evidence, we should follow the board's recommendation.

We have examined the entire record in the light of the established rules that the findings and recommendation of the local committee and the board of governors, although entitled to great weight, are not binding upon us, Light v. State Bar, 14 Cal.2d 328, 336, 94 P.2d 35; that we can weigh conflicting evidence, Furman v. State Bar, 12 Cal.2d 212, 214, 83 P.2d 12, and can impose discipline other than that recommended if the recommendation is disproportionate to the misconduct, Barton v. State Bar, 213 Cal. 186, 190, 2 P.2d 149, or not warranted because of other mitigating circumstances, Egan v. State Bar, 10 Cal.2d 458, 462, 75 P.2d 67; Barbee v. State Bar, 213 Cal. 296, 300, 2 P.2d 353; Smith v. State Bar, 211 Cal. 249, 258, 294 P. 1057, 73 A.L.R. 393.

Petitioner, now 74 years of age, was admitted to practice in 1900. He has no previous disciplinary record with The State Bar. Petitioner does not contend that he did not indulge in the course of conduct hereinafter described, but argues that such conduct, in the light of all the facts shown, does not establish moral turpitude and was not in violation of his duties as an attorney, and that, at worst, he was "somewhat careless."

In February, 1947, Marguerite Miller caused her mother, Lila Landon, to be placed in the psychopathic ward of the Los Angeles General Hospital. Mrs. Landon was a widow more than 70 years of age. Petitioner had represented Mrs. Landon on previous occasions, but had not been employed by or seen her for several years; she had, however, telephoned to him on one or more occasions, and had tried to contact him on other occasions but had been prevented by her daughter from so doing. At her request he was present and aided her at the psychopathic hearing on February 28, 1947. The trial judge, after hearing evidence, stated that in his opinion Mrs. Landon should go to a sanitarium, but because of her insistence he released her into the temporary custody of petitioner. What, if any, further action was taken in the psychopathic proceeding does not appear.

Also on February 28, 1947, Mrs. Landon signed a will which had been prepared by petitioner's law partner and which left all her property to petitioner. The will was signed by her immediately after the psychopathic hearing, in the corridor leading from the hearing room, not in the presence of petitioner but in the presence of petitioner's law partner. Several months after the psychopathic hearing Mrs. Landon employed independent counsel to prepare, and she executed, a second will likewise substantially in petitioner's favor. Although petitioner did not know of this transaction at the time, he thereafter learned that the will in his favor existed.

Mrs. Landon's principal property was an apartment house which, in 1944, she had placed in the names of herself and her daughter as joint tenants. It was valued at about $44,000 and encumbered by a mortgage or trust deed for $15,000 on which a balance of $14,545.36, payable at $119.00 a month, was due at the time involved. On February 28 she executed a quitclaim deed of this property to petitioner, and a few days later he executed a quitclaim deed of the property to her. The object of this exchange of deeds was to convert the joint tenancy to a tenancy in common, as part of a plan to raise money for Mrs. Landon's immediate needs.

On March 3, 1947, at Mrs. Landon's request, petitioner sought appointment as guardian of her person and estate. Mrs. Miller filed a counter-petition asking that she be appointed guardian. Her petition was denied and petitioner was appointed guardian. Thereafter he collected the income from the property and used it for Mrs. Landon's benefit; he also advanced her substantial sums from his personal funds.

On April 28, 1947, at the request of Mrs. Landon, petitioner as guardian filed a

complaint to set aside the joint tenancy deed which Mrs. Landon had executed in 1944, and to recover any interest claimed by Mrs. Miller, on the ground that such deed had been obtained by the fraud and undue influence of Mrs. Miller. Mrs. Miller took the position that she had used her own funds to care for her mother and that this was the consideration for the deed. After negotiations with Mrs. Miller and her counsel the action was compromised in January, 1948, on terms hereinafter described.

In October, 1947, Mrs. Landon broke her hip and her necessary expenses and pressing need for funds increased. At her request petitioner, as guardian, filed in the guardianship proceeding a petition to borrow $5,000 to be secured by a second trust deed on her half interest in the apartment house property.

On December 29, 1947, petitioner filed in the guardianship proceeding a petition to compromise the action to set aside the joint tenancy. Under the compromise agreed upon, petitioner's wife, Olga R. Fleming, was to purchase Mrs. Miller's interest in the property for $4,000. The petition stated that Mrs. Fleming "has agreed that the entire net income from said real property, or so much thereof as is necessary, shall be applied to the support of said Lila C. Landon during her lifetime." There is no evidence that this agreement was not faithfully performed during the time that Mrs. Fleming held the property and (as hereinafter stated in more detail) when a sale of the property was arranged by petitioner and approved by the court, Mrs. Fleming, upon repayment of the amounts due her, conveyed her entire interest to Mrs. Landon.

The petition to compromise the Miller action and the petition to borrow $5,000 were heard on January 19, 1948. At the hearing the following took place: "Mr. Fleming: * * * In order to compromise that lawsuit, * * * my wife, with Mrs. Landon's consent and approval, is buying the daughter's whatever interest she has in this property, buying it out for $4000, *subject to a life estate on the mother.* The Court: For what? Mr. Fleming: For $4000, subject to a life estate to the mother." (Italics added.) The court also approved the requested loan in the reduced amount of $2,500.[1] There was no discussion or statement as to who was to make the loan, but, as above indicated, it was stated that Mrs. Fleming was "buying the daughter's whatever interest she has." Because of the involved condition of the title (the outstanding first lien requiring payments of $119.00 a month on an unpaid balance of $14,545.36 and Mrs. Landon's limited interest) there was difficulty in procuring the loan and at Mrs. Landon's request Mrs. Fleming made such loan and became beneficiary under the second trust deed.

The compromise of the action against Mrs. Miller was consummated about January 30, 1948. Under its terms Mrs. Fleming paid Mrs. Miller $4,000; Mrs. Miller delivered to Mrs. Fleming a grant deed wherein the words "subject to a life estate in favor of Lila C. Landon for the term of her natural life" had been typed in but stricken out by inked lines.[2] These words

1. The original tentative plan to borrow $5,000 had not contemplated the purchase of Mrs. Miller's interest in the property but had contemplated possible allocation to Mrs. Miller of a portion of the sum borrowed, and Mrs. Miller had signed a consent to such plan.

2. It is not altogether clear what would have been the effect of the stricken phrase. The courts of this state, Butler v. Gosling, 130 Cal. 422, 426, 62 P. 596; Elliott v. McCombs, 17 Cal.2d 23, 28, 109 P.2d 329; Mott v. Nardo, 73 Cal.App.2d 159, 162, 166 P.2d 37, like those of other jurisdictions, 39 A.L.R. 129, have adhered to the feudal rule that an exception or reservation in favor of a stranger to a deed can create no interest in the stranger. But many courts have not applied this rule, and have effected the manifest intent of the parties to the deed, where the reservation or exception is in favor of a spouse. Boyer v. Murphy, 202 Cal. 23, 33, 259 P. 38, which recognizes the rule that a reservation to a stranger to the deed creates no estate, but says that by construing the language of reservation as an exception the grantor's intent can be effected, Linch v. Hartford Fire Ins. Co., 138 Neb. 110, 292 N.W. 27, 129 A.L.R.

had been stricken at Mrs. Fleming's and petitioner's direction, and Mrs. Miller had initialed the amendment and signed the deed as thus amended, prior to the January 19 hearing. Mrs. Miller also executed an affidavit wherein she stated that "This Affidavit is made for the purpose of inducing Olga R. Fleming to pay a consideration of $4000.00 to affiant upon execution and delivery of a Grant Deed conveying to Olga R. Fleming her aforesaid undivided one-half interest in said real property, and in consideration of such purchase by Olga R. Fleming and payment of said sum of $4000.00 therefor affiant agrees as follows:

"1. To execute any papers necessary hereafter in connection with extending or modifying the terms of said Deed of Trust held by Western Mortgage Corporation.

"2. To vacate on or before February 1st, 1948 the apartment now occupied by her at said premises, hereby agreeing that any tenancy or other right therein be deemed terminated on January 31st, 1947, and hereby waiving any defenses under State or Federal laws to an action for Unlawful Detainer or other proper action in the event that she fails to remove as aforesaid.

"3. John L. Fleming, husband of Olga R. Fleming, was on March 21st, 1947 appointed Guardian of the person and estate of said Lila C. Landon, and with the consent and agreement of affiant has been collecting the rents of the apartments at said premises 149 and 151 South Crescent Drive, Beverly Hills, and applying the same to the upkeep of said real property and expenses thereof, and to the maintenance of said Lila C. Landon, as will more fully appear in his First Annual Account as such Guardian. Affiant hereby releases any claim to such rents or any portion thereof.

"4. It is understood and agreed that the remaining undivided one-half interest in said real property is subject to proper testamentary disposition by said Lila C. Landon and there is an existing Will or Wills in and by which said Lila C. Landon gives said real property and other property owned by her or a substantial portion thereof to said John L. Fleming, under and by which affiant would take nothing. Affiant covenants and agrees in consideration of the matters hereinabove stated, and especially of the payment to her by Olga R. Fleming of $4000.00 upon delivery of the aforesaid Grant Deed, that she will not contest any properly executed Last Will and Testament of Lila C. Landon which leaves her estate or a substantial portion thereof to John L. Fleming, and hereby waives and renounces any right to contest the same either before or after the probate, either on the grounds of undue influence or incompetency, or any other grounds, reserving to herself all rights, however, as to any Will of Lila C. Landon which does not leave a substantial portion of her estate to John L. Fleming.

"This Affidavit and the covenants and agreements contained therein are made for the purpose of inducing Olga R. Fleming to make the aforesaid purchase from affiant of her aforesaid undivided one-half interest in said real property."

Soon after the compromise was effected Mrs. Miller filed a complaint against petitioner with The State Bar. Petitioner continued to act as guardian. With the approval of the court, evidenced by its order, he sold the real property for $44,000. Mrs. Fleming then conveyed her interest in the property to Mrs. Landon upon payment of $4,000 and interest, and her note and trust deed were satisfied upon payment of $2,500; petitioner then resigned as guardian.

The board of governors concluded that petitioner violated his oath and duties as an attorney, and was guilty of moral turpitude and dishonesty, by wilfully misrepresenting to the probate court that the deed from Mrs. Miller to Mrs. Fleming gave a life estate to Mrs. Landon; and by deal-

1063, 1064. Apparently, under the present state of the law, the striking out of the phrase did not affect Mrs. Landon's interest; if the phrase was a reservation the grantor's title would pass unqualified by such reservation; if it was an exception the life estate would not pass to the grantee, but neither would it pass to Mrs. Landon. 16 Am.Jur. 610.

ing with the property of his client and ward in a manner calculated to serve his personal ends and enrich his wife. It further concluded that petitioner violated his oath by wilfully refusing to protect the interest of his client; by unnecessarily placing himself in a position where the interests of petitioner and his wife conflicted with those of Mrs. Landon; by failing to inform the court of the conflict of interest which arose because his wife was the proposed lender of the $2,500; and by exacting from Mrs. Miller the covenant (in the affidavit) not to contest any will leaving Mrs. Landon's estate to petitioner, in view of the fact that petitioner knew that Mrs. Landon had executed two such wills while her capacity was questionable.[3] Petitioner's conduct, the board found, was part of a deliberate plan to use his office as attorney for the profit of his wife and himself at the expense of Mrs. Landon and her heirs.

We have concluded that the weight of the evidence is against the inferences that petitioner was guilty of wilful wrongdoing designed to enrich himself and his wife at the expense of Mrs. Landon. It appears from the evidence as a whole, and particularly from the testimony of petitioner, his wife, and his law partner, that petitioner's dealings with Mrs. Landon were had at her urgent request and because of the immediate necessity of providing funds for her care, and for the purpose of protecting her from the apparent unkindness and machinations of her daughter. This testimony could not be confirmed or disputed by Mrs. Landon at the committee hearing because Mrs. Miller prevented her mother's appearance at the hearings on the disciplinary action. After Mrs. Miller testified against petitioner, petitioner's counsel asked where her mother could be reached for service of subpena. Mrs. Miller gave a fictitious address and the next day took her mother to Oregon.

Petitioner testified that his inaccurate statement[4] as to the life estate (239 P.2d 868) was inadvertent and not intended to mislead the court or to gain advantage over Mrs. Landon. Adding credence to this testimony is the fact that the interest being purchased was the interest of Mrs. Miller—an interest held adversely to Mrs. Landon—and that the statement was made while the trial judge had before him the petition, which clearly stated the true interest in the property (the right to its "entire net income * * * or so much thereof as is necessary * * * to the support of said Lila C. Landon during her lifetime") which Mrs. Fleming agreed that Mrs. Landon should have. Adding credence to the testimony of petitioner and his law partner that despite his advice and

3. It is to be noted that incompetency to the extent of needing a guardian does not necessarily imply incompetency to make a valid will, In re Zanetti, 34 Cal.2d 136, 141, 208 P.2d 657.

4. Petitioner's statement to the court was: "[M]y wife, with Mrs. Landon's consent and approval, is buying the daughter's whatever interest she has in this property, buying it out for $4,000, subject to a life estate on the mother."

The statement in the petition then before the court was (after referring to negotiations for the settlement of the suit against the daughter): "That as a result of aforesaid negotiations between Petitioner and Marguerite M. Miller and Hugh Kelley her attorney in said action, it has been agreed, subject to the approval of the Court, as follows: Said Marguerite M. Miller will sell to Petitioner's wife, Olga R. Fleming, who is willing to purchase the same, her undivided one-half interest in said real property for $4000.00 cash and will vacate the apartment occupied by her in said premises on or before February 1st, 1948, thereby adding $50. a month to the income collectible [sic] from said real property; and Olga R. Fleming has agreed that the entire net income from said real property, or so much thereof as is necessary, shall be applied to the support of said Lila C. Landon during her lifetime."

Petitioner's explanation to the hearing committee of the discrepancy between his oral statement to the court and the written statement in the petition is: "I failed to differentiate between a legal life estate and her right to have the income from the property during the rest of her natural life, which were the arrangements which everyone understood were to be made."

protests Mrs. Landon insisted on making a will in petitioner's favor is the fact that thereafter Mrs. Landon, without the knowledge of petitioner, executed a will in his favor which had been prepared, at her direction, by independent counsel.

Petitioner's conduct was unquestionably unwise and improper; it admits of suspicion as to his motives. An experienced member of The State Bar, having regard for the duties and responsibilities of his profession and the proprieties of professional relationship with his clients, should not, without further safeguards for both his client and himself, have permitted his personal interests to become so enmeshed with those of a client of the age and state of health of Mrs. Landon. We are of the view, however, that petitioner has met the burden of showing that he was not guilty of moral turpitude. The net result, the only ultimate result, of petitioner's acts, has been to benefit, not to prejudice, Mrs. Landon. In the circumstances we feel that the punishment recommended by the board is disproportionately severe. We are satisfied that petitioner will be sufficiently punished, and will be sufficiently impressed with the impropriety of his conduct, if he is publicly reprimanded. This opinion shall constitute such reprimand.

EDMONDS, Justice (dissenting).

The record in this case amply supports the finding of the Administrative Committee, adopted by the Board of Governors, that the petitioner dealt with the property of his client and ward for his and his wife's personal advantage and to the disadvantage of a woman of advanced years and questionable mental capacity whose interests he was bound to protect. More specifically, as stated by the Board of Governors, Fleming placed Mrs. Landon in a position where she would receive "So much and only so much * * * as respondent and his wife, in their uncontrolled discretion, might see fit to give her".

Considering these findings, in my opinion, the committee and the Board of Governors erred, if at all, on the side of leniency and the recommendation of suspension for two years should be upheld. It is of some significance that two members of the Board of Governors voted against the recommendation on the ground that the degree of discipline is insufficient.

TRAYNOR, J., concurs.



38 Cal.2d 257

ALKOW v. STATE BAR OF CALIFORNIA.

L. A. 22026.

Supreme Court of California, in Bank.

Jan. 16, 1952.

Proceedings for review of an order of the Board of Governors recommending that an attorney be suspended from the practice of law for a period of three years. The Supreme Court held that the evidence was sufficient to sustain the recommendation of three years' suspension.

Order in accordance with opinion.

1. Attorney and Client ⇐57

Findings of fact made by local administrative committee or board of governors in disciplinary proceeding are not binding on the reviewing court, which will itself pass upon the sufficiency and weight of the evidence, but burden is on attorney petitioning for review to show wherein decision of board is erroneous or unlawful.

2. Attorney and Client ⇐58

In disciplinary proceedings, evidence of attorney's misconduct was sufficient to justify his suspension for period of three years. Business and Professions Code, §§ 6067, 6068, 6103, 6106.

3. Attorney and Client ⇐57
Corporations ⇐1

In proceedings for review of board of governors' recommendation of three years' suspension from practice of law, based, in part, upon conduct of attorney in connection with corporation doing business as collection agency, question would be whether attorney's conduct in connection with collection agency complied with pre-

scribed standards of conduct for members of legal profession, and it would be of no significance whether or not there had been evidence showing such a unity of interest and ownership as would justify disregard of separate corporate entity of collection agency.

4. Attorney and Client ⇐32

One who is licensed to practice as an attorney must conform to professional standards in whatever capacity he may be acting in particular matter.

5. Attorney and Client ⇐32

Conduct of attorney in issuing checks which he knows will not be honored violates fundamental rule of ethics, that of common honesty, without which profession is worse than valueless in place it holds in administration of justice.

Harry Alkow, in pro. per.

A. Ronald Button, Hollywood, Jerold E. Weil, San Francisco, for respondent.

PER CURIAM.

Petitioner was charged in twelve counts with the violation of his oath and duties as an attorney at law (Bus. & Prof.Code, ch. 4, art. 6, § 6103; art. 4, §§ 6067, 6068), the violation of Rules 2 and 9 of the Rules of Professional Conduct of The State Bar of California, soliciting employment by advertisement; commingling of funds, 33 Cal.2d 27, 30, and the commission of acts involving moral turpitude and dishonesty (Bus. & Prof.Code, ch. 4, art. 6, § 6106). After four hearings, the local administrative committee found petitioner guilty as charged and recommended to the Board of Governors that he be suspended from the practice of law for a period of three years. The Board, upon further hearing and review, dismissed three and sustained nine of the counts, made its own findings, and recommended three years' suspension.

[1] Petitioner, who is forty-six years of age, was admitted to practice in 1927. He contends in this proceeding (1) that the evidence is insufficient to sustain the Board's findings and (2) that in any event, the discipline imposed is unduly severe. He cites the general rule that findings of fact made by a local administrative committee or the Board of Governors are not binding on this court, which will itself pass upon the sufficiency and weight of the evidence. Fall v. State Bar, 25 Cal.2d 149, 159, 153 P.2d 1. However, the burden is on petitioner to show wherein the decision of the Board is erroneous or unlawful. Aydelotte v. State Bar, 209 Cal. 737, 740, 290 P. 41; Ring v. State Bar, 218 Cal. 747, 751, 24 P.2d 821; Light v. State Bar, 14 Cal.2d 328, 336, 94 P.2d 35; Propp v. State Bar, 20 Cal.2d 387, 390, 125 P.2d 825; Gaffney v. State Bar, 20 Cal.2d 735, 740, 128 P.2d 516. Petitioner has not met that burden.

Four of the nine counts involve petitioner's acts in connection with the Nick Harris Finance Exchange, a California corporation doing business as a collection agency. The Board found that at all times here pertinent petitioner "alone controlled and directed [its] business and affairs." The Board made further findings with regard to these four counts, as follows:

Count two: In November, 1946, one Rothert employed the Exchange to collect a claim and paid $10 advance on court costs. Petitioner filed an action on the claim in April, 1947, but allowed a year to elapse before setting it for trial. In the following six months he had the action postponed several times until it finally went off calendar in August, 1948. Some two months later petitioner told Rothert, in response to his inquiry as to when the case would be tried, that it would be settled in about ten days. At the expiration of that time, Rothert was unable to contact petitioner and never has been able to do so either by letter or telephone; and petitioner made no effort to communicate with him.

Count three: In November, 1947, one Wynne consulted petitioner with the purpose of placing in the hands of the Exchange a $900 claim for collection. He asked petitioner to bring an action thereon and gave petitioner $30 on account of court costs. Petitioner agreed to bring the action but said that the trial would not take place for about a year. In the following

months petitioner told Wynne on several occasions that an action had been filed, and that it would come up for trial in November, 1948. However, no action had been filed nor did petitioner use for court costs the $30 previously given to him for that purpose.

Count seven: Petitioner maintained a bank account designated "Harry Alkow, Trustee," wherein he kept his own funds and those of clients. In May, 1948, one Watry assigned and delivered to the Exchange for collection a promissory note for $2,026.22, at a fee of one-third of the recovery. In June, 1948, petitioner was paid $1,675 in full settlement of the note, but he did not report it to Watry until five months later. He then gave Watry as part payment a check for $400, which was returned to Watry marked "insufficient funds." A month later petitioner gave Watry in part payment a cashier's check for $350 and his own check for $116.66, which was post-dated and drawn on the "Harry Alkow, Trustee" account. The latter check was also returned to Watry marked "not sufficient funds." It was found that petitioner from June, 1948, had commingled Watry's pro rata of the recovery, $1,116.66, with funds belonging to the Exchange, and that petitioner knew when he issued the checks for $400 and $116.66, that there were not sufficient funds in the bank accounts to cover them.

Count ten: On several occasions in July, 1948, an advertisement was carried in the Los Angeles Times reading:

> "Anyone owe you money?
> See Nick Harris Collect.
> 650 S. Grand. TR–37333."

At said times petitioner maintained his office at 650 S. Grand Avenue, and his telephone number was the same as that appearing in the advertisement; he had no other office or telephone.

The remaining five counts concern petitioner's acts as a practicing attorney in an individual capacity dealing with his clients' affairs. The Board made findings with regard to these five counts as follows:

Count four: In September, 1948, petitioner issued his personal check in the sum of $31.75 to the order of the sheriff of Los Angeles County. At the time petitioner knew that he did not have sufficient funds in the bank for payment of the check. It has never been paid and petitioner is still obligated thereon.

Count five: In June, 1947, a Mrs. Welch employed petitioner to bring a divorce action against her husband. She paid him $115 as attorney fees and court costs. The action was tried in May, 1948, as a default case and Mrs. Welch was granted an interlocutory decree of divorce. However, petitioner failed to prepare such decree for the judge's signature, and none was ever entered. At the end of a year Mrs. Welch requested petitioner on several occasions to have the final decree entered; and on at least one occasion he told her that it had been entered, and that a copy was in the mail addressed to her. As above indicated, no interlocutory decree was ever entered and, of course, no final decree could have been entered.

Count six: In June, 1948, one Gleed employed petitioner to file a creditor's claim for $900 against a certain estate. Petitioner prepared the claim and Gleed verified it At the same time Gleed paid petitioner $75 for court costs and attorney fees in the event an action should be brought on the claim. Thereafter on several occasions petitioner told Gleed that the claim had been filed, and that he had talked to the executor concerning a settlement of the matter. However, no claim was ever filed and the six-month period within which it could have been filed was allowed to expire. The Board found that petitioner commingled the $75 with his own money and used it for his own purposes.

Count eight: In October, 1947, petitioner was retained by one Symansky to collect a $500 debt. Petitioner was paid $50 for court costs and was to receive forty per cent of the recovery as his fee. He filed an action and thereafter in September, 1948, he settled the case for $250, but he did not inform his client of that fact until four months later. Petitioner then paid Symansky $100, although the latter was en-

titled to receive $150. The Board found that petitioner converted the remainder of his client's pro rata, $50, to his own use.

Count nine: In August, 1948, certain clients of petitioner gave him a check for $747 to be paid to one Falk in adjustment of an alleged overcharge of rentals. A month later petitioner gave Falk his personal check in that amount, but it was dishonored for lack of funds in petitioner's bank account. Three months later petitioner gave Falk $572 in cash and a check for $175, which was drawn on an account that had been closed. The Board found that upon receipt of the $747, petitioner commingled it with his own funds and converted the whole thereof to his own use; and that $175 of the amount is still retained by him.

[2] Upon these findings covering petitioner's several acts of wrongdoing, the Board made its recommendation of three years' suspension. Petitioner claims that the charges were not established by "convincing proof and to a reasonable certainty". Hildebrand v. State Bar, 18 Cal.2d 816, 834, 117 P.2d 860, 869. But the record contains abundant credible evidence to sustain the findings on all charges, and it appears that petitioner's suspension for a period of three years is appropriate in view of the gravity of his continued misconduct over an extended time.

Petitioner maintains that the alleged acts of misconduct in his connection with the Nick Harris Finance Exchange are not matters chargeable to him but relate to dealings of the collection agency as a licensed corporate entity. (Counts 2, 3, 7, and 10.) In this connection, he calls attention to testimony to the effect that he went to work for the Exchange as an attorney in 1933, at which time and until death in 1943, Nick Harris was the sole owner of the business; that it then passed to the latter's wife, Mary Harris, who incorporated the business and continued with it until her death in 1948; that upon such incorporation in 1943, petitioner neither then nor at any other time held shares of stock in the business nor was he a director thereof, but he simply continued his employment on a salary basis; that from 1944 until liquidation of the business in 1948 following attachment proceedings, Mrs. Harris and another person each owned approximately fifty per cent of the stock and actively supervised the business. During his connection with the work of the Exchange, petitioner also conducted his own private law practice on the premises, and after the liquidation of the collection agency, he ceased for some time to have any office.

[3] Petitioner argues that there is no evidence which would show "such a unity of interest and ownership" as would justify disregard of the separate corporate entity of the Exchange and render him legally accountable for its acts as his *alter ego*. Minifie v. Rowley, 187 Cal. 481, 487, 202 P. 673; Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, Inc., 217 Cal. 124, 130, 17 P.2d 709. But whether or not the requirements of the *alter ego* doctrine are met has no significance here. Rather the instant proceeding presents the question of whether petitioner's conduct in connection with the collection agency complied with the prescribed standards of conduct for members of the legal profession.

The Board found that the Exchange was a corporation whose business and affairs petitioner "alone controlled and directed." There is ample evidence in the record to sustain this finding. The Chief of the Collection Agency License Division for the State of California testified that the license for the Nick Harris Finance Exchange had been issued annually for the years 1944–1948 in the name of Tom Morgan as Managing Director. The records of his department showed various complaints to have been filed against the Exchange, and he testified that he had always discussed these matters with petitioner because he could never locate Mr. Morgan. He further added that in the course of one investigation of the affairs of the Exchange in the District Attorney's office, the persons listed on the records as officers and stockholders of the corporation stated in petitioner's presence that they were acting as "dummies for [his] benefit" and peti-

tioner acknowledged that any claim with respect to the alleged misappropriation of moneys or conduct of the business was his "entire responsibility." Various investigators of the district attorney's office testified to the effect that petitioner, when questioned as to the management of the Exchange's business, admitted that its alleged officers were not active in its affairs, that he was the "prime party" behind the corporation, the "controlling interest," and responsible for any claimed defalcations and thefts. A prospective purchaser of the Exchange at the time when it was in the process of liquidation testified that in discussing the business with petitioner, the latter said that he was the "sole owner" of the stock; that he carried the corporation's license in the name of Mr. Morgan because petitioner was an attorney and could not carry it in his own name; that Mr. Morgan was only a former employee and had no interest in the business; and that petitioner fixed the purchase price. Mr. Morgan testified that petitioner was in charge of the Exchange and had employed him; that at petitioner's request, he took out the license for the corporation in 1944 in his name as Managing Director; that soon thereafter he found other employment and no longer was concerned with the business of the Exchange except that petitioner paid him between $25 and $35 per month to continue to carry the corporation's license in his name, and he continued to sign jointly with petitioner the Exchange's checks.

[4] However, in the determination of this disciplinary proceeding, it does not matter whether petitioner actually owned or controlled the Exchange. Petitioner does not challenge the sufficiency of the evidence to sustain the findings relating to his acts of wrongdoing in dealing with the clients of the Exchange. (Counts 2, 3, and 7.) These findings unquestionably show conduct involving moral turpitude including repeated misrepresentations to those clients Stephens v. State Bar, 19 Cal.2d 580, 583, 122 P.2d 549, as well as the misappropriation of their funds. Gaffney v. State Bar, supra, 20 Cal.2d 735, 739, 128 P.2d 516. Petitioner attempts to evade responsibility for his wrongful conduct by hiding behind the corporate existence of the Exchange and arguing that no relationship of attorney and client existed between him and its clients. But admittedly he was in the employ of the Exchange as an attorney and was undertaking to litigate claims for its clients, who consulted with him in regard to such legal services and relied on his judgment in safeguarding their interests. Assuming that petitioner was acting only as representative or agent of the Exchange in such matters, he nevertheless was obliged to comply with the required standards of honesty and good morals. Jacobs v. State Bar, 219 Cal. 59, 64, 25 P.2d 401; Petersen v. State Bar, 21 Cal.2d 866, 870, 136 P.2d 561. "One who is licensed to practice as an attorney in this state must conform to the professional standards in whatever capacity he may be acting in a particular matter." Libarian v. State Bar, 21 Cal.2d 862, 865, 136 P.2d 321, 323.

[5] Likewise there is abundant credible evidence supporting the findings on the counts concerning petitioner's acts as a practicing attorney in an individual capacity dealing with his clients' affairs. (Counts 4, 5, 6, 8, and 9.) This evidence shows numerous acts of misconduct, involving deliberate misrepresentations as well as misappropriation and commingling of clients' funds with his own. With respect to each of these counts, petitioner offers various excuses, presenting at best claims of alleged oversight and temporary financial distress. It would serve no useful purpose to detail these several explanations or his belated offers now to make amends through payment of the long overdue accounts with his clients. In any event, petitioner's continued course of conduct shows an habitual failure to give proper attention to his clients' affairs, Waterman v. State Bar, 8 Cal.2d 17, 20–21, 63 P.2d 1133, as well as a total lack of appreciation of his fiduciary duties in his financial accountings, which derelictions cannot be condoned. Marsh v. State Bar, 210 Cal. 303, 306, 291 P. 583; Ring v. State Bar, supra, 218 Cal. 747, 752, 24 P.2d 821; Glenn v. State Bar, 14 Cal.2d 318,

328, 94 P.2d 43. His continued practice of issuing checks which he knew would not be honored violates "the fundamental rule of ethics—that of common honesty—without which the profession is worse than valueless in the place it holds in the administration of justice." Tatlow v. State Bar, 5 Cal.2d 520, 524, 55 P.2d 214, 215.

As substantial evidence supports the findings of the Board covering petitioner's repeated instances of misconduct, as charged in counts 2, 3, 4, 5, 6, 7, 8, and 9, and such evidence is sufficient to sustain the recommendation of three years' suspension, it becomes unnecessary to consider whether the facts found under count 10 (newspaper advertising under the name of Nick Harris Finance Exchange) constitute a violation of the rule against the solicitation of professional employment. Rule 2 of the Rules of Professional Conduct of The State Bar, supra, 33 Cal.2d 27; cf. Light v. State Bar, supra, 14 Cal.2d 328, 337–338, 94 P.2d 35.

It is ordered that petitioner be suspended from the practice of law for a period of three years, commencing thirty days after the filing of this order.



38 Cal.2d 315

COVERSTONE v. DAVIES et al.

MOCK v. DAVIES et al.

MOCK et al. v. DAVIES et al.

L. A. 21949, 21950, 21951.

Supreme Court of California, in Bank.

Jan. 25, 1952.

Rehearing Denied Feb. 21, 1952.

Actions by Warren Coverstone, a minor, by Arthur L. Erra, as his guardian ad litem, and by William L. Mock, a minor, by Juanita L. Old, as his guardian ad litem, and by Rolla D. Mock and Velma M. Mock against L. N. Davies, individually and as a deputy sheriff of the County of Los Angeles, and others, for false arrest, malicious prosecution, assault and battery, conspiracy and trespass, and invasion of privacy. The Superior Court of Los Angeles County, Thurmond Clarke, J., rendered judgments of nonsuit in the three actions, which were consolidated for trial before a jury, and plaintiffs appealed. The Supreme Court, Spence, J., held that the arrest without warrant of two members of group assembled for illegal purpose of viewing "hot-rod" race was lawful and that the criminal proceeding against such members was not maliciously instituted and that the parents of one such member had no action for invasion of their privacy.

Judgments affirmed.

Carter and Schauer, JJ., dissented.

Prior opinion, 227 P.2d 300.

1. Appeal and Error ⇐927(3), 989

In testing the propriety of nonsuits, the evidence must be viewed in the light most favorable to plaintiffs and conflicts must be disregarded.

2. False Imprisonment ⇐39

In action for unlawful arrest, the facts that arrest was made without warrant and that criminal proceeding terminated in not guilty verdict, do not give rise to such presumption of legality of arrest as could warrant submission of a cause to jury.

3. False Imprisonment ⇐7(5)

Exoneration in criminal proceeding does not determine the legality of arrest of plaintiffs suing for unlawful arrest.

4. Unlawful Assembly ⇐1

The illegal purpose of group assembling to view "hot-rod" race renders the action of the group knowingly participating therein an "unlawful assembly" within statute providing that whenever two or more persons assemble together to do an unlawful act and separate without doing or advancing toward it or do an unlawful act in a violent, boisterous, or tumultuous manner such assembly is "unlawful assembly". Pen.Code, § 407.

See publication Words and Phrases, for other judicial constructions and definitions of "Unlawful Assembly".

5. Arrest ⇐63(4)

Officers arriving on scene of assembly which was unlawful because of illegal purpose of assembled group to view "hot-rod" race, had authority to arrest without warrant all those engaged in the commission of the unlawful act, and were entitled to

act on reasonable appearances in determining who were parties to the offense. Pen.Code, §§ 407, 836.

6. Arrest ⇐63(3)
False Imprisonment ⇐7(3)

Officers acted on probable cause in arresting without warrant two persons present in group, which was an unlawful assembly for illegal purpose of viewing "hot-rod" race, and the arrests were lawful as being arrests for acts committed in officers presence, and hence such persons did not have a cause of action for unlawful arrest. Pen Code, §§ 407, 836.

7. Arrest ⇐63(3)

A public offense is committed in presence of officer within meaning of statute providing that peace officer may arrest a person without a warrant for a public "offense committed in presence of officer", when circumstances exist that would cause a reasonable person to believe that a crime has been committed in his presence. Pen. Code, § 836.

See publication Words and Phrases, for other judicial constructions and definitions of "Committed in Presence of Officer".

8. Arrest ⇐63(1)

When an arrest for a misdemeanor is made on the complaint of one other than the arresting officer, a warrant is required to justify the arrest.

9. Malicious Prosecution ⇐42

Deputy sheriffs were acting in scope of their authority in signing complaint charging violation of unlawful assembly statute by two persons who were present in group which assembled for illegal purpose of viewing "hot-rod" race, and hence such persons did not have cause of action against deputy sheriff for maliciously instituting the criminal proceeding.

10. Torts ⇐8

A right of action for invasion of one's privacy is recognized in California.

11. Torts ⇐8

The gravamen of the tort of invasion of one's privacy is ordinarily the unwarranted publication by defendant of intimate details of plaintiff's private life.

12. Torts ⇐8

Publicity concerning arrest and subsequent prosecution of plaintiff's son did not give rise to cause of action in plaintiffs against police officers for invasion of privacy.

13. Torts ⇐8

The facts concerning arrest and prosecution of those charged in violation of the law are matters of general public interest, and therefore the publication of details of such official actions cannot, in the absence of defamatory statements, be actionable as an invasion of privacy.

14. False Imprisonment ⇐19
Malicious Prosecution ⇐41

Actions for false arrests and malicious prosecution are personal actions which do not give rise to a cause of action in any one other than the persons directly aggrieved.

C. Paul DuBois, Los Angeles, and R. D. Mock, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, H. Burton Noble, City Atty., Frank L. Kostlan, Asst. City Atty., Robert E. Michalski, Deputy City Atty., all of Pasadena, Crider, Runkle & Tilson, Donald Ruppe, and Anderson, McPharlin & Conners, all of Los Angeles, for respondents.

SPENCE, Justice.

Warren Coverstone and William L. Mock, by their respective guardians ad litem, brought actions against the sheriff of Los Angeles County and five of his deputies; the city manager, chief of police and three police officers of the City of Pasadena; and their respective sureties; charging (a) false arrest, (b) malicious prosecution, (c) assault and battery, and (d) conspiracy and trespass, based upon the arrest of these plaintiffs and their subsequent trial wherein they were acquitted. Rolla D. Mock and Velma M. Mock, the parents of William L. Mock, also brought an action against the same defendants for an alleged violation of their right of privacy predicat-

ed upon the publicity attendant upon the arrest and trial of their son. The three cases were consolidated for trial. At the close of plaintiffs' cases, nonsuits were granted as to all defendants on their motions therefor. Plaintiffs have appealed from the judgments entered accordingly.

[1] Plaintiffs contend that the nonsuits were improper because they had made out prima facie cases against all defendants. Viewing the evidence in the light most favorable to plaintiffs and disregarding conflicts, in accordance with the settled rule in testing the propriety of nonsuits, Lawless v. Calaway, 24 Cal.2d 81, 85, 147 P.2d 604; Lashley v. Koerber, 26 Cal.2d 83, 84–85, 156 P.2d 441; McCurdy v. Hatfield, 30 Cal.2d 492, 493, 183 P.2d 269, we have concluded that plaintiffs' contentions cannot be sustained, and that the judgments of nonsuits were therefore proper.

On January 17, 1947, a group of students from Pasadena Junior College had gathered near the intersection of Sierra Madre Boulevard and Sierra Madre Villa in Los Angeles County. Their purpose was to view a "hot-rod" race. Plaintiffs Warren Coverstone and William Mock were in the group, but claimed upon the trial that they did not know that a race had been proposed or was in progress. Defendants Mansell and Hoskins, two of the deputy sheriffs involved, arrived on the scene in a patrol car and ordered the group to stay together. Shortly thereafter these officers were reinforced by Captain Cook and Deputy Davies of the Sheriff's office and Officer Frakes and two other uniformed officers from the Pasadena City Police.

At the behest of Officer Frakes, the students were taken into custody and escorted to the Sheriff's Altadena Substation. There Coverstone and Mock were segregated from the group because they were over eighteen years of age, and were taken to the city jail by Deputies Mortenson and Knezevich. The youths were received at the city jail and conducted through the usual procedure, including booking, photographing, and fingerprinting. They were searched and their personal belongings were removed. After several hours they were released upon their own recognizance, and their personal belongings were returned. On January 20, 1947, they were arraigned on a complaint signed by defendant Davies which charged violation of Penal Code section 407 (unlawful assembly). They pleaded not guilty, and were subsequently tried on the charge and acquitted.

[2, 3] Plaintiffs contend that the above-recited facts are sufficient upon which to predicate a cause of action for unlawful arrest, in that the arrests were made without a warrant and the criminal proceeding terminated in a verdict of not guilty. While for the purposes of pleading, it has been held that the illegality of an arrest is presumed upon allegations of an arrest without a warrant and a subsequent confinement, Kaufman v. Brown, 93 Cal.App.2d 508, 512, 209 P.2d 156; Mackie v. Ambassador Hotel & Investment Corp. 123 Cal. App. 215, 221, 11 P.2d 3, such presumption cannot warrant submission of a cause to the jury where as here the record demonstrates the legality of the arrest. The fact that plaintiffs Coverstone and Mock were exonerated in the criminal proceeding has no bearing upon the legality of the arrest. (Cf. Neves v. Costa, 5 Cal.App. 111, 118, 89 P. 860; Wilson v. Loustalot, 85 Cal.App. 2d 316, 325, 193 P.2d 127, to the effect that the finding of guilt in the subsequent criminal proceeding cannot legalize an arrest unlawful when made. The converse would appear to be equally true.) Since it is settled that a peace officer may lawfully make an arrest for a public offense committed or attempted in his presence (Penal Code, § 836), the critical question presented in this case is whether the acts done in the presence of the arresting officer justified the arrests being made without a warrant.

[4–6] It is not disputed that the group was assembled to view a "hot-rod" race. Such illegal purpose renders the action of the group knowingly participating therein an unlawful assembly within the meaning of section 407 of the Penal Code. When the officers arrived upon the scene, they had the authority to arrest all those engaged in the commission of the unlawful act, and in our view they were entitled to act on reasonable appearances in determining who were parties to the offense. It is patent that the officers acted upon probable cause in ar-

resting Mock and Coverstone as members of the unlawful assembly. Such being the case, the arrests were lawful as being arrests for acts committed in the officers' presence.

[7, 8] Thus as was said in Garske v. United States, 8 Cir., 1 F.2d 620, 622, a search and seizure case: "It is the well-established doctrine now throughout the United States that for a crime, which they have probable cause to believe is being committed in their presence, though it be a misdemeanor, duly authorized peace officers may make arrest without a warrant." Or to state the same proposition in another fashion, a public offense is committed in the presence of an officer within the meaning of a statute such as Penal Code § 836, when "circumstances exist that would cause a reasonable person to believe that a crime has been committed in his presence." Ryan v. Conover, 59 Ohio App. 361, 364, 18 N.E. 2d 277, 279. Such rule, stated in the one form or the other, is consistently followed in the federal courts, United States v. Wiggins, D.C., 22 F.2d 1001, 1002; Peru v. United States, 8 Cir., 4 F.2d 881, 883; United States v. Stafford, D.C., 296 F. 702, 704–705, and in many state courts, State v. Reynolds, 101 Conn. 224, 229, 125 A. 636; Hill v. Day, 168 Kan. 604, 215 P.2d 219, 224; Commonwealth v. Chaplin, 307 Ky. 630, 636, 211 S.W.2d 841; Giannini v. Garland, 296 Ky. 361, 366, 177 S.W.2d 133; Cave v. Cooley, 48 N.M. 478, 481–482, 152 P.2d 886; People v. Esposito, 118 Misc. 867, 872, 194 N.Y.S. 326; Bock v. City of Cincinnati (Tapp v. City of Cincinnati), 43 Ohio App. 257, 261–263, 183 N.E. 119, error dismissed, 124 Ohio St. 666, 181 N.E. 879; 124 Ohio St. 667, 181 N.E. 888; Noce v. Ritchie, 109 W.Va. 391, 392, 155 S.E. 127; State ex rel. Verdis v. Fidelity & Casualty Co. of New York, 120 W.Va. 593, 597, 199 S.E. 884; State v. Rigsby, 124 W.Va. 344, 349–350, 20 S.E.2d 906. With respect to such misdemeanor as is here involved, the rule is embodied in the common law of England, 9 Halsbury's Laws of England sec. 117, p. 88, and has found expression in section 142 of the Restatement of the Law of Torts. As stated in State ex rel. Neville v. Mullen, 63 Mont. 50, 58, 207 P. 634, 636: "Whatever else may be said upon that subject, the utmost that can be exacted of the officer who arrests without a warrant is that the circumstances shall be such that upon them alone he would be justified in making a complaint upon which a warrant might issue."

Plaintiffs, however, cite and rely upon language in certain California cases to the effect that the doctrine of probable cause is inapplicable to arrests without a warrant in cases of misdemeanor. Ware v. Dunn, 80 Cal.App.2d 936, 943, 183 P.2d 128; Collins v. Owens, 77 Cal.App.2d 713, 718, 176 P.2d 372; People v. Perry, 79 Cal.App.2d Supp. 906, 908–909, 180 P.2d 465. The Ware and Collins cases involved situations in which the arrests were made upon the complaint of others. The facts indicated that no offense had been committed in the presence of the arresting officers. The facts in the Perry case, on the other hand, appear to be somewhat similar to those presented here, although it does not appear whether the officer was justified in making any arrest under the circumstances, let alone the arrest in question. However, we deem the language of the Perry case, and any implication in the language of the other cases, to be incorrect insofar as such language denies the application of the doctrine of probable cause to a situation in which an officer makes an arrest for acts done within his presence, which acts would cause a reasonable person to conclude that a public offense is being committed by the person who is arrested.

When an arrest for a misdemeanor is made upon the complaint of one other than the arresting officer, it is proper to require the securing of a warrant to justify the arrest. Ware v. Dunn, supra, 80 Cal.App.2d 936, 183 P.2d 128. However, to make the same requirement, when the officer sees that in all probability a public offense is being committed in his presence, would be to hamper law enforcement officers in their every day enforcement of the law. Peace officers would be reluctant to make arrests for fear that they would be held liable for having made an honest and reasonable mistake. It is thus manifest that the day to day problems of law enforcement require that peace officers be allowed to act with-

out fear of being held liable upon the facts as they see them, provided such facts would lead a reasonable person to conclude that he was witnessing the commission of a public offense by the person arrested.

[9] Plaintiffs next contend that the facts sustain a cause of action against Captain Cook and Deputy Davies of the Los Angeles County Sheriff's office for maliciously instituting the criminal proceeding against plaintiffs Mock and Coverstone. However, it is not contended, nor could it be contended upon the record as here presented, that defendants were acting outside the scope of their authority. Such being the case, the principles announced in White v. Towers, 37 Cal.2d 727, 235 P.2d 209, are applicable, and the record does not sustain a cause of action on that theory.

Inasmuch as the asserted causes of action for trespass, assault and battery, and conspiracy are dependent upon the unlawfulness of the arrest or the subsequent prosecution, it is patent that these plaintiffs, having failed to establish prima facie cases on the theories of false imprisonment or malicious prosecution, cannot prevail upon the other theories.

Finally, the parents of William Mock, contend that defendants are liable for the damages caused them, apart from those caused their son, on the theory that their right of privacy has been violated. There is evidence to show that Mr. Mock is, and was at the time in question, an attorney, licensed to practice in Iowa, and a certified public accountant, licensed to practice in California; that on January 17, 1947, he had a flourishing practice in Pasadena; that the publicity attendant upon his son's arrest and prosecution caused the business to decline, and caused friends to shun the Mocks; that ultimately, Mock was forced to abandon his practice in Pasadena and return to Des Moines, Iowa, where he is presently practicing; and that in addition to his business losses, Mock paid $500 in attorney's fees and $111 in incidental costs of investigation necessary in the defense of his son.

[10–13] While the right of action for the invasion of one's privacy is recognized in California, Melvin v. Reid, 112 Cal.App. 285, 289–291, 297 P. 91; Kerby v. Hal Roach Studios, 53 Cal.App.2d 207, 210, 127 P.2d 577; Metter v. Los Angeles Examiner, 35 Cal.App.2d 304, 309, 95 P.2d 491, it is clear that the principles which govern the right to recover on such theory do not encompass the facts asserted herein. See Melvin v. Reid, supra, 112 Cal.App. 285, 290, 297 P. 91. The gravamen of the tort is ordinarily the unwarranted publication by defendant of intimate details of plaintiff's private life. See annos. 138 A.L.R. 22; 168 A.L.R. 446.

In the instant case there is no such unwarranted publication by defendants of intimate details of plaintiffs' private lives. Even if it be assumed that defendants were the legal cause of the publicity concerning the arrest and subsequent prosecution of plaintiffs' son, the conclusion is inescapable that such publicity was not of such nature as to give rise to a cause of action in plaintiffs. The facts concerning the arrest and prosecution of those charged with violation of the law are matters of general public interest. Therefore the publication of details of such official actions cannot, in the absence of defamatory statements, be actionable. Metter v. Los Angeles Examiner, supra, 35 Cal.App.2d 304, 95 P.2d 491. The last cited case is peculiarly pertinent to the issue presented herein. In that case, plaintiff's wife had committed suicide in a rather bizarre manner. Defendant newspaper had published an account of the tragedy together with pictures of her and the building from which she had plunged to her death. Plaintiff was mentioned only as her husband and was quoted as to the circumstances surrounding her suicide. It was held that plaintiff had suffered no actionable invasion of his privacy, the court stating: "There are times, however, when one, whether willingly or not, becomes an actor in an occurrence of public or general interest. When this takes place, he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence." 35 Cal.App.2d 304, 309, 95 P.2d 491, 494. Further, as pointed out in Melvin v. Reid, supra, 112 Cal.App. 285, 290, 297 P. 91, 93, the right of privacy does not exist "in the dissemination of news and news events, nor in the discussion of events of the life of a

person in whom the public has a rightful interest * * *."

So far as the briefs and independent research have revealed, there have been no instances wherein courts have allowed recovery on this theory, where defendant's alleged wrongful act was directed toward a third person, and only as an incident to that act was it claimed that plaintiff's privacy had been invaded. Neither reason nor authority indicates that there should be an extension of liability to cover such a situation. Such a rule would open the courts to persons whose only relation to the asserted wrong is that they are related to the victim of the wrongdoer and were therefore brought unwillingly into the limelight. Every defamation, false imprisonment, and malicious prosecution would then be an actionable invasion of the privacy of the relatives of the victim.

[14] It is thus apparent, as defendants maintain, that there is no need in this case to depart from the established rule that actions for false arrest and malicious prosecution are personal actions which do not give rise to a cause of action in any one other than the person directly aggrieved. 34 Am. Jur. sec. 82, p. 754; 39 Am.Jur. sec. 75, p. 719; Rogers v. Smith, 17 Ind. 323, 324; Sperier v. Ott, 116 La. 1087, 1089, 41 So. 323, 7 L.R.A.,N.S., 518.

The judgments are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, and TRAYNOR, JJ., concur.

CARTER, Justice.

I dissent.

The majority of this court is, apparently, determined that no action for false arrest, false imprisonment or malicious prosecution shall lie against any one connected with the enforcement of the law, see White v. Towers, 37 Cal.2d 727, 235 P.2d 209. To achieve this result it is, of course, necessary here, as in the White case, to assume certain facts which do not appear of record. In the White case it was necessary for the court to assume that the one making the arrest and filing the charges was a deputy of the Fish and Game Commission. Without this assumption, the defendant there would have had no authority to make or procure an arrest for an alleged violation of the Fish and Game Code. In the instant case, a different assumption is made, but in my opinion, one on which the affirmance of the judgments of nonsuit rests.

The young men in the instant case were arrested and charged with a violation of section 407 of the Penal Code. That section provides that: "Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly." The record shows that a group of students were gathered near the intersection of two streets in Los Angeles. The record is not so clear as the majority would have us believe that "Their *purpose* was to view a 'hot-rod' race." These boys were found not guilty by a jury of the misdemeanor with which they were charged pursuant to the above Penal Code section. It appears to me that only two implications can be drawn from the verdict: That they were not assembled to do an unlawful act or that the lawful act for which they were assembled was not being carried forward in a "violent, boisterous, or tumultuous manner" as provided in the Penal Code. It is undisputed that the boys were present together with a number of other students so that there was an assembly of two or more persons. It is stated in the majority opinion that "Since * * a peace officer may lawfully make an arrest for a public offense committed or attempted in his presence (Penal Code, § 836), the critical question presented in this case is whether the acts done in the presence of the arresting officer justified the arrests being made without a warrant.

"It is not disputed that the group was assembled to view a 'hot-rod' race. *Such illegal purpose renders the action of the group knowingly participating* therein an unlawful assembly within the meaning of section 407 of the Penal Code." (Emphasis added.) But the jury, by its verdict, found no illegal purpose. There is

no evidence that these boys participated in the hot-rod race, or that they even knew that there was going to be one at that time and place. In People v. Palmer, 76 Cal. App.2d 679, 685, 173 P.2d 680, 683, it was said: "* * * it is well settled that the question of whether or not a person who is shown to have been present at the time and place of the commission of a crime has aided and abetted therein is one of fact for the jury to decide from all the circumstances proved." And the jury here returned a verdict of "not guilty." The mere fact that the boys were present when the officers arrived does not constitute the existence of such circumstances as would cause a reasonable person to believe that a crime was being committed in the presence of the officers so as to warrant an arrest without a warrant. Under the holding in this case, an officer could arrest any innocent bystander who unfortunately happened to be passing by the scene of any crime, imprison him, and then say that because he happened to be in the vicinity there was probable cause to believe him guilty. It is specifically provided (Penal Code, § 836) that a peace officer may arrest a person, without a warrant "For a public offense committed or attempted in his presence." These boys were standing on the bank by the side of the road when they were arrested. One who is merely a spectator at the scene of a crime, who does not participate therein, nor aid or abet its commission, cannot be held as a party to it. People v. Woodward, 45 Cal. 293.

It seems that the majority feels that the arrest and imprisonment were lawful because the boys were assembled at that particular spot for an illegal purpose. In so doing, the verdict in the criminal case is, by implication, set aside. For there the verdict showed that there had not been an illegal purpose in the assemblage of the young people.

So far as the imprisonment is concerned, after the boys were arrested without a warrant, the plaintiffs' evidence shows that they were not taken before a magistrate prior to incarcerating them and that there were no orders of commitment, which conduct of the officers was contrary to sections 145 and 849 of the Penal Code. Retention of prisoners for an unnecessary period of time without a magistrate's commitment order, constitutes false imprisonment. Gomez v. Scanlan, 155 Cal. 528, 102 P. 12.

There is also evidence in the record from which it could be found that the complaint was filed by the police officers against these plaintiffs to avoid the possibility of lawsuits for false arrest and imprisonment. Mr. Mock, father of one of the plaintiffs, testified that Captain Cook, one of the defendants here, called him to his office and remarked that a complaint had not been filed against the boys but that unless they (the police) were released from liability they would have to do so to protect themselves. In Franzen v. Shenk, 192 Cal. 572, 580–583, 221 P. 932, 935, it was said:

"* * * if it appears anywhere during the trial * * * that the defendant did not actually believe in the guilt of the person charged with crime, then that fact is an essential element to be considered in the determination of the question of whether or not the defendant had probable cause.

"* * * the same evidence which tends to prove malice may also, if it indicates a lack of belief on the part of the defendant in the guilt of the plaintiff, tend to prove want of probable cause. * * * If, on the other hand, in addition to malice, there was a lack of belief by the defendant in the guilt of the plaintiff, there was want of probable cause, despite the existence of facts which would justify the suspicions of a reasonable man in the guilt of the accused." Viewing the evidence in the light most favorable to plaintiffs and disregarding conflicts as this court must do in testing the propriety of nonsuits, it appears to me that there was ample evidence from which the jury could have found that these defendants did not themselves believe that they had either probable cause or reasonable grounds for the arrest, imprisonment or prosecution of these plaintiffs. No officer should be permitted to bring unwarranted, unfounded charges against any individual for the purpose of rendering himself immune from liability.

I am of the opinion now, as I was when I wrote my dissent in White v. Towers, supra,

that the protection of individual rights should be zealously guarded from unwarranted police action and that a privilege of police immunity should not be so extended that it protects any law enforcement officer who chooses to make an arrest on mere suspicion or conjecture.

The majority decision in this case is another step in support of the police state philosophy which the majority of this court has approved and sanctioned in several recent decisions, see People v. Rochin, 101 Cal.App.2d 140, 225 P.2d 1, 913, reversed Rochin v. California, 72 S.Ct. 205; White v. Towers, 37 Cal.2d 727, 235 P.2d 209; People v. Gonzales, 20 Cal.2d 165, 124 P.2d 44, and demonstrates the absurdity of the argument that a person whose rights have been violated by a peace officer may obtain redress against the offending officer. People v. Gonzales, 20 Cal.2d 165, 169, 124 P.2d 44.

I would reverse the judgment as to all defendants.

SCHAUER, Justice.

I concur generally in the view of the law, and in the conclusion, stated by Justice CARTER.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.



108 Cal.App.2d 845

PEOPLE v. RODRIGUEZ et al.

Cr. 4653.

District Court of Appeal, Second District, Division 1, California.

Jan. 28, 1952.

Manuel Figueroa Rodriguez and Aurora Gonzales were convicted of robbery and kidnapping in the Superior Court, Los Angeles County, Charles W. Fricke, J. From the judgment of conviction and from an order denying a motion for new trial the defendants appealed, and the appeal of the first named defendant was dismissed. The District Court of Appeal, Second Appellate District, Doran, J., held that the evidence was sufficient to sustain conviction of the last named defendant and that there was no error in an instruction defining kidnapping.

Judgment and order affirmed.

1. Kidnapping ⇐5
Robbery ⇐24(1)

In prosecution for kidnapping and robbery, evidence that defendant invited prosecuting witness to accompany her and that she drove automobile and led the way to basement hallway where prosecuting witness was robbed by defendant's companion was sufficient to sustain conviction.

2. Criminal Law ⇐808½

In prosecution for kidnapping, instruction defining kidnapping in language of statute was not error.

E. J. Marks, Santa Ana, for appellant Aurora Gonzales.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment and order denying a motion for a new trial.

The alleged offense was robbery and kidnapping. Appellant Gonzales was found guilty of both counts. The appeal of defendant Rodriguez was dismissed by this court on November 29, 1951, pursuant to the provisions of Rule 17, Rules on Appeal.

The facts, as recited in respondent's brief are as follows:

"The prosecuting witness Roberto Godines, a construction laborer from Brawley, California, was in Los Angeles on October 13, 1950 and the early morning of Saturday, October 14, 1950. In the early part of the morning October 14, 1950 Godines went to a place at 257 South Main Street, Los Angeles, known as the Tip Top Cafe. While he was seated in a booth in this cafe, Godines saw the appellant Aurora Gonzales and he asked her if she would accept a beer with him, and she said, 'No' but that instead they should go to another place and have a good time. Aurora Gonzales said that Godines should go with her and with the other woman, Gudelia Perez,

and that they would go to see some girls. Roberto Godines accepted this invitation.

"As they started to leave the Tip Top Cafe an accident occurred outside on the street and the two women went down the street to see who had been hit by an automobile. They came back quickly and went to a car that was parked by the curb. This was a black Chevrolet coupe with a seat in the rear. The women called to Godines to get into the car. Godines got into the back seat where a Filipino man was already seated. Aurora Gonzales told Godines where to sit in the car. Aurora Gonzales then got into the driver's seat of the car, with the other girl in the middle of the front seat and the defendant Manuel Figueroa Rodriguez came in on the right-hand side of the front seat. Appellant Aurora Gonzales started the car and drove about two blocks south and then turned to the left and then went about four blocks and stopped at a gasoline station to make an inquiry. Aurora Gonzales then turned to the right and then they arrived at a parking place and Aurora Gonzales got out and went around the car and opened the door and Rodriguez also got out and Mrs. Gonzales told Godines to get out. The three of them then started to walk and they walked about 150 feet across a vacant place and turned to the left where there were some apartments and they then went down about five or six steps into a basement and the appellant Aurora Gonzales told Godines not to make any noise. Appellant Gonzales told Godines that they were going to wake up some girls.

"After they had gotten down into the basement they came to a hallway leading to some apartments; Aurora Gonzales was walking ahead and Rodriguez was behind the prosecuting witness Godines. Rodriguez then grabbed Godines from the back with his hand on his neck and with his right hand he hit Godines in the face. Godines was hit with the right fist and he began to bleed. Rodriguez continued to hit Godines and at the same time was searching him and pulled out his wallet. When he found there was nothing in the wallet he hit Godines again and turned him over on the left side where he pulled out four twenty-dollar bills and some loose change. A watch was also taken from the victim at this time. Then the two, Rodriguez and Aurora Gonzales, left running. Godines was left lying on the floor bleeding from the nose and temple.

"Godines was able to get up and go to a gasoline station nearby and an ambulance came. He was treated at the scene and then two police officers arrived and took him in an automobile back to the bar located at 257 South Main. When they arrived at the bar, the two women, Aurora Gonzales and the Perez woman, and Rodriguez were standing outside. These three were then pointed out to the police officers by Godines. The defendants were handcuffed and taken into the car. The witness was positive as to his identification.

"Godines rode in the rear seat with one of the police officers in the middle and Rodriguez was on the right side of the rear seat. The two women rode in the front seat of the car. At the time that the prosecuting witness was picked up he had blood on his shirt. People's Exhibit No. 2 was the watch which the prosecuting witness testified was worth $23 and which was stolen from him by the defendants.

* * * * * *

"The officers told appellant Aurora Gonzales why she was under arrest and she made no response.

* * * * * *

"Officer Reddish testified that the watch identified by the victim Godines was found by him in the extreme right-hand side of the rear seat of the police car which was used to take the defendants to the city hall and then to the jail; that it was behind the cushion."

It is contended on appeal in substance that the evidence is insufficient to support the judgment and that "an instruction given the jury was prejudicially erroneous".

[1] Appellants' contention that the evidence is insufficient cannot be upheld. The law is well settled with regard to appeals in such circumstances. The effect of the evidence was for the jury to determine. And in that regard, as pointed out by respondent, "The intent and under-

standing of the criminal mind is rarely susceptible of direct proof, but the circumstances attending the perpetration of the crime and the reasonable inferences that may be drawn from them, together with the action of the appellant after the crime, render the claim of insufficient proof to convict the appellant of the crimes charged in the information of no force and effect whatsoever. In fact, the actions of the appellant can hardly be reconciled with any claim of innocence. The reasonable inferences to be drawn from the evidence presented to the jury provides sufficient proof of the unity of action that existed between Rodriguez and the appellant."

[2] The instruction about which appellant complains relates to the definition of kidnapping. It is argued that, "The effect of the instruction was to permit the jury to convict of a crime other than the one charged in the information". The contention is highly technical and without merit. As pointed out by respondent, "The instruction was in the language of the penal code section and the information sufficiently informed appellant of the charge made against her".

There being no prejudicial errors in the record, the judgment and order are affirmed.

DRAPEAU, J., concurs.

WHITE, Presiding Justice.

I concur. From a reading of the testimony adduced at the trial I am convinced that reasonable inferences to be drawn therefrom were sufficient to warrant the triers of fact in concluding that appellant Gonzales knowingly aided and abetted in the commission of the crimes charged. Pen.Code, § 31.

As to the instruction which it is claimed was prejudicially erroneous, I am satisfied that the information sufficiently informed appellant that she was charged in Count II with a violation of section 209 of the Penal Code, and that the instruction, given as it was in the language of the code section just cited, did not tend to either mislead or confuse the jury.

Furthermore, from an examination of the entire cause, including the evidence, I am of the opinion that the error, if any, complained of has not resulted in a miscarriage of justice. Const.Cal., Art. VI, sec. 4½.



108 Cal.App.2d 856

NANNY v. RUBY LIGHTING CORP.

Civ. 14785.

District Court of Appeal, First District, Division 1, California.

Jan. 29, 1952.

W. C. Nanny brought contract action against the Ruby Lighting Corporation, and defendant moved for a change of venue. The Superior Court, City & County of San Francisco, Preston Devine, J., entered an order granting the motion, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that although defendant had failed to file the required affidavit of merits, since plaintiff had not objected to such failure in the trial court, plaintiff waived the defect and was precluded from raising the point on appeal.

Affirmed.

1. Corporations ⇐503(3)

Where complaint in contract action against corporation failed to state place of business of corporation and failed to allege where contract had been made, where it was to be performed, where obligation or liability arose, or where breach occurred, corporation, upon taking proper steps, was entitled to have place of trial changed to corporation's principal place of business. Code Civ.Proc., §§ 395, 396b; Const. art. 12, § 16.

2. Venue ⇐61

Motion made at time of demurring, for change of venue based upon convenience of witnesses was premature prior to filing of answer, since until then issues to be tried had not been fixed. Code Civ.Proc., §§ 395, 396b; Const. art. 12, § 16.

3. Venue ⇐65

Failure to file affidavit of merits is sufficient to sustain ruling denying motion for change of venue. Code Civ.Proc., §§ 395, 396b; Const. art. 12, § 16.

4. Venue ⇐67

If objection is made to defective affidavits of merits filed in support of motion for change of venue, defendant may amend the affidavits to make them conform to the legal requirements. Code Civ.Proc., §§ 395, 396b; Const. art. 12, § 16.

5. Appeal and Error ⇐181

Where procedural defect could be corrected in trial court, and no objection is made in that court, generally complaining party has waived right to object and may not successfully raise point on appeal.

6. Venue ⇐21

Generally, a defendant is entitled to have action tried in county of his residence, and the right of plaintiff to have action tried elsewhere is the exceptional right that must find its justification in the terms of some statute, burden being upon plaintiff to bring himself within some exception to the general rule. Code Civ. Proc., §§ 395, 396b; Const. art. 12, § 16.

7. Venue ⇐7

Actions in contract, except as otherwise provided by statute, are personal actions triable in county of defendant's residence. Code Civ.Proc., § 395.

8. Appeal and Error ⇐186

Where complaint fails to allege facts sufficient to deprive defendant of his normal and important right to trial in county of his residence, and defendant, by motion, calls such defect to attention of trial court, but fails to comply with all statutory provisions relating to change of venue, and plaintiff fails to object to defendant's defective compliance with such provisions in trial court, plaintiff waives such defect and is precluded from raising the point on appeal. Code Civ.Proc., §§ 395, 396b; Const. art. 12, § 16.

9. Appeal and Error ⇐891

Appellate court has power to take additional evidence for purpose of affirmance.

10. Appeal and Error ⇐186

Where plaintiff failed to object to defendant corporation's failure to file affidavit of merits in support of motion for change of venue, plaintiff waived such defect and was precluded from raising the point on appeal, in view of facts that if such objection had been raised in trial court, defendant corporation could have cured defect, and that defendant had filed proper affidavit of merits in appellate court. Code Civ.Proc., §§ 395, 396b; Const. art. 12, § 16.

Mueller & McLeod, San Francisco, for appellant.

Dinkelspiel & Dinkelspiel, San Francisco, (Harold A. Block, San Francisco, of counsel), Knight, Gitelson, Ashton & Hagenbaugh, Los Angeles, (Alfred Gitelson, Los Angeles, of counsel), for respondent.

PETERS, Presiding Justice.

This is an appeal from an order granting a motion for change of venue.

[1] The action was filed in San Francisco. The complaint fails to state the principal or any place of business of the corporate defendant, and fails to allege where the contract was made, where it was to be performed, where the obligation or liability arose, or where the breach occurred. If the defendant's principal place of business was other than San Francisco, it is quite apparent that either under Article XII, section 16 of the Constitution, or under the provisions of section 395 of the Code of Civil Procedure (assuming that that section applies to corporations) the defendant, upon taking proper steps, was entitled to a change of place of trial.

The steps required to be taken by a defendant desiring a change of venue are prescribed by section 396b of the Code of Civil Procedure. It provides, in part: "Except as otherwise provided in section 396a, if an action or proceeding is commenced in a court having jurisdiction of the subject matter thereof, other than the court designated as the proper court for the trial thereof, under the provisions of

this title, the action may, notwithstanding, be tried in the court where commenced, unless the defendant, at the time he answers or demurs, files with the clerk * * an affidavit of merits and notice of motion for an order transferring the action or proceeding to the proper court * * *."

The record shows that defendant demurred and filed a notice of motion for an order for a change of venue, predicated on the allegations that if any contract was entered into between the parties it was entered into in Los Angeles County; that any obligation arising out of said contract arose in that county; that defendant's principal and only place of business is Los Angeles County; that the convenience of witnesses requires a change of place of trial, and that the court designated in the complaint is not the proper court for the trial of the action. This notice was supported by two affidavits. It is conceded that neither affidavit constituted a proper affidavit of merits, and that no such proper affidavit as required by the section was ever filed in the trial court.

[2] The first affidavit was filed by the attorney for defendant. It avers that he, the attorney, has caused investigation to be made of the matters alleged in plaintiff's complaint with respect to the issues raised by the complaint, which investigation disclosed that five witnesses, all residents of Los Angeles, are necessary and material witnesses for defendant; that by these witnesses affiant expects to prove certain facts which are set forth and which, if true, show no cause of action; that all the records of defendant are in Los Angeles; that no witness proposed to be called is a resident of San Francisco. There is no averment in this affidavit that defendant's principal place of business is Los Angeles. This affidavit seems to be in support of a plea for a change of venue on the ground of convenience of witnesses, although it hints at an affidavit of merits by the attorney. The motion for change of venue based upon convenience of witnesses, here made at the time of demurring, was probably premature prior to the filing of the answer, because until then the issues to be tried have not been fixed. Cook v. Pendergast, 61 Cal. 72; Armstrong v. Superior Court, 63 Cal. 410; Wong Fung Hing v. San Francisco Relief & Red Cross Funds, 15 Cal.App. 537, 115 P. 331; Pascoe v. Baker, 158 Cal. 232, 110 P. 815; Carruthers v. Crown Products Co., 89 Cal. App.2d 326, 200 P.2d 819.

The second affidavit is by Ben Ruby who avers that he is president of defendant; that the corporation maintains its principal and sole place of business in Los Angeles; that all records of the corporation are maintained there; that if any contract existed between the parties it was entered into in Los Angeles while plaintiff was a resident of that county; and that there does not exist, nor ever did exist, any special contract in writing between plaintiff and defendant relating to the place of performance. This, of course, did not constitute an affidavit of merits.

No counter-affidavits were filed, nor was any objection made in the trial court to the failure to file a proper affidavit of merits. The court granted the motion for a change of venue to Los Angeles County. Plaintiff appeals.

[3] On this appeal plaintiff's main contention is that, because no proper affidavit of merits was filed, defendant waived, under the provisions of section 396b of the Code of Civil Procedure above quoted, its right to have the place of trial changed to Los Angeles County. There can be no doubt that section 396b requires the filing of an affidavit of merits and that, had the trial court denied the motion for change of venue, the failure to file a proper affidavit of merits would, of itself, have been sufficient to sustain the ruling. Fernandez v. Fernandez, 11 Cal.2d 568, 81 P.2d 913; Noland v. Noland, 52 Cal.App.2d 58, 125 P. 2d 847; Rowe v. Policy Holders Life Ins. Ass'n, 131 Cal.App. 339, 21 P.2d 443; Mono Power Co. v. City of Los Angeles, 33 Cal.App. 675, 166 P. 387; Wells v. Wells, 74 Cal.App.2d 158, 168 P.2d 73.

[4] These cases, however, do not contain the complete answer to the problem here presented. Defendant's counsel states that he has examined the record in all of these cases and that in all of them objec-

tion to the failure to file a proper affidavit of merits was made in the trial court. Plaintiff does not challenge this statement. This is important because had such an objection been made in the instant case, the defendant could have amended the defective affidavits to make them conform to the legal requirements. Jaques v. Owens, 18 Cal.App. 114, 122 P. 430; Palmer & Rey v. Barclay, 92 Cal. 199, 28 P. 226; Lundy v. Lettunich, 50 Cal.App. 451, 195 P. 451; Rowe v. Policy Holders Life Ins. Ass'n, 131 Cal.App. 339, 21 P.2d 443; Joe Lowe Corp. v. Rasmusson, 53 Cal.App.2d 490, 127 P.2d 1002; Yellow Mfg. Acceptance Corp. v. Stoddard, 93 Cal.App.2d 301, 208 P.2d 1040. Although defendant made no effort to amend or supplement its affidavits in the lower court, apparently because the defect in such affidavits was not called to its attention in that court, it filed a proper affidavit of merits with this court at the time of the oral argument.

[5–7] Where a procedural defect could be corrected in the trial court, and no objection is made in that court, it is generally held that the complaining party has waived his right to object and may not successfully raise the point on appeal. Shay v. Superior Court, 57 Cal. 541; Howard v. Harman, 5 Cal. 78; Rubel v. Peckham, 94 Cal.App.2d 834, 211 P.2d 883; Grimes v. Nicholson, 71 Cal.App.2d 538, 162 P.2d 934; Otsuka v. Balangue, 92 Cal.App.2d 788, 208 P.2d 65. Here no counter-affidavits were filed, nor was objection made in the trial court. In Westover v. Bridgford, 25 Cal.App. 548, 144 P. 313, this waiver rule was held to apply to a defective notice of motion for a change of venue. This rule would seem to apply with particular force to the present case. Here the complaint shows on its face that, at least in the face of a proper objection, San Francisco has no jurisdiction of the cause of action because it fails to allege any reason why the trial should be held in a county other than defendant's residence. As was said in Goossen v. Clifton, 75 Cal.App.2d 44, 47, 170 P.2d 104, 107: "The general rule is that a defendant is entitled to have actions tried in the county of his residence. The right of the plaintiff to have the action tried elsewhere is the exceptional right, and must find its justification in the terms of some statute. It is the duty of a plaintiff to bring himself within some exception if he can—otherwise, the defendant's right is to have the case tried in the county of his residence. See cases collected 25 Cal.Jur., § 13, p. 866. Actions in contract, except as provided in § 395 above quoted, are personal actions triable in the county of defendant's residence. See 25 Cal.Jur., § 15, p. 869." See, also, Crofts & Anderson v. Johnson, 101 Cal.App.2d 418, 225 P.2d 594.

As opposed to this concept, section 396b does provide that a court having jurisdiction of the subject matter has jurisdiction to try the action unless the defendant takes certain steps, one of which is to file an affidavit of merits. There is undoubtedly some conflict between the thought that the defendant has a right to have the action tried in the county of his residence unless the plaintiff pleads an exception, and the thought that the action may be tried where commenced unless the defendant properly moves for a change of venue. See 25 Cal. Jur., p. 909, § 42.

[8] This apparent conflict can be reconciled, and the ends of justice served by holding that where a complaint fails to allege facts sufficient to deprive the defendant of his normal and important right to a trial in the county of his residence, and the defendant, by motion, calls this defect to the attention of the trial court, but fails to comply with all of the provisions of section 396b, and the plaintiff fails to object to this defective compliance in the trial court, the plaintiff must be deemed to have waived the defect, and is precluded from raising the point on appeal.

[9, 10] This conclusion is greatly strengthened by the rule that, had proper objection been made, a defective compliance with section 396b could have been cured in the trial court, and by the fact that a proper affidavit of merits has now been filed in this court. This court, of course, has power to take additional evi-

dence for the purpose of an affirmance. In re Estate of Schluttig, 36 Cal.2d 416, 224 P.2d 695. While appellant attacks the form of this affidavit, an examination of it demonstrates that it is in proper form.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



108 Cal.App.2d 841

HAINES v. WERTMAN et al.

Civ. 18542.

District Court of Appeal, Second District, Division 1, California.

Jan. 28, 1952.

Rehearing Denied Feb. 18, 1952.

Hearing Denied March 27, 1952.

LeRoy A. Haines sued Raymond A. Wertman and others to quiet title to real property which divorce decree had awarded to plaintiff's wife for life to be held in joint tenancy as community property, and named defendant cross-complained asserting that by virtue of deed from plaintiff's wife, named defendant was a tenant in common with plaintiff. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., entered an order quieting title in plaintiff, and defendants appealed. The District Court of Appeals, White, P. J., held that since the property had been adjudged to be community property and it had been decreed that it should be held in joint tenancy, upon the death of plaintiff's divorced wife, title to the property passed to plaintiff.

Affirmed.

1. Divorce ⇐249(1)

In divorce action, court has jurisdiction to adjudge character of any property claimed to be community property.

2. Divorce ⇐255

Where divorce decree adjudging real property held in joint tenancy to be community property had become final, question as to character of property was no longer open.

3. Divorce ⇐321½

Where divorce decree awarded property held in joint tenancy to wife as community property and provided that the property shown remain in joint tenancy, upon death of wife, the property passed to husband, although wife had granted the property to her son.

4. Divorce ⇐249(2)

Where parties to divorce stipulated that they intended and regarded property held in joint tenancy to be community property, the court was empowered to determine the character of the property as being community property and to treat it accordingly.

Arthur E. Boyd, Jr., Los Angeles, for appellants.

James J. McCarthy, Santa Monica, for respondent.

WHITE, Presiding Justice.

Defendants have appealed from a judgment whereby title to a parcel of real property was quieted in plaintiff and defendants were denied the relief sought in their cross-complaint.

In March, 1944, Henrietta J. Haines obtained an interlocutory judgment of divorce from LeRoy A. Haines, plaintiff and respondent herein. With respect to the property here in question the judgment provided, in part, "that plaintiff and cross-defendant (the wife) may live in the real property of the parties hereto, located at 2460 South Westgate Avenue, West Los Angeles, * * * and may further have the use of all the furniture and furnishings therein contained, for the balance of her lifetime. It is further ordered and adjudged that on the death of either the plaintiff or the defendant, that said real property shall be the property of the survivor. * * * It is further ordered and adjudged that all *other* community property shall remain in the possession of the party holding the same at the present time, and it is further ordered that neither of said parties shall sell, transfer or encumber any of the community property without the consent of the other being first obtained. * * *" (Emphasis added.)

The minute order of the court made at the time the interlocutory judgment was

granted contains the statement: "The Plaintiff is to have the use of the home together with the furnishings during the rest of her life. *The property to remain in joint tenancy as at present.*" (Emphasis added.)

A final judgment of divorce was entered in June, 1945, incorporating therein the terms of the interlocutory judgment. On January 6, 1947, Henrietta Haines executed a grant deed of her interest in the property to her son, Raymond A. Wertman, which deed was recorded. On July 26, 1949, after the previous deed had been recorded, Mrs. Haines executed a grant deed of the same property to her ex-husband, plaintiff in the present action. Plaintiff thereafter brought his action to quiet title to the property against Raymond A. Wertman, Anna Laura Wertman, and others. Defendant Raymond A. Wertman by cross-complaint asserted that the deed to plaintiff was void since Mrs. Haines had theretofore conveyed her interest to him, Wertman, who thereby became a tenant in common with plaintiff.

The trial court found that "on the date of the filing of the complaint in this action, to-wit, on December 16th, 1949, and subsequent thereto, the real property described in the complaint was held in joint tenancy between the plaintiff, LeRoy A. Haines, and his divorced wife, Henrietta Haines * *" (Henrietta Haines died after the action was commenced); that upon her death the property passed to plaintiff by right of survivorship. The court further found that the interlocutory judgment provided "that the real property described in plaintiff's complaint in this action remain in joint tenancy between the plaintiff herein and Henrietta J. Haines, she to have the exclusive right of possession of said real property during her lifetime and that neither party shall convey said real property without the consent of the other, and that the real property upon the death of one shall go to the survivor." The court then found that the deed from Mrs. Haines to defendant Raymond A. Wertman was of no force or effect.

Appellants' first contention on appeal is that the interlocutory decree of divorce in the case of Haines v. Haines, later incorporated in the final decree, gave Mrs. Haines a fee interest in an undivided one-half of the property here in question as a joint tenant with Mr. Haines. That in addition thereto, Mrs. Haines was given the right to occupy the property rent-free for such a period as she might desire during her lifetime, or until she disposed of her interest in the same. That, assuming the court in the divorce decree intended to restrain the parties from alienating the property during their lifetime, the court was without jurisdiction so to do, and that any such attempted restraint was void. That therefore Mrs. Haines was free to alienate her interest in the real property at any time after the final decree of divorce, as she did in fact do by executing a grant deed of her interest to her son, appellant herein.

In the divorce action Mrs. Haines, the wife, alleged that the property which was on record as in joint tenancy was in fact community property of the parties, and at the trial this contention was adopted by the husband. At the trial of the divorce action it was stipulated by both parties thereto that "the real property is to remain in joint tenancy in accordance with the deed provisions as they now are, with the property to pass to the survivor of the two."

[1, 2] In an action for divorce the court has jurisdiction to adjudge the character of any property claimed to be community property. A reading of the decree in the divorce action, which was before the trial court herein and is now before this court on appeal, convinces us that that is exactly what the court did, and the disposition of the community property having become final, the question as to its character is no longer open.

Acting upon the pleadings and the aforesaid stipulation the court in the divorce proceeding determined that the real property in question was community property, and pursuant to the aforesaid stipulation decreed that it was "to remain in joint tenancy * * * with the property to pass to the survivor of the two."

[3, 4] Appellants' contention that the trial court exceeded its jurisdiction in awarding joint tenancy property to respondent as community property is, therefore,

without merit. Though the real property awarded by the court in the divorce action did stand in the names of the parties as joint tenants the complaint alleged, and at the trial the defendant husband took the position, that it was community property. There is no evidence in the record to the contrary. In fact, the stipulation of the parties shows that while the property was taken by husband and wife as joint tenants, they intended it to be and regarded it as community property. This manifest intention empowered the court to determine its character as being community property and treat it accordingly. Tompkins v. Tompkins, 83 Cal.App.2d 71, 77, 187 P.2d 840.

For the foregoing reasons the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



108 Cal.App.2d 829

PEOPLE v. NATION.

Cr. 2311.

District Court of Appeal, Third District, California.

Jan. 25, 1952.

Freddie Nation was convicted in Superior Court, San Joaquin County, Thomas B. Quinn, J., of burglary and he appealed from denial of his motion to annul, vacate and set aside the prior judgment of court sentencing him to imprisonment for the crime of burglary. The District Court of Appeal, Van Dyke, J., held that where person accused of burglary went before magistrate and answered that he was guilty of charge of burglary, order of magistrate holding him to answer to Superior Court for crime of which he stood accused was not a certification as upon a plea of guilty but simply a holding of defendant to answer and fact that defendant was not represented by counsel did not invalidate proceeding before magistrate or subsequent proceedings.

Motion to dismiss appeal granted.

1. Criminal Law ⇐232

Where person accused of burglary went before magistrate and answered that he was guilty of charge of burglary, order of magistrate holding him to answer to Superior Court for crime of which he stood accused was not a certification as upon a plea of guilty but simply a holding of defendant to answer, and fact that defendant was not represented by counsel did not invalidate proceeding before magistrate or subsequent proceeding. Pen. Code, § 859a.

2. Indictment and Information ⇐41(1)

Filing of information for burglary in Superior Court gave court jurisdiction and jurisdiction of that court did not depend upon regularity of proceedings before magistrate.

3. Indictment and Information ⇐137(5)

Statute providing that information must be set aside by court in which defendant is arraigned upon his motion if before filing thereof defendant had not been legally committed by a magistrate provides exclusive method of trying question whether information was founded on necessary preliminary examination and commitment. Pen.Code, § 995.

Freddie Nation, in pro per.

Doris H. Maier, Deputy Atty. Gen., for respondent.

VAN DYKE, Justice.

Appellant, Freddie Nation, has appealed from the denial by the Superior Court of San Joaquin County of his motion to annul, vacate and set aside the prior judgment of that court sentencing him to imprisonment for the crime of burglary. To this appeal the respondent has interposed a motion to dismiss upon the grounds that the appeal is irregular, frivolous, sham and without merit. The motion is based upon the records and files in the case. The motion to annul, vacate and set aside the judgment, which judgment had been rendered on May 29, 1943, was upon the grounds "that the trial court was without jurisdiction to render judgment against

this defendant and to sentence him to imprisonment in the state prison on a plea of guilty on a felony charge of burglary when he was not represented by counsel at the proceedings, in violation of Section 858 et seq. of the Penal Code of California, and in violation of Section 8 of Article I of the Constitution of the State of California." It appears to be the position of appellant that the entire proceedings resulting in this imprisonment were null and void ab initio. In more detail his notice of motion in the trial court and his allegations of fact in support thereof show the following: When accused of burglary by a complaint filed in the police court of Stockton he appeared before that court without counsel; he was thereupon asked if he was guilty of the charge and answered that he was; no further proceedings were then taken, but an order was made holding him to answer to the Superior Court for the crime of which he stood accused; thereafter an information was filed in the Superior Court charging him with the same crime; when he appeared in that court for further proceedings on the information and while he was again without counsel the court merely determined the degree of the crime and sentenced him to imprisonment. Appellant further sets forth that he had not been counseled as to his rights to an appeal and hence did not prosecute one from the judgment which he now seeks to annul.

[1–3] It seems clear that appellant mistakenly believes that the proceedings before the magistrate were in accordance with Section 859a of the Penal Code which permits a defendant represented by counsel to plead guilty, whereupon his case may be certified directly to the superior court which then proceeds as upon a plea of guilty in that court. The section authorizes this procedure in lieu of preliminary examination and holding over, followed by the filing of an information. The section provides that it shall not be construed to authorize the receiving of a plea of guilty by the magistrate, from any defendant not represented by counsel. But such was not the procedure followed as is shown by appellant's notice of motion to annul the judgment. Whatever may have been done by the magistrate, the order of the magistrate was not a certification as upon a plea of guilty but simply a holding of the appellant to answer, followed by the filing of an information. "The filing of the information gave the [superior] court jurisdiction to proceed in the case", Ex parte McConnell, 83 Cal. 558, 23 P. 1119; People v. Youders, 96 Cal.App.2d 562, 568, 215 P.2d 743; In re Edwards, 99 Cal.App. 541, 544, 278 P. 910, 290 P. 591, and the jurisdiction of that court did not depend upon the regularity of the proceedings before the magistrate. If those proceedings were irregular in any way then the situation is governed by Penal Code, Section 995 which "provides the exclusive method of trying the question whether the information was founded on the necessary preliminary examination and commitment." Ex parte McConnell, supra; In re Stroff, 132 Cal.App. 351, 354, 22 P.2d 770; People v. Duncan, 50 Cal.App.2d 184, 187, 122 P. 2d 587; In re Tedford, 31 Cal.2d 693, 694, 192 P.2d 3. That section provides for setting aside an information if, before the filing thereof, the defendant had not been legally committed by a magistrate.

It further appears from the record as a whole that appellant does not complain that he was not informed of his right to counsel by the magistrate; nor that he was not informed by the trial court of his right to counsel and told that if without funds counsel would be procured for him when he was before that court on arraignment and entered a plea of guilty. In fact, the record he has filed here discloses affirmatively that such information was given and that he proceeded on his own representation to enter his plea.

It appearing that the appeal is devoid of merit, the motion to dismiss is granted.

We concur: ADAMS, P. J., PEEK, J.

PARKER et al. v. BOWRON, Mayor of the City of Los Angeles et al. *

Civ. 18517.

District Court of Appeal, Second District, Division 1, California.

Jan. 21, 1952.

Rehearing Denied Feb. 11, 1952.

Hearing Granted March 20, 1952.

Mandamus proceeding by Lester A. Parker, individually and as a member of and Secretary-Treasurer of the Council of Federated Municipal Crafts of Los Angeles, California, a voluntary unincorporated association, and for and on behalf of certain members of the association against Fletcher Bowron, Mayor of City of Los Angeles, and others, members of the City Council, to require the mayor and council to pay salaries at least equal to those prevailing in private employment in accordance with section 425 of the City Charter. The Superior Court, Los Angeles County, Walter R. Evans, J., rendered a judgment discharging an alternative writ and denying a peremptory writ of mandate, and petitioners appealed. The District Court of Appeal, Drapeau, J., held that it would be assumed that the council acted in its sound discretion, and hence a writ would not issue.

Judgment affirmed.

White, P. J., dissented.

1. Mandamus ⇐10

Writ of mandate will not be granted unless it is necessary to protect a substantial right and upon showing that substantial damages will be suffered by petitioner if writ is denied.

2. Mandamus ⇐23(1)

Writ of mandate is to be issued only upon application of party beneficially interested. Code of Civil Procedure, § 1086.

3. Mandamus ⇐23(1)

Writ of mandate will not issue when petitioner has no direct interest in compelling defendants to perform function mentioned in writ.

4. Mandamus ⇐23(1)

Union of Federated Municipal Crafts of city was directly interested in having city pay to plumbers, carpenters and laborers in its employ salaries at least equal to those prevailing in private employment in accordance with city charter and was therefore a proper party to maintain mandamus proceeding against Mayor and city council.

5. Mandamus ⇐68

Mandamus is proper remedy to compel city council or city civil service board to perform its mandatory duties prescribed by charter.

6. Mandamus ⇐71

Writ of mandate need not compel officer or board to perform duties in particular way, but will issue only to require performance of ministerial duties.

7. Mandamus ⇐72

Exercise of discretion on part of officer or board will not be interfered with in mandamus proceeding except for arbitrary disregard of law or flagrant abuse of discretion.

8. Mandamus ⇐72

Public officer may be compelled by mandamus to perform act which it is his legal duty to perform, but court may not control exercise of discretion and substitute its own discretion for discretion vested in officer.

9. Municipal Corporations ⇐220(2)

Under Los Angeles City Charter providing that in compensation of employees, council shall, in each instance, provide wage at least equal to prevailing wage for same quality of service rendered to private persons under similar employment, positive standard for fixing salaries is not established, but council is required to exercise sound judgment and discretion.

10. Mandamus ⇐107

If Los Angeles city council failed or neglected to act in matter of fixing wages under charter providing that council shall provide salary at least equal to prevailing wage for same quality of service rendered to private persons under similar employment, mandamus would issue to compel it to act.

11. Mandamus ⇐107

Where Los Angeles city charter provided that council should provide wages at least equal to prevailing wage for same

 * Subsequent opinion 254 P.2d 6.

quality of service rendered to private persons under similar employment, and council passed salary ordinance after making survey of prevailing wages, court would assume that council acted in exercise of sound discretion in fixing wage rates, and writ of mandate would not issue to compel council to fix wages in any particular amount.

David Sokol, Los Angeles, and Clarence E. Todd, San Francisco, for appellants.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., George William Adams, Alan G. Campbell and John F. Feldmeier, Deputy City Attys., all of Los Angeles, for respondents.

DRAPEAU, Justice.

The instant proceeding in mandamus was initiated by petitioner individually, as a member and officer of the Council of Federated Municipal Crafts of Los Angeles, and for and on behalf of certain affiliated unions and their members.

The petition alleges that petitioner Council of Federated Municipal Crafts of Los Angeles (hereinafter referred to as the Union) is an unincorporated association and that the United Brotherhood of Carpenters and Joiners of America, Local Union No. 2231; United Association of Plumbers and Steam Fitters, Local Union No. 78; Southern California District Council of Laborers and Carpenters District Council of Los Angeles County, all unincorporated associations, are members of the Union; that Union is devoted to improvement of working conditions of members of its affiliated unions; that each and all of the members of said affiliated unions have authorized Union to represent them collectively with respect to matters involving wages, hours and working conditions; and "that in so doing the said 'Union' represents those members of the 'affiliated unions' who are working for the City of and County of Los Angeles, State of California, the Los Angeles City Board of Education, the Water and Power Department of the City of Los Angeles, and the Harbor Department of the City of Los Angeles."

Petitioners here seek a writ of mandate requiring respondents, the mayor and the city council, to pay to plumbers, carpenters and laborers in the employ of the city of Los Angeles, salaries at least equal to those prevailing in private employment, in accord with section 425 of the City Charter which reads in part as follows: "In fixing the compensation to be paid to persons in the city's employ, the Council * * * shall, in each instance, provide a salary or wage at least equal to the prevailing salary or wage for the same quality of service rendered to private persons, firms or corporations under similar employment, in case such prevailing salary or wage can be ascertained."

It is alleged that in fixing salaries for the three named classifications—plumbers, carpenters and laborers—the city made a survey as to the prevailing wage in March, 1950; that such survey disclosed the actual monthly wage then being paid in private employment was more than city was paying for the same quality of work.

In this connection it is alleged that the prevailing wage in private employment was as follows:

$435 for journeymen plumbers; $382.80 for carpenters; $287.10 for laborers. But that city in violation of section 425, supra, was paying to members of the affiliated unions a graduated monthly wage scale as follows:

$303 for the first year of service and $375 for the fifth year to plumbers; $259 to $319 to carpenters; $181 to $221 to laborers.

It is also alleged that by reason of the survey, respondents had available facts from which they could have ascertained the prevailing wages for these three classifications, but that they refused to take such information into consideration, and refused to pay such prevailing wages.

A supplemental answer filed by respondents in open court at the start of the trial alleged that a salary ordinance effective January 30, 1951, had raised the monthly graduated scale of wages as follows:

Plumbers: $337 for the first year of service to $417 for the fifth year; carpenters: $303 to $375; laborers: $211–$273–$288.

At the trial, respondents objected to the introduction of any evidence on the grounds:

1. That none of the petitioners named was beneficially interested in the subject of the proceeding or in any relief sought by the petition;

2. That the petition failed to state a cause of action in mandamus against any of respondents, because it attempted to compel action in a matter left to their discretion.

The objection was sustained by the trial court. From the judgment which followed discharging the alternative writ, denying a peremptory writ of mandate, and dismissing the petition, petitioners appeal.

The questions presented for decision are:

1. Do petitioners have legal capacity to sue?

2. Does the petition state a cause of action in mandamus?

It is alleged that the city employs 26 plumbers out of a total of 2631 members of the United Association of Plumbers and Steamfitters; 250 carpenters of a total of 35,000 members of the Carpenters District Council of Los Angeles County; and 110 laborers of a total of 11,000 members of the Southern California District Council of Laborers; and that the Union is the "collective bargaining representative of practically every craft of employee of the City of Los Angeles", including the above named unions.

[1–3] As stated in Thomasson v. Jones, 68 Cal.App.2d 640, 642, 157 P.2d 655, 656, it is established law that "A writ of mandate will not be granted unless it is necessary to protect a substantial right and upon a showing that substantial damages will be suffered by the petitioner if the writ is denied. Ault v. Council of City of San Rafael, 17 Cal.2d 415, 110 P.2d 379. The writ of mandate is to be issued only upon the application of the party beneficially interested. Code of Civil Procedure, sec. 1086. The writ will not issue when the petitioner has no direct interest in compelling the defendants to perform the function mentioned in the writ. Ellis v. Workman, 144 Cal. 113, 115, 77 P. 822."

In the more recent case of Hollman v. Warren, 32 Cal.2d 351, 357, 196 P.2d 562, 566, where it was contended that petitioner was not a properly interested party, our supreme court held: "Aside from her character as an applicant for appointment as a notary it is alleged that she is a resident and taxpayer of the City and County of San Francisco. As such she is interested in having a sufficient number of notaries commissioned to act therein. The rule applicable here is stated thus in 35 American Jurisprudence, [page] 73; section 320: '(B)y the preponderance of authority * * * where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced. * * *'"

In Denver Building Trades Council v. Vail, 103 Colo. 364, 86 P.2d 267, 269, the petitioner, a voluntary association, was composed of twenty-three affiliated labor organizations the membership of which consisted of skilled and unskilled laborers engaged in the building and construction industry. The council sought to restrain the State Highway Engineer from opening certain highway construction bids on the ground that his invitation to submit the bids included what purported to be the prevailing rates of wages for the work required, but in fact were not the prevailing rates.

It was there contended that the petitioner council had no legal standing in court. The Supreme Court of Colorado held otherwise in the following language: "It is conceded that the Trades Council seeks to be the mouthpiece for union labor in the particular lines of work to be involved in the proposed construction. No single workman who hopes or desires to be employed on one of these projects could be expected to go to the trouble and expense of bringing an action individually. In the light of the practical situation, and in view of the obvious intent of the General Assembly (that prevailing

rates be stated in the invitation for bids and "shall be included in proposals or bids for the work"), we hold that the Trades Council has a sufficient interest in the subject matter to enable it to institute the proceedings in the case at bar."

In Board of Social Welfare v. County of Los Angeles, 27 Cal.2d 98, 100, 162 P.2d 627, 628, the same principle was recognized. It was there stated: "We are therefore of the opinion that although such board may be without specific authority to directly order the issuance of a duplicate warrant by a county auditor * * * nevertheless the board is a 'party beneficially interested' in the issuance of such warrant, within the meaning of the provision of section 1086 of the Code of Civil Procedure that 'It (the writ of mandamus) must be issued upon the verified petition of the party beneficially interested' (see 16 Cal.Jur., §§ 53–56, pp. 850–856), and is a proper party to maintain mandamus proceedings against county officials who fail or refuse to issue a warrant to a needy aged person who is a member of a class entitled thereto. Persons who are members of such a class are ordinarily financially, and often physically, unable to maintain such proceedings on their own behalf, and to deny to them the assistance of the welfare board under such circumstances would tend to defeat the purpose of the legislation which seeks to provide for them during needy old age."

[4] As agent of its affiliated unions and the members thereof, Union is directly interested in having the provisions of the city charter enforced on behalf of such membership. Accordingly, it is a proper party to maintain the instant proceeding.

Section 425 of the city charter here under consideration directs that the council, in fixing the compensation to be paid to city employees, shall provide a salary or wage "*at least equal* to the prevailing salary or wage *for the same quality* of service rendered to private persons, firms or corporations *under similar employment, in case such prevailing salary or wage can be ascertained.*" (Emphasis added.)

[5-7] As stated in Leftridge v. City of Sacramento, 59 Cal.App.2d 516, 525, 139 P. 2d 112, 117: "Mandamus is a proper remedy to compel a city council or a city civil service board to perform its mandatory duties prescribed by the charter. McAlpine v. Baumgartner, 10 Cal.2d 409, 74 P.2d 753. In the present case the writ was properly issued to require the Civil Service Board to ascertain the prevailing scale of wages paid in the vicinity of Sacramento to employees performing the duties of the class of workmen to which the petitioners belong, pursuant to the provisions of Section 52 of the Charter. The writ, however, may not compel an officer or a board to perform the duties in a particular way. It will issue only to require the performance of ministerial duties. The exercise of discretion on the part of such officer or board will not be interfered with in that proceeding except for arbitrary disregard of the law or for flagrant abuse of discretion. Mosesian v. Parker, 44 Cal.App.2d 544, 548, 112 P.2d 705; Morales v. Ingels, 30 Cal.App.2d 182, 85 P.2d 907; 16 Cal.Jur. 809, § 28; 34 Am.Jur. 859, § 70."

[8] In construing section 425, supra, this court held in Allen v. Bowron, 64 Cal. App.2d 311, 313, 148 P.2d 673, 674:

"It is fundamental that a public officer may be compelled by mandate proceedings to perform an act which it is his legal duty to perform, but the court in such proceedings may not control the exercise of discretion on the part of the officer and may not substitute its own discretion for the discretion vested in the officer. A writ of mandate will not issue to force the exercise of discretion in a particular manner. Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784; Browning v. Dow, 60 Cal.App. 680, 213 P. 707; Inglin v. Hoppin, 156 Cal. 483, 105 P. 582.

"The fixing of the salaries of the many employees of a large city, especially in a period of great emergency when conditions are subject to frequent change, undoubtedly calls for the exercise of a wise discretion." Section 425 does not say that the city shall pay the prevailing wage. Under the language employed, the city council must ascertain whether the services rendered the city are the same quality as those rendered

in private employment; whether they are rendered under similar employment, and then fix salaries at least equal to the prevailing salaries, if such prevailing salaries can be ascertained.

[9] The section does not establish a positive standard for fixing salaries of employees in the service of the city, but requires the exercise of sound judgment and discretion on the part of the members of the council in fixing salaries and wages which are at least equal to those prevailing in private employment.

In Adams v. Wolff, 84 Cal.App.2d 435, 437–438, 190 P.2d 665, cited by appellants, the sections of the Charter of San Francisco there in question prescribed an exact formula to be used by the Board of Supervisors in fixing salaries: i. e., certification to such Board by the Cilvil Service Commission that certain rates have become established and are generally prevailing in private employment, leaving nothing to the discretion of the Board but to fix the salaries accordingly.

The situation here presented does not involve the problem of classification of employees, and no arbitrary, capricious or wrongful act on the part of the council is alleged.

[10, 11] If the council had failed or neglected to act in the matter of fixing salaries, mandamus would lie to compel it to act. Such writ, however, may not compel the council to act in a particular manner. Leftridge v. Sacramento, supra. The record discloses that the council passed a salary ordinance effective as of January 30, 1951. It must be assumed that in so doing, the city council in the exercise of a sound discretion fixed wage rates that were at least equal to those paid in private employment.

For the reasons stated, the judgment is affirmed.

DORAN, J., concurs.

WHITE, Presiding Justice (dissenting).

I dissent. I am in accord with that part of the prevailing opinion which holds that petitioner is a proper party to maintain this proceeding, but I dissent from that portion of the opinion holding that the petition does not state a cause of action and affirming the judgment.

We are not here concerned with an appeal after trial in the mandamus proceeding, but are confronted with an appeal taken from a judgment which was ordered by the court upon the respondents' motion after their objection to the introduction of any evidence was sustained by the court. In other words, there was no trial.

Respondents contend that "since this is a mandamus proceeding, the affirmative allegations of the answer are to be accepted as true * * *. And the negative allegations in the answer are also to be accepted as true, since they were not countervailed by any pleading or by any offer of proof by the appellant."

Neither the code section relied upon nor the cases cited by respondents support them in this claim.

Section 1091 of the Code of Civil Procedure provides, *not* that uncontroverted or negative allegations of the answer are to be accepted as true upon consideration of an objection to the introduction of any evidence, but that *"On the trial,* the applicant is *not* precluded by the answer from any valid objection to its sufficiency, and may countervail it by proof either in direct denial or by way of avoidance." (Emphasis added.) While it is undoubtedly the rule, as urged by respondents, that the return is accepted as true unless controverted by the petitioner, the latter may countervail the allegations of the return *on the trial.* Here there was no trial, and the cases of Hunt v. Riverside, 31 Cal.2d 619, 623, 191 P.2d 426; Ertman v. Municipal Court, 68 Cal.App.2d 143, 150, 155 P.2d 908, 156 P.2d 940; Brown v. Superior Court, 10 Cal.App.2d 365, 368, 52 P.2d 256; Vanderbush v. Board of Public Works, 62 Cal.App. 771, 775, 217 P. 785, and Friedland v. Superior Court, 67 Cal.App.2d 619, 623, 155 P.2d 90, cited by respondents, are not in point. In the instant proceeding every effort was made by petitioner to put in his proof. Witnesses were in the courtroom, and it is conceded that a witness was on the stand ready to

answer questions; but petitioner was not permitted to put on his proof or to proceed in accordance with section 1091 of the Code of Civil Procedure, because of respondents' objection that the petition failed to state a cause of action.

As was said by our Supreme Court in the recent case of City & County of San Francisco v. Superior Court, 38 Cal.2d 156, 238 P.2d 581, 586, a proceeding similar to the one at bar, "The question whether compliance (with the charter provision) is sufficient for the purpose of establishing the validity of the wage scales when questioned by the employees can be decided only *on the trial* in the mandamus proceeding." (Emphasis added.)

By the court's ruling herein, petitioner was denied a statutory right under section 1091 of the Code of Civil Procedure, to meet the objections of the answer if his petition stated a cause of action, and I am convinced it did.

Conceding the correctness of the holding in the majority opinion that the writ of mandamus may not be used to compel a city council, officer or board to perform their mandatory duties in a particular manner, it is elementary that the courts will interfere when the determination or action of the council, board or officer is fraudulent, or so palpably unreasonable or arbitrary as to indicate an abuse of discretion as a matter of law.

Section 425 of the City Charter of Los Angeles provides in part that the council or other authority "shall, in every instance, provide a salary or wage at least equal to the prevailing salary or wage for the same quality of service rendered to private persons, firms or corporations, under similar employment, in case such prevailing salary or wage can be ascertained."

Petitioner alleged that in fixing the compensation to be paid to the members of the "affiliated unions" classified as plumbers, carpenters and laborers, respondents "made a survey in conjunction with the City Schools of Los Angeles, County of Los Angeles, and the Los Angeles City Housing Authority in March, 1950 of salaries and wages paid to persons under similar employment for the same quality of service rendered to private persons, firms or corporations; such survey included data obtained from employers in the Los Angeles area representing the major types of industry and business." That in fixing the compensation to be paid the aforesaid city employees, respondents had available the foregoing data as revealed by their own survey, but nevertheless, * * * failed, neglected and refused to pay such prevailing salary or wages and refused to consider, or to take into consideration, such prevailing salary or wages in fixing the salaries or wages of the carpenters, laborers and plumbers as aforesaid."

The petition, therefore, stated a cause of action, and it was error to sustain respondents' objection to the introduction of any evidence.

I would reverse the judgment.



108 Cal.App.2d 764

PEOPLE v. BECKER.

Cr. 4741.

District Court of Appeal, Second District, Division 1, California.

Jan. 21, 1952.

Hearing Denied Feb. 18, 1952.

Roy J. Becker was convicted in the Superior Court, Los Angeles County, William B. Neeley, J., of willful and corrupt misconduct while holding office as school director and he appealed. On motion to dismiss the appeal, the District Court of Appeal, Hanson, J. pro tem, held that the mere resignation of the defendant for personal reasons and not in compliance with judgment following conviction, did not constitute a waiver of defendant's right to a decision on the merits.

Motion denied.

1. Criminal Law ⇐1131(4)

Where school director resigned pending appeal from conviction for willful and corrupt misconduct in office, dismissal of appeal could not be obtained on theory that

director could not be retried should conviction be reversed. Government Code, §§ 1090, 1097, 3060, 3070, 3072; Pen.Code, §§ 683, 889; Education Code, § 1011.

2. Officers ⇐121

Whether prosecution lies against a person for willful and corrupt misconduct in office is governed by person's status as officer at time accusation is filed, rather than his status at time of retrial following reversal of conviction. Government Code, § 3060.

3. Constitutional Law ⇐321

The right of every man to his day in court is not limited to trial court but embraces as well his day in appropriate reviewing court.

4. Criminal Law ⇐1134(1)

Function of courts of review is to decide cases on their merits unless there is a want of jurisdiction, a request to give an advisory opinion or its counterpart, or to decide an academic question.

5. Criminal Law ⇐1131(4)

An appellant has a right to have settled on appeal question whether there has been a ground of complaint against him, and such a ground may not be deemed to be waived merely because a reversal of the judgment would be ineffectual to reinstate the original status quo.

6. Criminal Law ⇐1131(4)

Where school director had been convicted for willful and corrupt misconduct in office resignation of director for personal reasons and not in compliance with judgment following conviction, would not be deemed a waiver of director's right to a decision on the merits upon his appeal. Government Code, §§ 1090, 1097, 3060, 3070, 3072; Pen.Code, §§ 683, 889; Education Code § 1011.

S. V. O. Prichard, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Marcus R. Brandler, Thomas P. Finnerty, Jr., Deputies Dist. Atty., all of Los Angeles, for respondent.

HANSON, Justice pro tem.

The motion by the People to dismiss the appeal in this case presents the single question whether the mere resignation of a school director after his conviction upon the written accusation of a grand jury charging him with willful and corrupt misconduct in office is to be deemed a waiver of his right to a decision on the merits upon his appeal.

The accusation charged the appellant, as defendant below, with having voted as a director of the Board of Education of the City of Los Angeles to have it enter into three contracts with the Landier Management Company at a time when the defendant had an interest in the contracts. The accusation is captioned: "Accusation Willful or Corrupt Misconduct in Office (Section 3060 Government Code of the State of California)." It then proceeds as follows: "The Grand Jury * * * hereby accuses Roy J. Becker of willful and corrupt misconduct in office, committed as follows: * * * the said Roy J. Becker willfully, unlawfully and corruptly violated Sections 1011 of the Education Code * * * 1090 of the Government Code * * * and Section 1097 of the Government Code * * * by then and there being interested in" (naming three contracts entered into by the Board of Education with the Landier Management Company).

Section 1011 of the Education Code which the accusation charged was violated provides that "No member of the governing board of any school district shall be interested in any contract made by the board of which he is a member." Section 1090 of the Government Code provides that "Members of the Legislature, State, county, township and city officers shall not be interested in any contract made by them in their official capacity, or by any body or board of which they are members", and Section 1097 of the same code provides that "Every officer or person prohibited by the laws of this State from making or being interested in contracts, * * *, who violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the

State prison for not more than five years, and is forever disqualified from holding any office in this State."

Section 3060 of the Government Code referred to in the caption of the accusation reads as follows: "An accusation in writing against any district, county, township, or municipal officer, for willful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed. * * *" Section 3070 of the same code provides that "The trial shall be by a jury, and conducted in all respects in the same manner as the trial of an indictment." Section 3072 provides that "Upon a conviction and at the time appointed by the court it shall pronounce judgment that the defendant be removed from office. * * *" It should perhaps be added that Penal Code, sec. 683 provides as follows: "The proceeding by which a party charged with a public offense is accused and brought to trial and punishment, is known as a criminal action", and that Section 889 of the same code provides: "When the proceedings are had for the removal of district, county, municipal, or township officers, they may be commenced by an accusation or information, in writing, * * *."

Accordingly it is plain that the accusation was framed so as to charge various violations of the statute but with the punishment limited to a removal from office. For our purposes it is not necessary to portray or endeavor to define the proceedings any further.

A jury being waived the case was tried by the court which on August 27, 1951, found the defendant guilty as charged and by its judgment entered upon the same day removed the defendant "from office as a member of the Board of Education of the City of Los Angeles, and that said office is now declared vacant." Two days later on August 29, 1951, the defendant served and on September 6, 1951, filed his notice of appeal. After the filing of the notice of appeal the defendant on that same day appeared before the Board of Education where he stated: "A notice of appeal in my case has been filed today and it is my intention to prosecute this appeal, as far as the courts will permit, to vindicate my good name and to reverse the judgment pronounced against me that I have been guilty of willful and corrupt misconduct in office.

* * * * * *

"In order to make clear to all that I am prompted in making this appeal only by a desire to clear myself of the charges that have been made against me, and also to relieve the Board of any complications that might be involved in my continuance as a member of this Board, I hereby tender my resignation as of this date."

The resignation was thereupon accepted by the remaining members of the Board.

The attorney general contends that the appeal should be dismissed for two reasons. *First*, because we are not in a position to render an effectual judgment, i. e., that a reversal could not restore appellant to the office from which he resigned; *second*, because if we should reverse the case for error defendant could not be "retried inasmuch as the action lies only against one in office."

[1, 2] It is a sufficient answer to the last contention to point out that the defendant held the office at the time the accusation was filed and at the time the judgment was rendered. It is that status and not his status on retrial that governs. We pass then to a consideration of the first contention.

The offenses charged were, as appears by the statutes quoted, of sufficient gravity to warrant punishment not merely of removal from office, but fine and imprisonment in the penitentiary along with disqualification to hold any public office in the future. Inasmuch as the offenses charged were of a character which would warrant different types of punishment we need to keep constantly in mind that an offense is one thing and the punishment therefor quite another. The conviction involves certain disqualifications which would not follow from the commission of the crime without conviction. See Williston, Does a Pardon Blot Out Guilt?, 28

Harv. L. Rev. 647, 653. The action below was not merely one to remove the defendant from office, but to convict for an offense and *thereby* achieve the defendant's removal. The resignation tendered by the defendant—not to the court—but to the Board of Education and accepted by the latter, did not eliminate the conviction. Unless and until the conviction is set aside the criminal record stands. The resignation was not an election to let it stand; it was not made in compliance with the judgment but for the reasons stated by the defendant to the Board at the time of resignation. The offense charged, if true, would not have been erased by the resignation even if the latter had preceded the filing of an accusation.

[3–6] The right of every man to his day in court is not limited to the trial court but embraces as well his day in the appropriate reviewing court. Courts of review, like trial courts, sit to decide cases on their merits unless there be a want of jurisdiction, a request to give an advisory opinion or its counterpart, or to decide an academic question or the like. Owing to the numerous cases which come before our busy courts of appeal for review which possess little or no merit there is real justification now and then, for a dismissal of them without a decision on the merits. But many of the tests for dismissal as evolved in America, as contradistinguished from those in England, are far from persuasive. The rather general and oft-repeated phrases that just because a judgment by the reviewing court may "prove ineffectual" or that there is nothing "on which its judgment can operate" travel in a circle. Generally, it is only where the holding is based on the want of an actual controversy that a dismissal may possess merit, but quite too often appeals are dismissed upon grounds that are entirely negligible. Against this improper trend our Supreme Court has within the last three months taken a very decided stand, Reitano v. Yankwich, 38 Cal.2d 1, 237 P.2d 6, which we interpret as requiring us to deny the motion to dismiss. Moreover, we think, as did the court in Inchbald v. Robinson, 1869, 4 Ch.App. 388, that the true rule is that an appellant has a right to have settled on appeal whether there has been a ground of complaint against him and, what is more, that such a ground may not be deemed to be waived merely because a reversal of the judgment is "ineffectual" to reinstate the original *status quo*.

The defendant resigned from the Board of Education so as not to embarrass its members while a conviction hung over his head. In Commonwealth v. Fleckner, 167 Mass. 13, 44 N.E. 1053, the defendant appealed from a judgment of conviction which he later satisfied. The language of Justice Holmes in that case is applicable to the facts of this case. He said: "We should be slow to suppose that the legislature meant to take away the right to undo the disgrace and legal discredit of a conviction * * * merely because a wrongly convicted person has paid his fine or served his term", or, as in the case before us, resigned his office.

Likewise, in speaking to the point the Indiana Supreme Court recently has said: "* * * it would seem absurdly inconsistent to dismiss as moot a proceeding initiated to clear one's reputation of the infamy and stigma resulting from an allegedly erroneous conviction on a criminal charge, even though the one seeking vindication cannot for reasons of public policy, recover the amount of his fine and costs, nor compel the state to pay damages for his unjust imprisonment.

"'An erroneous judgment against him is an injury per se, from which the law will intend he is or will be damnified by its continuing against him unreversed. * * * A judgment on the merits is conclusive between the parties, and, if not by direct, it may be followed by remote consequences actually injurious.' Barthelemy v. People, 2 Hill (N.Y.) 248, 255." State ex rel. Topez v. Killigrew, 202 Ind. 397, 174 N.E. 808, 810, 74 A.L.R. 631.

Turning to our own decisions we find it stated in In re Byrnes, 26 Cal.2d 824, 161 P.2d 376, 378: "For although Byrnes served the full terms of imprisonment im-

posed under the judgments of conviction in the first action, that fact does not bar his right to an appeal from such judgments for the purpose of clearing his name (See, People v. Chamness, 109 Cal.App.Supp. 778, 288 P. 20; In re Lincoln, 102 Cal.App. 733, 283 P. 965; State v. Cohen, 45 Nev. 266, 201 P. 1027, 18 A.L.R. 867, 872) * * *." So in People v. Chamness, supra [109 Cal.App.Supp. 778, 288 P. 21], it was said: "We are satisfied that a defendant convicted of a criminal offense and faced with a term in jail, unless he pays a fine, does not by paying the fine waive his rights to appeal. There is no basis in fact for the contention that he waives his appeal, for the thing done bears no inconsistent relation to the thing to be done, so there is not factually an election. Nor is the one step a relinquishment of the right to pursue the other by virtue of any statute or written rule of court. Rather it is a practice adopted by the courts out of necessity, because: 'The demands of actual, practical litigation are too pressing to permit the examination or discussion of academic questions,' as was quoted in Foster v. Smith (1897), 115 Cal. 611, 47 P. 591, 592. It is a practice which may be departed from, if public interest requires. Piper v. Hawley (1918), 179 Cal. 10, 175 P. 417. If the defendant has a real, though perhaps not a legal, interest in the determination of the questions involved, even though the judgment itself has been satisfied, it seems to us that the press of other business is no justification for dismissing the appeal on hand. It is to substitute fantasy for fact to say the defendant's real interest in the case ceases with the payment of the fine. Is a good name no longer to be chosen rather than riches? Is a question alive so long as the payment of $100 is involved, but moot when only the matter of a besmirched name remains? We prefer to follow those courts, in the minority though they are, where an appeal is considered useful, though it may serve no purpose but to give a man a chance to clear his name."

People v. Craig, 9 Cal.2d 615, 72 P.2d 135, and Reid v. Superior Court, 44 Cal. App. 349, 186 P. 634, relied upon by the attorney general are not in point. In the Craig case the defendant was convicted of a felony in the federal court. On the basis of that conviction a *quo warranto* proceeding was instituted against him in the state court seeking his removal from the state office he held. From an adverse decision against him in the state trial court he appealed. Pending that appeal his conviction in the federal court became final on October 12, 1936, when the Supreme Court of the United States declined to review it. Thereafter, while the appeal in the state court was still pending the defendant submitted his resignation as a state officer to the Governor. Upon those facts the Supreme Court of this state dismissed the appeal. The only vital question before the state court on appeal was whether the procedure by *quo warranto* was applicable. The determination of that question necessarily became academic by reason of the resignation. We have no such case here.

The case of Reid v. Superior Court, 44 Cal.App. 349, 186 P. 634, held that the lower court had jurisdiction and hence that certiorari to review the proceedings below did not lie. The discussion by the court in that case upon the point involved in the instant case was not necessary to a decision of the case. But even if it had been we would be unable to follow the views there expressed. The case has never been cited at all by the Supreme Court nor has this dictum therein ever been cited by any District Courts of Appeal.

The motion to dismiss the appeal is denied.

DORAN, Acting P. J., and DRAPEAU, J., concur.

Hearing denied; SPENCE, J., dissenting.

109 Cal.App.2d 76

PEOPLE v. SMITH.

Civ. 2772.

District Court of Appeal, First District, Division 2, California.

Jan. 31, 1952.

George Edward Smith was convicted for the theft of an automobile and he filed a motion, in the nature of a petition for a writ of error coram nobis, to set aside and vacate the judgment. The Superior Court, Santa Clara County, William F. James, J., denied the motion and defendant appealed. On motion to dismiss the appeal, the District Court of Appeal, Goodell, J., held that alleged errors, which could have been presented by defendant on a motion for new trial or appeal from judgment would not be considered on motion in nature of a petition for writ of error coram nobis.

Appeal dismissed.

1. Criminal Law ⇐997

Motion to vacate a judgment in nature of a petition for coram nobis is a remedy of narrow scope, and its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of defendant, was not then known to court.

2. Criminal Law ⇐997

Applicant for writ of coram nobis must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ.

3. Criminal Law ⇐997

Defendant's contentions that he was not charged under proper statute, that prosecution was not carried through under statutory provision under which he was originally booked, that he was brought before court for arraignment and preliminary hearing without being offered aid of counsel or being informed of his constitutional rights, and that he was not given an immediate hearing before a magistrate within time set by law, could have been presented on a motion to quash information, and motion in nature of a petition for writ of error coram nobis would not be entertained to correct alleged errors.

4. Criminal Law ⇐997

The function of a writ of error coram nobis is to correct an error of fact.

5. Criminal Law ⇐997

Contentions of defendant that he was denied aid of a witness the defense had subpoenaed and that he was oppressed by introduction of evidence he was not prepared to meet, could have been presented on a motion for new trial or appeal from judgment, and motion in nature of petition for writ of error coram nobis would not be entertained to correct alleged errors.

6. Criminal Law ⇐997

Contention that attorney did not properly represent defendant could not be determined by proceedings in the nature of a petition for writ of error coram nobis.

7. Criminal Law ⇐997

Contentions of defendant that he was prejudiced by conduct of court at time he appeared for sentence 10 days after his conviction could not be determined by proceedings in the nature of a petition for writ of error coram nobis.

8. Criminal Law ⇐997

A defendant seeking to set aside a conviction has burden of producing convincing proof of a fact which constitutes a legal ground for setting aside the judgment.

9. Criminal Law ⇐997

In proceeding in the nature of a petition for a writ of coram nobis to set aside conviction, presumption that judgment is valid is strong and neither trial court nor appellate court is bound to accept at face value the allegations of the petition for the writ.

Alfred P. Chasuk, Mountain View, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., Winslow Christian, Deputy Atty. Gen., San Francis-

co, N. J. Menard, Dist. Atty. of Santa Clara County, Margaret V. Morten, Deputy Dist. Atty., San Jose, for respondent.

GOODELL, Justice.

Appellant filed, in the court in which he had been tried, a motion to set aside and vacate judgment, which is in the nature of a petition for a writ of error *coram nobis*. On its denial he appealed. Respondent moved to dismiss the appeal on the ground that appellant's motion had raised no substantial issue. Both the appeal and the motion to dismiss it were submitted on the same record.

On December 6, 1947 appellant was arrested in Palo Alto and charged with the theft of an automobile. After a preliminary hearing an information was filed charging him under § 503, Vehicle Code. He was tried before a jury, convicted, and sentenced to the penitentiary. There was no motion for a new trial, and no appeal from the judgment.

At the trial appellant was represented by counsel appointed by the court. When appellant's motion to vacate the judgment was presented in the trial court he was represented by a different attorney, who now represents him herein.

[1, 2] When the motion came before the trial court appellant's counsel stated the points set forth in the petition, amplified by argument; the district attorney replied; the court denied the motion from the bench, and a minute order was entered.

"In this state a motion to vacate a judgment in the nature of a petition for *coram nobis* is a remedy of narrow scope. [citations] Its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court. [citations] The applicant for the writ 'must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief.' (People v. Shorts (1948), 32 Cal.2d 502, 513, 197 P.2d 330, 336.)" People v. Adamson, 34 Cal.2d 320, 326–327, 210 P.2d 13, 15.

Appellant's motion (prepared by himself) presents eight contentions, four of which are based on proceedings before trial, three on proceedings at the trial, and one on proceedings after verdict.

Proceedings before trial:

After the assertion that "petitioner is entirely and wholly innocent of the charge upon which he was convicted" appellant alleged that he "should have been charged under 499–b of the * * * Penal Code" and that he was "indicted for grand theft auto, and the change of charge was without the knowledge of petitioner". Appellant states that "He was thus denied an opportunity to prepare an adequate defense". No reasons are suggested why this was so; no authorities are cited; no argument is made. It is not shown how an accused person has any right to say under which statute he shall be prosecuted, or to insist that the prosecution has to be carried through under the statutory provision under which he was originally booked.

Appellant's other contentions are that he was brought before the court for arraignment and preliminary hearing without being offered the aid of counsel, or being informed of his constitutional rights, and that he was not given an immediate hearing before a magistrate within the time set by law.

[3] All four matters, if they were as alleged, were known at the time, People v. Adamson, supra, and the remedy then available was a motion to quash the information. In re Tedford, 31 Cal.2d 693, 694–695; 192 P.2d 3; People v. James, 99 Cal.App.2d 476, 484, 222 P.2d 117; see, also, People v. Coates, 95 Cal.App.2d 78, 80, 212 P.2d 263; People v. Bailey, 105 Cal.App.2d 150, 153–154, 232 P.2d 518.

Proceedings at the trial:

[4] The three specifications under this head were not available to appellant in this

proceeding because of the rule stated in People v. Reid, 195 Cal. 249, 258, 232 P. 457, 461, 36 A.L.R. 1435, as follows: "The uniform conclusion of the decisions is that the function of a writ of error *coram nobis* is to correct an error of fact. It never issues to correct an error of law nor, so far as we have been able to ascertain, has it ever issued to redress an irregularity occurring at the trial, such as misconduct of the jury, or of the court, or of any officer of the court (except under circumstances amounting to extrinsic fraud, which in effect deprived the petitioner of a trial upon the merits)."

[5] One of appellant's complaints is that he "was denied the aid of a witness the defense had subpoenaed, the court approved the procedure of the District Attorney's office * * * who informed witness not to appear". If the attempt of the defense to get this witness into court was blocked or thwarted by any officer of the court or otherwise, that situation—a very serious one if in fact it existed—was known at the time, People v. Adamson, supra. It could have been presented on a motion for new trial or by appeal. If there had been any misconduct of the prosecuting officers it could not have been considered in this proceeding since those matters "could have been presented on appeal from the judgment", People v. Watkins, 92 Cal.App.2d 375, 377, 206 P.2d 1118, 1119.

Appellant's complaint that he "was oppressed by introduction of evidence he was not prepared to meet * * * the court erred in allowing two rebuttal witnesses (two police inspectors) then refused to allow defense to answer to their testimony" is answered by what has been said above. If it occurred it was known at the time, and it was an error of law which could have been presented on a motion for new trial or by appeal.

[6] Appellant complains that the attorney appointed by the trial court to conduct the defense (not appellant's present counsel) was inexperienced in criminal matters, and that he admitted that that was his first court appearance as an attorney. There is nothing in the record (beyond appellant's bare assertion) indicating that the defense was not ably and adequately conducted. But even if there had been, it is settled by the authorities that lack of effective aid of counsel cannot be determined in *coram nobis* proceedings. People v. James, supra, 99 Cal.App.2d 476, 479, 222 P.2d 117; People v. Krout, 90 Cal.App.2d 205, 208, 202 P.2d 635.

Proceedings after verdict:

[7] Appellant states that he "appeared for sentence March 13, 1948, ten days after his conviction, this period being used for the probation officer to compile his reports, and the court immediately commanded the probation officer to sit down without giving his report, the court stating its mind was already made up and any report by the officer would have no effect upon its decision. The court stated further that the plea for leniency made by ten of the jurors stemmed from the fact that they thought the offense of 503, California Vehicle Code was a misdemeanor, and the records will show that eight (8) of these jurors went further and each wrote a personal letter to the Adult Authority. The contents of which your petitioner does not know except that they asked for leniency in some form as they were of the opinion that the defendant had no previous criminal record."

No case has been cited, and we know of none, where *coram nobis* has been successfully invoked with respect to matters such as those last discussed.

[8, 9] In a case such as this the burden is upon the petitioner "of producing convincing proof of a fact which constitutes a legal ground for setting aside the judgment. The presumption that the judgment is valid in all respects is strong * * *." People v. Shorts, 32 Cal.2d 502, 508, 197 P.2d 330, 333, supra; People v. Bailey, supra, 105 Cal.App.2d 150, 153, 232 P.2d 518. Neither the trial court nor the appellate court is bound "to accept at face value the allegations of the petition" for the writ. People v. Adamson, supra, 34 Cal.2d 320, 330, 210 P.2d 13; People v.

Chapman, 96 Cal.App.2d 668, 671, 216 P. 2d 112, 114.

No substantial issue was raised by appellant's motion to vacate the judgment of conviction. Accordingly respondent's motion should be granted.

The appeal is dismissed.

NOURSE, P. J., and JONES, J. pro tem., concur.



KUCHEL v. TOLHURST. *

Civ. 18688.

District Court of Appeal, Second District, Division 1, California.

Jan. 25, 1952.

Thomas H. Kuchel, as Controller of the State of California, sued Shelley Rollins Tolhurst to enforce a demand for additional tax due upon amount of deduction erroneously allowed in original computation of inheritance tax. The Superior Court, Los Angeles County, Frank G. Swain, J., rendered judgment for defendant, and petitioner appealed. The District Court of Appeal, Hanson, J. Pro Tem., held that the tax was recoverable.

Reversed with directions.

1. Taxation ⇐895(6)

Revenue and Taxation Code section authorizing proceedings to be brought by controller where transfer has been made without determining tax would not be applicable remedy where deduction had erroneously been allowed in computing inheritance tax due. Revenue and Taxation Code, §§ 13984, 14531.

2. Taxation ⇐895(6)

Fact that no section of Inheritance Tax Law provided remedy by which controller could enforce rights given him by revenue and taxation code section relating to erroneous deductions in computing inheritance tax due would be immaterial, because court could and would supply remedy for such rights. Revenue and Taxation Code, §§ 13984, 14101.

3. Judgment ⇐576(1)

Order of probate court fixing amount of inheritance tax due could not be regarded as res judicata as to claim for additional tax arising upon discovery that deduction had erroneously been allowed in computing tax due. Revenue and Taxation Code, § 13984.

4. Taxation ⇐895(6)

Where erroneous allowance of deduction in fixing inheritance tax due resulted from appraiser's filing wrong report with court, it would be hypercritical to contend that error lay in filing report rather than in allowing deduction, and effect of statute permitting assessment of tax upon amount of erroneous deduction could not be thus avoided. Revenue and Taxation Code, § 13984.

James W. Hickey, Chief Inheritance Tax Atty., Sacramento, Morton L. Barker, Senior Inheritance Tax Atty., Betty Jo Sheldon, Asst. Inheritance Tax Atty., Los Angeles, for appellant.

R. Norman Wenzell, Hollywood, for respondent.

HANSON, Justice pro tem.

The State Inheritance Tax Law, Revenue and Taxation Code, sec. 13984, expressly provides that where a deduction has erroneously been allowed in computing the inheritance tax due—payable by the beneficiary where it has not been paid prior to the decree of distribution by the personal representative of the estate, Rev. & Tax. Code, sec. 14101—that the Superior Court having jurisdiction may enter an order "assessing tax upon the amount of the deduction" regardless of any lapse of time.

In the case before us an inheritance tax appraiser in appraising the property of the estate of which respondent was the sole beneficiary properly valued *the undivided interests* of the decedent in certain real property, but inadvertently deducted therefrom the *total* of the outstanding encumbrances against the property as a whole instead of the proportionate part thereof

*Subsequent opinion 246 P.2d 41.

allocable to decedent's interest. As a consequence of this error the appraiser prepared a report for filing with the Superior Court showing that a tax of $76.59 was due when in fact the tax due was $1,099.61. Before the appraiser filed his report with the court he discovered his error and prepared a new or amended report showing that the correct tax due was $1,099.61. Through inadvertence on his part he filed with the court of probate the original report he had prepared instead of the new or amended report. Thereafter the clerk of the court having given the statutory notice of the filing of the report and the respondent not having filed any objections thereto within the time allotted by statute the court entered the usual formal order approving the report and fixing the tax at $76.59. This tax was paid by respondent and thereafter the court approved the executor's final report, entered a decree of distribution and discharged the executor. The controller did not discover the true facts until some 19 months after the decree of distribution at which time he made demand upon respondent for the sum of $1,023.02. The demand being refused the controller filed in the Superior Court in which probate of the estate was had an action against respondent as defendant to recover the amount just mentioned. In that action the controller entitled his pleading "Petition for determination of Inheritance Tax." A citation having been issued and served upon respondent he filed his "objections" thereto. By his objections below he contended, as he does here, (1) that the order of the probate court fixing the tax at $76.59 was res judicata; (2) that no remedy is provided by the Inheritance Tax Law to enforce the provisions of the statute, Rev. & Tax. Code, sec. 13984, relied upon by the controller; and (3) that the only statutory remedial enforcement action is Section 14531 of the Revenue and Taxation Code and that its language is not wide enough to cover the right created by Section 13984 of the same code. The controller contends otherwise.

[1, 2] We take up the last contention first as we are of the view that the section is not applicable as the controller contends, but we do not agree with respondent that just because this section is not applicable and there is no other statutory enforcement section that the controller is without remedy. The section mentioned applies as respondent contends only to cases where the "taxability, tax liability, and amount of tax have not been determined". In the case before us the probate court had determined these factors quoted from the section. But the mere fact that neither this section nor any other section of the Inheritance Tax Law provides a remedy by which the controller can enforce the rights given him by Section 13984 is immaterial, because the court can, must and will supply a remedy for the right. 1 C.J. 986, sec. 95; 1 C.J.S., Actions, § 4c, P. 971; Burson v. Cowles, 25 Cal. 535, 536.

[3] We come next to the contention that the order of the probate court fixing the amount of the tax was res judicata. Assuming, without deciding, that it was res judicata or that it could be so regarded in the absence of a statute cutting down the sweep of a judgment, we have no such case here. If we view the order as being in every respect res judicata we are at once faced with the fact that even under such a holding that Section 13984 must be deemed to create a new or separate right. If on the other hand we view the section as restricting the res judicata effect of the order, we know of no reason and none has been suggested to us, why the legislature could not constitutionally do so.

[4] A further contention of the respondent, which we have not so far mentioned is that the error made by the appraiser was not that of erroneously allowing a deduction which should not have been allowed, but in erroneously filing the wrong report. We decline to discuss such a fanciful and hypercritical contention.

The judgment is reversed with instructions to the court to enter judgment for the amount claimed by the controller.

WHITE, P. J., and DORAN, J., concur.

SANAL v. MEADOR et al.

Civ. 18606.

District Court of Appeal, Second District, Division 3, California.

Jan. 25, 1952.

Rehearing Denied Feb. 15, 1952.

Hearing Denied March 24, 1952.

Action by Dorothy Sanal against John Donald Meador, and another for injuries sustained when struck by automobile while crossing a street. From a judgment of the Superior Court, Los Angeles County, Wilbur C. Curtis, J., in favor of the defendants the plaintiff appealed. The District Court of Appeal, Second Appellate District, Shinn, P. J., held that the trial court's finding was to be construed as a decision that there was no crosswalk where plaintiff was struck and that finding of absence of any crosswalk was not sustained by evidence.

Judgment reversed.

1. Automobiles ⇐217(2, 3)

A pedestrian crossing street, if in a crosswalk, has right of way over vehicles, but if at point other than in crosswalk, has duty to yield right of way to vehicles. Vehicle Code, §§ 560, 562.

2. Automobiles ⇐146

A failure to yield right of way is negligence.

3. Automobiles ⇐247

Where complaint stated that pedestrian, who was struck by automobile, was walking across boulevard at about northerly intersection of boulevard with named court at usual crossing for pedestrians at intersection, a finding that allegations were untrue except that an accident did occur near the intersection was to be construed, under the circumstances, as a finding that there was no crosswalk at point in question. Vehicle Code, §§ 81, 83–85.

4. Automobiles ⇐244(1)

In action for injuries sustained by pedestrian when struck by automobile while crossing boulevard at point at which narrow roadway, which had been accepted as a public street by ordinance, entered the boulevard, evidence with respect to whether sidewalk bordering roadway had been set apart for public use indicated public nature of sidewalk and did not support finding of absence of any crosswalk across boulevard. Vehicle Code, §§ 81, 83–85.

5. Dedication ⇐20(5)

Areas of private property laid out and improved with intention that they be publicly used as streets or sidewalks may become such through continued public use as effectually as by express dedication.

6. Dedication ⇐44

Construction of sidewalks on either side of roadway, whether it was called a court or an alley, for use of lot owners whose houses faced roadway, and for convenience of others, was strongest evidence of intention to convert them from private to public ownership.

7. Dedication ⇐44

The fact that it had been unnecessary for city to do maintenance work on sidewalks bordering street did not conclusively show that sidewalks were private rather than public sidewalks. Vehicle Code, § 81.

8. Automobiles ⇐244(6, 50)

Where trial court's implied finding that there was no crosswalk at point where pedestrian was struck by automobile was not sustained by evidence, testimony that pedestrian whirled and stepped toward automobile before being struck was not conclusive on questions of negligence and contributory negligence, since it could not be said that trial court would have reached same conclusion if it had found that pedestrian was standing in a crosswalk. Vehicle Code, §§ 560, 562

William H. Brawner and Newell & Chester, Los Angeles, for appellant.

Knight, Gitelson, Ashton & Hagenbaugh, Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiff appeals from a judgment in favor of defendant Meador in an action for damages arising out of an accident in which plaintiff was injured when she was struck by defendant's automobile as she was crossing Glenoaks Boulevard at Colgin Court, in the city of Burbank.

The action was first tried to a jury, but after the jury disagreed was submitted to and decided by the trial judge. The court found that defendant was not negligent in the operation of his automobile, and that plaintiff was guilty of contributory negligence. These findings are challenged as being without support in the evidence. It is also contended by plaintiff that the court failed to make its findings upon the most important factual question in the case, namely, whether plaintiff, when she was struck, was in an unmarked crosswalk.

Glenoaks Boulevard, a north and south street, is approximately 60 feet in width. Colgin Court is located on the east side of Glenoaks between Santa Anita Avenue to the north, and Providencia Avenue to the south. It is 15 feet six inches in width between curbs and has narrow sidewalks extending along its northerly and southerly lines. There are many small houses, placed side by side, facing the court. Opposite Colgin Court, and extending westerly from Glenoaks, is an alley of the same dimensions as Colgin Court. At about 5:15 p. m. on the 29th day of October, 1949, plaintiff drove her automobile south on Glenoaks and parked it at the west curb just north of the intersection of the alley. At that time there was a single streetcar line on the west half of Glenoaks, the east rail of which was a few feet west of the center line of the boulevard, which center line was marked by one or two white lines. Plaintiff emerged from her car and walked across the westerly half of Glenoaks. She stopped at the center line waiting for the passage of northbound vehicular traffic on the east half of Glenoaks. It was dusk and headlights of the cars were burning, some on low beam and some on high beam. As she was standing near the middle of the street she was struck by defendant's car traveling south in the car tracks on Glenoaks. She was knocked to the ground ahead of the car, was rendered unconscious, suffered numerous fractures and other serious injuries. Defendant had previously lost the sight of one eye but otherwise possessed normal vision. The weather was clear and the street was dry. Defendant testified that he did not see plaintiff until he was within two car lengths of her; he was driving 20 or 25 miles an hour with his lights on low beam; other cars were passing him on his right; upon seeing plaintiff he applied his brakes and endeavored to stop, and did stop within about a car length after striking plaintiff. Plaintiff testified she was dressed in a brown blouse and blue jeans, that as she entered Glenoaks she looked to the left, or north, and saw no car approaching south of Santa Anita, 150 feet or more to the north. Having reached the middle of the street she watched for traffic traveling north. She again looked to the north on the west side of the street and for the first time saw defendant's car which was practically upon her. Before she had an opportunity to escape she was struck.

The court found that defendant was not negligent, and that plaintiff was guilty of contributory negligence.

A primary factual question was whether plaintiff was in a crosswalk. The complaint read in paragraph V as follows: "* * * the plaintiff was walking across said Glenoaks Boulevard at or about the northerly intersection of said Glenoaks Boulevard with Colgin Court, and at and in the usual and regular crossing for pedestrians on said street, at said intersection." This was considered during the trial as a sufficient allegation that plaintiff was in a crosswalk, and evidence was introduced as to whether a crosswalk existed and whether plaintiff was in it. The court made the following finding: "That all of the allegations contained in paragraph V of said Complaint are untrue except that an accident did occur on October 29, 1949, near the intersection of said Glenoaks Boulevard with Colgin Court between the Chrysler automobile operated by defendant John Donald Meador and the person of plaintiff, and that plaintiff did sustain certain injuries." This finding could mean either that there was a crosswalk and that plaintiff was not in it, or that there was no crosswalk. Defendant would have us hold it to be merely a finding that if there was a crosswalk plaintiff was not in it. The learned trial judge would not have made such an ambiguous

and inconclusive finding. The complaint was deemed sufficient to allege there was a crosswalk. Counsel for defendant in drafting the findings to negative the allegation no doubt understood that they negatived the existence of a crosswalk. It is a situation that will continue to occur as long as attorneys incorporate in findings ambiguous allegations of the pleadings, and courts sign them in the hope that they are sufficient to settle the material facts. We cannot agree with defendant's construction of the finding.

[1–3] If plaintiff was in a crosswalk she had the right of way over vehicles, Vehicle Code, § 560; if she was crossing Glenoaks at a point other than within a crosswalk it would have been her duty to yield the right of way to vehicles. Vehicle Code, § 562. Failure to yield the right of way is negligence. The duties of the respective parties in this respect lay at the very foundation of their conduct from which negligence or the absence of negligence was to be found. All the witnesses who testified to plaintiff's position placed her at or about the northerly line of the intersection. The undisputed evidence was that defendant's car traveled about a car length after striking plaintiff and came to rest with its rear end at the north line of the intersection. Plaintiff lay in the intersection a few feet ahead of the car. Her car, which she had just left, was parked at the north line of the intersection. It was not disputed that she was traveling straight across Glenoaks. We must resolve the ambiguity of the finding in the light of this evidence, and we cannot construe it as a finding that plaintiff was not struck at the north intersection of the two roadways. In view of the fact that the court made a finding on the subject it was clearly the intention to find that a crosswalk did or did not exist. Defendant contended at the trial there was no crosswalk, and introduced evidence which he claimed, and still claims, ruled out the existence of a crosswalk. We construe the finding as a decision that there was no crosswalk.

[4] The next question is whether the evidence supports this finding. Defendant's contention is that the area covered by the cement sidewalks was never dedicated as a part of Colgin Court. He introduced testimony given by a deputy city engineer to the effect that the city of Burbank does not maintain the sidewalks. Relying upon these facts he insists that no crosswalks existed across Glenoaks. This contention requires consideration of one of the court's findings, certain sections of the vehicle code, and also the circumstances under which Colgin Court became a street and the uses that have been made of it.

The complaint alleged, the answer admitted, and the court found that Glenoaks Boulevard and Colgin Court were and are public highways in the city of Burbank, intersecting at approximate right angles. Therefore they were streets within the definition of section 81 of the Vehicle Code which defines a street as: "A way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel." The paved area of Colgin Court between curbs was a roadway, which is defined by section 83 of the Vehicle Code as "that portion of a highway improved, designed or ordinarily used for vehicular travel." A sidewalk is defined by section 84 of the Vehicle Code as "that portion of a highway, other than the roadway, set apart for pedestrian travel." One of the definitions of a crosswalk in section 85 of the Vehicle Code is: "That portion of a roadway ordinarily included within the prolongation or connection of the boundary lines of sidewalks at intersections where the intersecting roadways meet at approximately right angles, except the prolongation of any such lines from an alley across a street." It necessarily follows that if the sidewalks were part of the street (Colgin Court), those portions of Glenoaks included within the prolongation of the lines of such sidewalks were crosswalks.

[5, 6] Colgin Court was accepted as a public street by ordinance of the city of Burbank adopted in 1938. On the original subdivision map it was designated as an alley and this alley now extends westerly from Glenoaks. It does not appear in the

evidence when the court was first laid out, although it does appear that that area has been a part of the city of Burbank since 1927. The ordinance by which Colgin Court was accepted by the city as a street described it as extending from Glenoaks to Sixth Street, or for a distance of two blocks, but did not describe the width of the area which was accepted. In view of the evidence as to the residences that are on Colgin Court, and the length of time for which the court has been a public street of Burbank, it was a reasonable inference that the sidewalks were at the time of acceptance a part of the street. But whether or not this be true, we think it was a necessary inference that there has been a public use of the sidewalks for many years. Unquestionably they were laid out for public use, just as the roadway itself was laid out. It would be quite unreasonable to ignore the inference that these sidewalks, on the boundaries of a street that has existed for many years, have during that time been generally used by the public. They furnish the only means provided for pedestrians entering or leaving the residential area through which the street extends. It would be difficult to imagine circumstances under which sidewalks so located could remain exclusively in private ownership, and the use thereof by the public generally be regarded other than as a public use. It is of course well settled that areas of private property laid out and improved with the intention that they be publicly used as streets or sidewalks may become such through continued public use as effectually as by express dedication. The construction of sidewalks on either side of Colgin Court, whether, at the time, it was called a court or an alley, for the use of lot owners whose houses face the roadway, and of others who might have occasion to use the walks, is the strongest evidence of an intention to convert them from private to public ownership. The law on the subject is thoroughly expounded in City of Laguna Beach v. Consolidated Mtg. Co., 68 Cal.App.2d 38, 155 P.2d 844; Barnes v. Daveck, 7 Cal.App. 487, 94 P. 779, and numerous cases there cited.

[7] Defendant relies heavily upon the testimony of the deputy city engineer that although the roadway of the court is maintained by the city, the sidewalks are not, and he contends that unless they have been so maintained they are private walks and not subject to public use. We attach little importance to this testimony. It meant only that the city had done nothing for the maintenance of the sidewalks. Although under section 81 of the Vehicle Code a way or place becomes a street if it is publicly maintained and open for public vehicular travel, the mere fact that over a period of years an existing street, including sidewalks, has not required maintenance work, does not alter its character as public property. There was no evidence that the city has ever been called upon to do maintenance work, or that the sidewalks from the time they were installed have ever needed repair. But aside from this, we think defendant gives section 81 too narrow a contruction. It is the *roadway* that must be maintained and open to the use of the public for purposes of *vehicular* travel. Colgin Court is such a street, and if there are adjoining public sidewalks they are a part of the street. If maintenance of the sidewalks enters into the matter in any way it is not to aid in determining whether the walks are public or private but only collaterally, as affecting the duty of the city, which is quite beside the question. We therefore conclude there was insufficient evidence to support the finding that a crosswalk does not exist in the area.

[8] Defendant calls attention to the testimony of two witnesses, each of whom testified that immediately before she was struck plaintiff took a step toward the car, and "whirled." Defendant argues that if plaintiff had not taken this step she would not have been struck by his car and that for this reason alone the court was justified in finding that defendant was not negligent and plaintiff was guilty of contributory negligence. We cannot agree. The fact that plaintiff took a false step when confronted with sudden danger would be of slight importance in deciding the questions of negligence and contributory negligence,

as compared with the fact as to her position—whether within or outside a crosswalk. It would not only be unfair and unjust to plaintiff and the trial court, but also an unwarranted assumption of fact, for us to say that the trial court's conclusions as to negligence and contributory negligence would have been the same if it had been found that plaintiff was standing in a crosswalk.

The judgment is reversed.

WOOD and VALLÉE, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



108 Cal.App.2d 781

NIEL v. BARTON et al.

Civ. 8076.

Sac. 6210.

District Court of Appeal, Third District, California.

Jan. 21, 1952.

Action to foreclose a materialman's lien by D. G. Niel, doing business as Niel's Lumber Service, against Loren L. Barton and another. From an adverse judgment in the Superior Court for Merced County, Gregory P. Maushart, J., Loren L. Barton appealed. The District Court of Appeal, Van Dyke, J., held that a minor is not an "owner" within the statute relating to improvements made with knowledge of owner of the property, so that his property does not become liable to a mechanics' lien.

Judgment reversed with instructions.

1. Mechanics' Liens ⇐70

Generally there can be no mechanics' lien upon an infant's property under a contract made by another person not his guardian and not possessing any authority to bind him.

2. Mechanics' Liens ⇐76

The statute relating to improvements made with knowledge of the owner is based upon a doctrine of estoppel, that one who knowing the material or labor of another is being used in improvement of his property stands by while such is being done giving no notice that he will not be responsible for value thereof, is estopped thereafter to deny his liability. Code Civ.Proc. § 1192.

3. Estoppel ⇐98(1)

Generally minors cannot be held liable under the doctrine of estoppel.

4. Mechanics' Liens ⇐67, 76

A minor is not an "owner" within the statute relating to improvements made with knowledge of "owner" of the property, so that his property does not become liable to a mechanics' lien, because having learned of the use of the labor or materials of another upon his property, he has not actively disclaimed liability by giving the statutory notice of nonresponsibility. Code Civ.Proc. § 1192.

See publication Words and Phrases, for other judicial constructions and definitions of "Owner".

H. E. Gleason, Turlock, for appellant.

Gilbert Moody, Turlock, for respondent.

VAN DYKE, Justice.

This action was brought to foreclose a materialman's lien. The trial court found that plaintiff-respondent furnished building materials for improving a dwelling house and constructing a fence about the same upon land owned by appellant Barton; that the materials were furnished at the request of defendant Allen; that more than ten days prior to the filing of the claim of lien appellant had actual knowledge of the furnishing and use of the materials and of respondent's claim therefor and did not at any time file or post a notice of nonresponsibility. The answer of appellant Barton alleged that he had no knowledge of the furnishing or use of the materials until within ten days of the time the lien claim was recorded; that he had in no manner authorized Allen to contract for him. While the trial court did not ex-

pressly find on these allegations it is apparent from the findings made that the judgment is based solely upon Section 1192 of the Code of Civil Procedure which declares that every improvement and all work made or done with the knowledge of the owner of the property shall be held to have been so done or improved at the instance of such owner unless he shall within ten days after he obtains such knowledge give notice that he will not be responsible therefor. It appears that appellant Barton was at all pertinent times a minor. The court on his petition appointed a guardian ad litem for him.

[1] Appellant advances a number of contentions, but we think it unnecessary to consider any except those based upon appellant's nonage. Generally speaking, there can be no lien such as was here adjudged upon an infant's property under a contract made by another person not his guardian and not possessing any authority to bind him, 57 C.J.S., Mechanics' Liens, § 64; and although respondent's complaint, as amended to conform to proof, alleged that the materials here furnished were so furnished at the request of defendant Allen with the knowledge, consent and authority of appellant Barton, yet the trial court only found, as noted, that the materials were furnished at the request of Allen, and as to Barton found only that after learning of their furnishing and use Barton did not disclaim responsibility.

It was held in Fish v. McCarthy, 96 Cal. 484, 31 P. 529, that the guardian of a minor could not subject the estate and property of a ward to such a lien without first obtaining an order of the court authorizing the guardian to do so. "As the mechanics' lien arises from work done and materials furnished under an obligatory contract, if the contract be not binding, the lien necessarily fails. An infant is not bound by his contract except in certain cases, in which the erection of a building is not included. A conveyance or mortgage by him of his real estate would not be binding upon him; and legislatures are certainly not to be presumed to have intended to allow him to encumber his property, indirectly, by a contract for its improvement, when he cannot do the same thing in a binding mode by an instrument executed expressly for the purpose." Phillips on Mechanics' Liens, Sec. 108, p. 199.

[2–4] If a lien grounded upon an express contract by or for a minor is subject to the infirmities we have discussed, then will Section 1192 warrant the liening of a minor's property where the minor is at best a noncontracting owner and is sought to be held solely under the provisions of that section as an owner who, after obtaining knowledge of the improvements to his property, does not give notice of nonresponsibility? The research of counsel and the research of the court have revealed no direct answer to this question in decisions of the appellate courts of this State. The query might be more accurately stated as being whether or not a minor can be an "owner" within the meaning of the section. We find the following in James on Liens of Mechanics (California), Section 105: "Neither a minor who is the owner of land nor his guardian is an owner within the meaning of this section. Where, therefore, buildings are constructed upon the land of a minor the fact that both he and his guardian have knowledge of the construction of the building does not subject such property to liens though they fail to give the notice of non-responsibility required by the statute." Section 1192 has been declared to be based upon the doctrine of estoppel in that one who, knowing the material or labor of another is being used in the improvement of his property, stands by while this is being done, meanwhile giving no notice that he will not be responsible for the value of the same, is estopped thereafter to deny his liability. John R. Gentle & Co. v. Britton, 158 Cal. 328, 332, 111 P. 9. But generally minors are not held liable under the doctrine of estoppel. 19 Am.Jur., Estoppel, sec. 174. We conclude that a minor is not an owner within the meaning of Section 1192, so that his property becomes liable to a lien solely for the reason that, having learned of the use of the labor or materials of another upon his property. he has not ac-

tively disclaimed liability by giving the statutory notice of nonresponsibility.

The judgment is reversed with instructions to the trial court to enter judgment in favor of appellant.

SCHOTTKY, J. pro tem., and PEEK, J., concur.



108 Cal.App.2d 832

PEOPLE v. THOMAS et al.

PEOPLE v. BOTILLER et al.

Civ. 4408.

District Court of Appeal, Fourth District, California.

Jan. 25, 1952.

Rehearing Denied Feb. 18, 1952.

Hearing Denied March 24, 1952.

Eminent domain proceedings by the people of the State of California against Charles A. Thomas and others and Fred F. Botiller and others. The proceedings were consolidated for the purpose of a jury trial. The Superior Court of Riverside County, John G. Gabbert, J., rendered judgment on jury's verdict as to the fair market value of the property involved, severance damages and special benefits, and Fred F. Botiller and others appealed. The District Court of Appeal, Mussell, J., held that the findings and judgment as to the necessity of acquiring the various parcels were amply supported by the evidence.

Judgment affirmed.

1. Eminent Domain ⇐68

When state highway commission adopts resolution declaring that public interest and necessity require acquisition of certain real property for public improvements, resolution becomes conclusive of such facts recited therein, and may not be disputed in absence of fraud, bad faith, or abuse of discretion. Streets and Highways Code, § 103.

2. Eminent Domain ⇐192

Facts constituting bad faith or fraud on part of highway commission adopting resolution for condemnation of land must be specifically alleged.

3. Eminent Domain ⇐68

The state highway commission must determine necessity for acquisition of property sought to be condemned for construction of new limited access free highway and for conversion of existing highway into limited access freeway and where the commission determined that public interest and necessity required the acquisition of certain real property for such highways the property owners could not assert that portions of the property not included within the right of way lines of highway were not suitable or adaptable or in excess of property needed for the proposed improvement. Streets and Highways Code, § 103.

4. Pleading ⇐362(1)

In proceeding to condemn land for highway purposes motion of state to strike property owners' bare allegations as to fraud, bad faith, abuse of discretion and that state highway commission was acting in excess of its authority in adopting resolutions concerning public interest and necessity for the improvement and the property needed therefor was properly granted. Streets and Highways Code, § 103.

5. Pleading ⇐356(4)

Where amended answer was filed after time to answer had elapsed and without leave of court or stipulation between the parties, a motion to strike such answer was properly granted. Code Civ.Proc. § 453.

6. Eminent Domain ⇐58, 130

Where two acres of 6.81 acres of land sought to be condemned for highway purposes were small, irregular in shape and in a location inaccessible to the owner, department of public works was authorized to acquire entire parcel at fair market value and in an amount equal to any possible severance damages owners might have suffered if the two acres had not been acquired. Streets and Highways Code § 104.1.

7. New Trial ⇐56

Where juror's misconduct is urged as ground for new trial, prejudice from such misconduct must be shown.

8. Eminent Domain ⇐224

Where juror testified on voir dire examination that he was retired rancher, and trial judge during course of trial of eminent domain proceedings informed counsel for property owners that juror was director of bank, and juror stated that he would follow court's instructions, particularly those pertaining to market value and damages, and that he had no preconceived idea of property value in the vicinity of the land, denial of property owners' new trial motion for misconduct of juror who was discovered by owners after verdict to be bank vice-president engaged in appraising real estate for bank loans was not abuse of discretion.

9. Appeal and Error ⇐978(3)

Trial court's determination of new trial motion for alleged misconduct of juror will not be disturbed on appeal in absence of showing of abuse of discretion.

10. Eminent Domain ⇐145(4), 169, 195

Special benefits could be assessed for fence, which was integral part of limited access freeway and which would be maintained by the state, against owners of ranch lands, certain portions of which were specially benefited by maintenance of fence without cost or expense to them, notwithstanding that no fence was mentioned in condemnation resolution of state highway commission or in the complaints in the condemnation proceedings and that ranch owners had no vested right to continued existence of highway in the specific location. Streets and Highways Code, § 102.

11. Eminent Domain ⇐169

The purpose of condemnation resolution of state highway commission is to require the statement that public interest and necessity require the proposed construction and improvement and that the land sought to be condemned is necessary therefor and the commission is not required to set forth the details of the proposed construction in the resolution. Streets and Highways Code, § 102.

12. Eminent Domain ⇐191(7)

Complaint in highway condemnation proceeding is not required to plead the manner or details of the highway construction.

13. Constitutional Law ⇐92

Land owners have no vested rights to the continued existence of a state highway in a specific location or to the permanent maintenance of a fence as a part of such highway, since the highway may be relocated if, as and when necessary in the public interest.

14. Eminent Domain ⇐124, 145(1)

Special benefits which may be deducted from damages are to be assessed as of the time of the taking of the property and the possibility that the benefit may subsequently be terminated by the condemnor does not preclude the deduction of the benefit, although it is properly considered in determining its value.

15. Eminent Domain ⇐96

Where no highway existed prior to construction of new limited access freeway, the owners of 6.81 acres taken from 912 acre tract could not recover damages for severance of access rights by the taking of the 6.81 acre tract. Streets and Highways Code, § 23.5.

16. Eminent Domain ⇐106

State highway commission's condemnation resolution for limited access freeway did not create in owners' property a new right of access to a freeway to be constructed, where no highway, conventional or otherwise, existed before. Streets and Highways Code, § 23.5.

17. Eminent Domain ⇐50
Highways ⇐103

The construction of freeways or limited access highways is within statutory authority of state highway commission and department of public works and land owners' right of access to new limited access freeway can be condemned. Streets and Highways Code, §§ 102, 145.

18. Eminent Domain ⇐195

Maps attached to complaint in highway condemnation proceeding do not determine the amount of land necessary to be condemned and such amount must be determined from the averments in the complaint.

19. Eminent Domain ⇐200, 262(5)

In proceeding to condemn for highway purposes 6.81 acres of a 912-acre tract, land

owners had burden of proof as to severance damage, if any, and the fair market value, and where no direct evidence was introduced on issue of damages for severance, no prejudice resulted from failure of court or jury to find upon issue of damage for severance.

20. Evidence ⇐98

Where no direct evidence is introduced upon issue, the finding is properly against the party who has the burden of proof.

Harry M. Irwin, Los Angeles, for appellants.

Robert E. Reed, Sacramento, George C. Hadley, John N. McLaurin and Herbert J. Williams, Los Angeles, for respondent.

MUSSELL, Justice.

Two eminent domain proceedings were filed in Riverside county for the purpose of acquiring real property and abutter's rights of access owned by appellants and others. People v. Charles A. Thomas, et al., No. 47581, was instituted for the purpose of constructing a new limited access freeway, Road VIII–Riv–77–E, where no highway existed before, and People v. Fred F. Botiller, et al., No. 49411, for the purpose of converting the existing Santa Ana Canyon Highway, Road VIII–Riv–43–A, into a limited access freeway. The two proceedings were consolidated for the purpose of a jury trial.

As both proceedings contained parcels of real property with identical numbers, during the trial Parcel 2 in the Thomas case and Parcel 4 in the Botiller case were consolidated and designated Parcel "A"; parcels 3 and 4 in the Thomas case were designated Parcel "B", and Parcel "C", respectively, for the purpose of convenience and clarity. In the Thomas case Parcel 2 (also designated Parcel "A") consisting of 19.37 acres, and Parcel 4 (also designated Parcel "C") consisting of 6.81 acres, were parts of a larger parcel of 912 acres of undeveloped ranch land owned by all appellants. Parcel 3 (also designated Parcel "B") contained 15.16 acres of undeveloped ranch land and was a part of a larger parcel of approximately 26.05 acres. These various parcels are shown in color on a map in evidence marked "Plaintiff's Exhibit 13–A".

As shown on this exhibit Parcel "A" contains 19.37 acres. It is triangular in shape and from its westerly point extends easterly along the south line of existing highway (Riv–43–A) for a distance of 1,831.30 feet; thence southwesterly 914.82 feet; thence northwesterly 1,772.48 feet to the point of beginning.

A portion of Parcel "B" is narrow and wedge shaped and extends from its westerly point easterly approximately 2,100 feet to and into the junction of highways Riv–77–E and Riv–43–A. This portion is bounded on the north by the A. T. & S. F. Railway right of way and on the south by highway Riv–43–A and contains approximately 4½ acres.

Parcel "C" is also triangular in shape, with one side extending approximately 838.30 feet along a curve 50 feet south of the south right of way line of highway Riv–77–E. The highway crosses this parcel in a general east and west direction and a triangular portion of said parcel "C", consisting of 2 acres is north of the right of way line of the highway. A 50 foot strip of Parcel "C" extends along and is south of the south highway right of way line.

The jury, after hearing the evidence and viewing the premises, returned a verdict as to the fair market value of the property involved, severance damages and special benefits. A motion for a new trial was denied and this appeal followed.

Appellants first contend that the wedge shaped 4½ acres in Parcel "B" has no utility whatever for the proposed state highway; that the respondent has not done and does not contemplate doing any work of improvement or construction in this 4½ acre portion; in the 2 acre parcel north of the right of way in Parcel "C", in the 50 foot strip south of the right of way lines in this parcel, or in a substantial portion of the 19.37 acre portion of Parcel "A". Appellants then contend that the evidence does not support the trial court's finding "that the use and purpose for which the real property and interests in the real property sought to

be condemned was and is a public use authorized by law, to wit, a right of way in fee for freeway purposes, and that the taking of said real property and interests in real property was and is necessary to such public use and purpose." These contentions are both without merit.

The resolutions adopted by the California Highway Commission in each of the instant cases contain recitals that the Commission finds, determines and declares that "The public interest and necessity require the acquisition, construction and completion by the State of California, acting through the Department of Public Works, of a public improvement, namely a State Highway. The public interest and necessity require the acquisition for said public improvement of the real property, or interests in real property" described therein, and that "Said proposed state highway is planned and located in a manner which will be most compatible with the greatest public good and the least private injury."

Section 103 of the Streets and Highways Code provides that "The resolution of the commission shall be conclusive evidence:

"(a) Of the public necessity of such proposed public improvement.

"(b) That such real property or interest therein is necessary therefor.

"(c) That such proposed public improvement is planned or located in a manner which will be most compatible with the greatest public good and the least private injury."

[1–3] When, as here, the state highway commission adopts a resolution declaring that public interest and necessity require the acquisition of certain real property for public improvements, that resolution becomes conclusive of such facts recited therein, and the same may not be disputed in the absence of fraud, bad faith, or an abuse of discretion. People v. Milton, 35 Cal.App.2d 549, 552, 96 P.2d 159. In the instant case the appellants failed to allege specific facts constituting fraud, bad faith or abuse of discretion. Such a pleading is necessary to raise such issues. People v. Olsen, 109 Cal.App. 523, 531, 293 P. 645. The contention that the portions of the property not included within the right of way lines of the highway is not suitable or adaptable or in excess of property needed for the proposed improvement raises no issue since it was for the commission to determine the necessity for the acquisition of property sought to be condemned. County of Siskiyou v. Gamlich, 110 Cal. 94, 98, 42 P. 468.

[4, 5] On plaintiff's motion, bare allegations as to fraud, bad faith, abuse of discretion and that the California Highway Commission was acting in excess of its authority were stricken by the trial court as was a third amended answer which had been filed after time to answer had elapsed and without leave of court or stipulation between the parties. Such a motion was properly granted. County of Siskiyou v. Gamlich, supra, 98; Section 453, C.C.P.; Silica Brick Co. v. Winsor, 171 Cal. 18, 22, 151 P. 425.

In addition to the resolutions of the Highway Commission, testimony was introduced by the respondent that Parcel "A", consisting of 19.37 acres, was acquired for the construction of the Chino highway crossing over the Santa Ana Canyon highway and for the construction of a drainage channel and to allow water to drain under the Santa Ana Canyon road onto Parcel "B" and eventually to pass through a culvert at the westerly apex of the triangle and under the railroad embankment, and that portions of Parcel "B" will be used for a "turning lane" from the Chino highway into the Santa Ana highway.

[6] It was shown that the two acres in Parcel "C" were small, irregular in shape and in a location inaccessible to the owner and that by acquiring this portion, the appellants received the fair market value therefor by the jury's verdict and in an amount equal to any possible severance damage the appellants might have suffered if the same had not been acquired. Under section 104.1 of the Streets and Highways Code the department of public works is authorized to acquire the entire parcel under such circumstances or where the shape or condition will give rise to claims or litigation concerning severance damage.

The findings and judgment as to the necessity of acquiring the various parcels are amply supported by the evidence.

[7–9] Appellants next claim that they were prejudiced by the failure of a juror on his voir dire examination to disclose his occupation or business employment. The testimony of the juror on such examination was as follows:

"Q. May I inquire as to your occupation? A. Retired rancher.

"Q. Mr. Wilks, I believe you testified you are a retired rancher? A. That's right."

The affidavits used on motion for a new trial state that the appellants herein discovered after the verdict was returned in the instant action that this juror was vice-president of the First National Bank of Elsinore, California, and had been employed by said bank to make appraisals of real estate for contemplated real estate loans and that the juror failed to disclose his business or occupation. However, it appears from an affidavit filed by the respondent in opposition, that the trial judge, during the course of the trial and prior to the rendition of the verdict by the jury, informed counsel for the appellants that the juror was a director of a bank. There was evidence that counsel for the appellants was put on notice of any possible incidental employment of Mr. Wilks and it appears that appellants' attorney had an opportunity to re-examine the juror if he so desired. The record fails to disclose bias or prejudice on the part of the juror. He stated that he would follow the court's instructions, particularly those pertaining to the market value and damages, and had no preconceived idea of property values in the vicinity of appellants' land. Where misconduct of a juror is urged, prejudice from that misconduct must be shown. Anderson v. Pacific Tank Lines, 52 Cal.App.2d 244, 249, 126 P.2d 153. The trial court passed upon the matter and by its denial of the motion for a new trial, determined that the alleged misconduct of the juror was not prejudicial. There is no showing of abuse of discretion. Under such circumstances, the trial court's decision will not be disturbed on appeal. Spadoni v. Maggenti, 121 Cal.App. 147, 156, 8 P.2d 874.

[10–14] Appellants argue that special benefits were assessed against them contrary to law for the maintenance of a fence within the highway, and in this connection the court instructed the jury as follows: "The Court instructs you that if, from the evidence adduced during this proceeding, you find that the plaintiff, the State of California, will maintain a fence at its own cost and expense along the Santa Ana Canyon Highway upon which the defendants' property abuts, you may consider whether or not the maintenance of the fence, without cost or expense to these defendants has specially benefited the defendants' property not sought to be taken. If you find that the defendants' property has been so benefited, you may include in the form of verdict handed to you under the subject of special benefits the sum or sums of money representing your determination, if any, of the amount of such benefits."

The jury found that certain portions of appellants' ranch land was specially benefited by the maintenance of a fence without cost or expense to them and that other portions were not. The court made findings and conclusions that said lands were specially benefited in the amounts found by the jury and entered judgment accordingly. The position taken by appellants is that since no fence is mentioned in the condemnation resolution or in the complaint, the commission is not bound to erect and maintain it. The commission was not required to set forth the details of the proposed construction in the resolution and the purpose of such resolution is to require the statement that public interest and necessity require the proposed construction and improvement and that the land sought to be condemned is necessary therefor. Section 102, Streets and Highways Code. It was not necessary for respondent to plead the manner or details of the construction in the complaint and it is sufficient since it met the requirements of the statute. County of San Luis Obispo v. Simas, 1 Cal.App. 175, 178, 81 P. 972. The appellants have no vested rights to the continued existence of

a state highway in a specific location or to the permanent maintenance of a fence as a part of such highway, since the highway may be relocated if, as and when necessary in the public interest. Holloway v. Purcell, 35 Cal.2d 220, 226, 217 P.2d 665. Moreover, special benefits which may be deducted from damages are to be assessed as of the time of the taking of the property and the possibility that the benefit may subsequently be terminated by the condemnor does not preclude the deduction of the benefit, although it is properly considered in determining its value. 29 C.J.S., Eminent Domain, § 183c, pp. 1066, 1067. Evidence was introduced in the instant case that the special provisions for the project called for a 4-strand, barbed wire fence on steel posts; that a portion of the fence had been constructed; that it was an integral part of the highway and would be maintained by the respondent. The evidence also shows that the fences were constructed for the purpose of physically restricting access to the freeway, and that they are an integral part thereof. We find no error in the instruction given and conclude that the evidence supports the finding of the jury and the judgment of the court as to special benefits.

[15, 16] Appellants next contend that the instruction given by the trial court excluding any damage for severance of access rights by the taking of Parcel 4 is contrary to the law. The instruction complained of is as follows:

"For the purposes of determining the severance damages, if any, to the remaining portion of defendants' 912 acres by virtue of the taking of only Parcel C, you are not to consider that said remaining acreage at any time had direct access, including ingress and egress, in and to State Highway No. 77, referred to in these proceedings as the New Chino Freeway.

"Accordingly, it would be improper for you to include in your verdict any sum or sums of money whatsoever which would be based upon the fact that the defendants' remaining acreage had direct access to and from the New Chino Freeway."

The evidence shows that no highway existed in the location of Parcel 4 prior to the construction of the freeway and it is apparent that appellants never had an existing easement of access to state highway road VIII–Riv–77–E, or any other highway and since no property right was acquired, they have no supportable claim for damages. A "freeway" is defined as a highway in respect of which the owners of abutting lands have no right or easement of access to or from their abutting lands or in respect to which such owners have only limited or restricted right or easement of access. Sec. 23.5, Streets and Highways Code. The resolution passed by the highway commission did not create in appellants' property a new right of access to a freeway to be constructed where no highway, conventional or otherwise, existed before. City of Los Angeles v. Geiger, 94 Cal.App.2d 180, 210 P.2d 717. As was there said, 94 Cal.App. 2d at page 191, 210 P.2d at page 724: "There can be no detriment to a right which never existed and no compensation for a loss not sustained. The construction of the freeway improvement did not cause defendants to lose an easement for access to Cahuenga Boulevard since it had never been acquired. Manifestly plaintiff cannot be required to pay damages for injury to a non-existent right or for a mere hope, surmise * * * or expectancy that a right might possibly be obtained in the future, Colusa and Hamilton R. Co. v. Leonard, 176 Cal. 109, 125–127, 167 P. 878 * * *."

[17, 18] The argument is advanced by appellants that the condemnation of appellants' right of access to Parcel 4 is unauthorized and contrary to law. There is no merit in this argument. The construction of freeways or limited access highways is within the statutory authority of the state highway commission and the department of pubilc works. Holloway v. Purcell, supra, 35 Cal.2d at pages 228, 229, 217 P. 2d 665. Section 102 of the Streets and Highways Code empowers the department in the name of the People to condemn real property or interest therein which it is authorized to acquire. Under Section 145 of the Streets and Highways Code "The

State Highway Engineer is authorized to lay out and construct local service roads on and along any State highway where there is particular danger to the traveling public of collision due to vehicles entering the highway from the side or sides thereof and to divide and separate any such service road from the main thoroughfare by raised curbs or dividing sections or by other appropriate devices." While the map used to show the proposed construction contained a notation that the 50 foot strip adjacent to the highway running through Parcel "C" was for "proposed U. S. Government road connection", maps attached to a complaint do not determine the amount of land necessary to be condemned. This must be determined from the averments in the complaint. People v. Milton, supra, 35 Cal.App. 2d at page 553, 96 P.2d 159.

[19, 20] Appellants complain that reversible error was committed in that no verdict was returned or finding made on the issue of damages for severance of Parcel 4. No evidence was introduced upon this issue. The appellants had the burden of proof as to such severance damage, if any, and the fair market value. Reed Orchard Co. v. Superior Court, 19 Cal.App. 648, 661, 128 P. 9, 18. Since no direct evidence was introduced upon the issue, the finding is properly against the party who has the burden of proof. Monterey County v. Cushing, 83 Cal. 507, 510, 23 p. 700. No prejudice resulted from the failure of the court or jury to find upon the issue of damage for severance of this parcel. Madera Sugar Pine Co. v. Adams, 68 Cal.App. 111, 117, 228 P. 544.

A review of the entire record before us fails to disclose prejudicial error affecting the substantial rights of the defendants. Under such circumstances, the judgment must be and is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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240 PACIFIC REPORTER

SECOND SERIES

108 Cal.App.2d 775

HUYCK v. MERRITT et al.

Civ. 8014.

District Court of Appeal, Third District, California.

Jan. 21, 1952.

Jacob Huyck, a passenger for hire, brought action against Jack M. Merritt, motorist, and Lambert Lapacek, plaintiff's driver, for injuries sustained when passenger's driver, traveling south, attempted to turn left at intersection controlled by signals and his automobile was struck by the motorist approaching from the south. The Superior Court, Joaquin County, Thomas B. Quinn, J., entered a judgment on a verdict returned against both defendants, and defendant Jack M. Merritt appealed. The District Court of Appeals, Adams, P. J., held that evidence on issue of negligence and proximate cause was sufficient to sustain the verdict against defendant motorist.

Judgment affirmed.

1. Trial ⇐343

In action by passenger for hire against his driver and another motorist for injuries sustained in a collision, verdict of jury against both defendants implied that jury concluded that both defendants were negligent and that negligence on part of each proximately contributed to the accident.

2. Appeal and Error ⇐1001(1)

In injury action by passenger for hire against his driver and another motorist, if there was substantial evidence to show negligence on part of motorist which proximately contributed to the accident, District Court of Appeal would be bound by the verdict against the motorist and the judgment based thereon.

3. Appeal and Error ⇐930(1)

On appeal, evidence must be viewed in light most favorable to judgment.

4. New Trial ⇐163(2)

Denial of motion for new trial which asserted as one ground therefor that evidence was insufficient to justify verdict, indicated that trial court, which heard the witnesses, was satisfied that verdict found support in the evidence.

5. Automobiles ⇐244(11, 36)

In action by passenger for hire against his driver and another motorist for injuries sustained when passenger's driver, traveling south, attempted to turn left at intersection controlled by signals and his automobile was struck by motorist approaching from the south, evidence on issue of motorist's negligence and whether such negligence proximately contributed to the collision, was sufficient to sustain verdict against the motorist. Code Civ.Proc. § 2055.

6. Appeal and Error ⇐1067

Where, in injury action by passenger for hire against his driver and another motorist, jury found negligence on part of both defendants, and on motorist's appeal the negligence of passenger's driver was conceded, failure of trial court to give requested instruction regarding unavoidable accidents which occur without having been proximately caused by negligence was not reversible error.

7. Trial ⇐252(8)

An instruction as to unavoidable accident is properly refused where there is no evidence warranting a finding of such accident.

8. Trial ⇐295(1)

A trial court is not required to state all the law applicable to a case in a single instruction, but the charge is sufficient if it as a whole fairly states the law.

9. Trial ⇐260(8), 295(6)

In action for injuries sustained in collision occurring while one vehicle involved

was making a left turn at intersection, charge which as a whole fairly stated the law relating to vehicles turning left at intersections was proper though not contained in a single instruction, and refusal to give requested instruction on ground that substance of it was given was not error. Vehicle Code, § 551.

Honey & Mayall, Stockton (Harvey Hakeem, Stockton, of counsel), for appellant.

Miller, Kroloff & Brown, Stockton, for respondent.

ADAMS, Presiding Justice.

This is an appeal by defendant Jack M. Merritt from a judgment for plaintiff Jacob Huyck against Merritt and Lambert Lapacek in an action to recover damages for personal injuries received by Huyck in a collision between an automobile driven by Merritt and one driven by Lapacek, in the latter of which plaintiff was a passenger for hire. A jury before which the case was tried gave judgment for plaintiff against both Merritt and Lapacek. The latter has not appealed.

The accident occurred about 11:00 p. m. on July 19, 1949, at the intersection of Bay Shore Boulevard and Harbor Road in Redwood City, San Mateo County. The intersection was in a 55 mile zone, and traffic at that point was controlled by signals. Bay Shore Boulevard, upon which both automobiles were traveling, is a north-south highway divided into four traffic lanes and accommodates fast traffic, being characterized as a "speedway."

Huyck, who lived in Contra Costa County, was employed near Redwood City where Lapacek, who also lived in San Pablo, was likewise employed. On the night of the accident Lapacek and Huyck were proceeding south on the Bay Shore Boulevard while Merritt was proceeding north, bound for San Francisco. Lapacek was on the inside or left half of his lane of traffic, and Merritt was on the inside half of his line of traffic. As Lapacek neared the intersection of Bay Shore Boulevard with Harbor Road he slowed up and paused at a signal a short distance north of the intersection, intending at that point to make a left hand turn across Merritt's line of traffic in order to reach his destination on Harbor Road. Merritt, at the time, was driving his Cadillac car at a rate of speed estimated to be between 45 and 50 miles an hour, and as he neared the intersection where the accident occurred he confronted a green light. From his own testimony he saw Lapacek's car pause at the signal on the opposite side of the intersection but did not reduce his speed. Lapacek, after his pause, made to allow a car ahead of Merritt's to pass, proceeded ahead at approximately 15 miles an hour and then turned to the left across Merritt's lane of traffic, with the result that his car was struck by Merritt's car and the injuries for which Huyck sought recovery were sustained by him.

Merritt bases his ground for reversal of the judgment against him on the ground that there is no evidence that he contributed proximately to the cause of the accident; and upon what he claims are reversible errors on the part of the trial judge in refusing two instructions proposed by him.

[1–3] The negligence of defendant Lapacek is conceded, and the only problem for our solution is whether his negligence was the sole proximate cause of the accident or whether there was, likewise, negligence on the part of Merritt which proximately contributed to the collision. The verdict of the jury implies that they concluded that both Lapacek and Merritt were negligent and that negligence on the part of each proximately contributed to the accident. If there is substantial evidence to show such negligence on the part of Merritt, this Court is bound by the verdict and judgment; and the evidence must be viewed by us in the light most favorable to the judgment.

Merritt's testimony, taken by plaintiff under Section 2055 of the Code of Civil Procedure, shows that he saw Lapacek's car approaching at a time he (Merritt) was a few hundred feet back of the intersec-

tion—perhaps 600 or 700 feet; that Lapacek might have been at the light on the opposite side of the intersection, either stopped or barely moving; that when Lapacek was stopped at the light Merritt was 400 or 500 feet back; that Lapacek stopped long enough to permit the car ahead of Merritt to go by, then turned in front of Merritt; that he (Merritt) did not reduce his speed until Lapacek started to turn in front of him; that he kept his eye on Lapacek's car. Merritt was familiar with the intersection, it was well lighted, his car was in excellent condition with adequate brakes, the road was dry and visibility was good. Lapacek testified that he signaled for a left hand turn, and that was not denied.

From the foregoing testimony the jury may have inferred that when Lapacek stopped at the intersection and paused to let the car ahead of Merritt go by he thus indicated that he did not intend to proceed southward on Bay Shore Boulevard but intended to turn left, and that Merritt should have anticipated that Lapacek intended to make such a turn, and should have decreased his speed to avoid hitting him; and that in failing to do so he was negligent.

[4] Merritt interposed a motion for a new trial, asserting as one of the grounds therefor that the evidence was insufficient to justify the verdict against him; and the denial of such motion indicates that the trial court, which heard the witnesses, was satisfied that the verdict found support in the evidence.

Appellant cites and relies upon Flannery v. Koch, 103 Cal.App.2d 55, 228 P.2d 580, but the facts in that case were different, for appellant there had the right of way, the driver of the other car having driven through a stop sign when she entered appellant's lane of traffic. He also cites Bingham v. Greenamyer, 25 Cal.App.2d 467, 77 P.2d 867 and Sinclair v. Harp, 18 Cal.App.2d 167, 63 P.2d 876, but they likewise are distinguishable on the facts.

[5] We cannot say that the evidence shows that Merritt was without negligence or that his negligence did not proximately contribute to the collision.

[6] Appellant's requested instruction regarding unavoidable accident, the failure to give which he urges constitutes reversible error, reads:

"In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred *without having been proximately caused by negligence.* Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it." (Italics ours.) It is not applicable here where the jury found negligence on the part of both parties, and Lapacek's negligence is conceded.

In Temple v. De Mirjian, 51 Cal.App.2d 559, 125 P.2d 544, relied upon by appellant, the testimony showed that defendant was unable to control the direction of his vehicle because the steering gear was inoperable. In the instant case there was no evidence of lack of control of his car by either Lapacek or Merritt, and the case is clearly distinguishable from Temple v. De Mirjian.

[7] As was said in Burke v. John E. Marshall, Inc., 42 Cal.App.2d 195, 205, 108 P.2d 738, an instruction as to unavoidable accident is properly refused where there is no evidence warranting a finding of such accident. Also see statement of the rule as set forth in Guay v. American President Lines, 81 Cal.App.2d 495, at pages 513–514, 184 P.2d 539.

Appellant also requested the giving of the following instruction, which was refused on the ground that the substance of it was given:

"At the time of the happening of the accident in question, Section 551 of the Vehicle Code of the State of California, provided as follows:

"'*Vehicle Turning Left at Intersection.*

"'(a) The driver of a vehicle within an intersection intending to turn to the left

shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard.

"'(b) Said driver turning left having so yielded and having given a signal when and as required by this code may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right of way to the driver making the left turn.'

"A violation of the above statute constitutes negligence as a matter of law. Therefore, if you find from a preponderance of the evidence that the driver of the car in which the plaintiff was riding at the time and place of the accident in question violated this law, then he was guilty of negligence, and if such negligence was the sole proximate cause of the happening of the accident in question and the injuries sustained by the plaintiff, then the plaintiff is not entitled to recover damages from Defendant Jack M. Merritt in this action, and your verdict must be in favor of the Defendant Jack M. Merritt."

The instruction given reads:

"At the time of the happening of the accident in question, Section 551 of the Vehicle Code of the State of California, provided as follows:

"'Vehicle turning left at intersection. (a) The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard.

"'(b) Said driver turning left having so yielded and having given a signal when and as required by this code may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right of way to the driver making the left turn.'

"You may ask yourself the question: When is a vehicle so close to an intersection as to constitute an immediate hazard?

"The answer is that the vehicle is that close whenever, if a reasonably prudent person were in the position of the driver intending to make a left turn, he would apprehend the probability of an accident were he then to attempt crossing the path of the approaching vehicle.

"When the law says that one person has a right of way over another, its purpose simply is to establish a practical basis for necessary courtesy on the highway, and its meaning is that when at any given moment of time, two persons, neither of whom then occupies the space in question, desire to proceed into the same place on the highway, one of them shall yield. The other has the privilege of the immediate use of the space in question. That privilege is his right of way.

"Failure to yield to one to whom the law has given the right of way is negligence."

Another instruction given reads: "In this case the drivers of two vehicles are named as defendants, namely, Lambert Lapacek, the driver of the automobile in which plaintiff was riding and Jack M. Merritt, the driver of the other automobile involved in the accident. You are instructed that although both of these parties have been sued, it is not necessary that you render the same judgment as to both defendants. If you find that one of these defendants was guilty of negligence proximately causing the accident in question and that the other defendant was not, then your verdict, if it be for the plaintiff, shall be against the negligent defendant and in favor of the defendant free from negligence."

[8, 9] It is well established that a trial court is not required to state all the law applicable to a case, in a single instruction. If the charge as a whole fairly states the law, that is sufficient. The charge here meets that test.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

109 Cal.App.2d 18

CARPENTER v. ATCHISON, T. & S. F. RY. CO.

Civ. 4423.

District Court of Appeal, Fourth District, California.

Jan. 29, 1952.

Rehearing Denied Feb. 26, 1952.

Action under the Federal Employers' Liability Act by Thurlyne B. Carpenter, as administratrix of the estate of Wayne Carpenter, deceased, against Atchison, Topeka & Santa Fe Railway Company, a corporation, for death of plaintiff's husband, a track supervisor employed by defendant, who was killed while operating railway motor car at crossing, when railway motor car was struck by a truck. The Superior Court of Orange County, Raymond Thompson, J., after the jury failed to arrive at a verdict, granted defendant's motion for judgment and from the judgment entered plaintiff appealed. The District Court of Appeal, Mussell, J., held that whether defendant railroad complied with its duties in a reasonably careful manner under the circumstances shown or whether it was guilty of conduct which contributed in whole or in part to injuries received by decedent were questions for the jury.

Judgment reversed.

1. Master and Servant ⇐86

In determining whether there was in record any evidence of negligence on part of defendant railroad which should have been submitted to jury in action by deceased employee's representative under Federal Employers' Liability Act for wrongful death, federal statutes and decisions were controlling. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

2. Master and Servant ⇐87

Federal Employers' Liability Act is to be given a liberal construction in order to accomplish its humanitarian purposes. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

3. Master and Servant ⇐101(9)

Under Federal Employers' Liability Act duty which rests on defendant is to use reasonable care in furnishing its employees with a safe place to work and safe tools and appliances. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

4. Master and Servant ⇐101(9)

The term negligence as used in Federal Employers' Liability Act is a violation of employer's duty to use reasonable care in furnishing its employees with a safe place to work and safe tools and appliances. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

5. Master and Servant ⇐90

Under Federal Employers' Liaibility Act, employer is liable for injuries which can be attributed to conditions under its control when they are not such as a reasonable man ought to maintain in the circumstances. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

6. Master and Servant ⇐286(5)

Where evidence in action under Federal Employers' Liability Act is such that fair minded men might honestly draw different conclusions as to existence of negligence on part of defendant, question is not one of law but one of fact to be settled by jury. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

7. Judgment ⇐197

The rules governing the determination of a motion for judgment under the statute are the same as those applicable to motions for a judgment of nonsuit and directed verdict which motions may be properly granted when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff. Code Civ.Proc. § 630.

8. Master and Servant ⇐96(1)

Federal Employers' Liability Act imposes a liability on a common carrier by railroad for injuries to or death of an employee resulting in whole or in part from its negligence. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

9. Master and Servant ⇐285(11), 286(34)

In action under Federal Employers' Liability Act for death of plaintiff's husband, who was a track supervisor employed by

defendant railroad, and who was killed while operating railway motor car at a crossing when railway motor car was struck by a truck, whether defendant railroad complied with its duties in a reasonably careful manner under the circumstances shown and whether it was guilty of conduct which contributed in whole or in part to injuries received by plaintiff's decedent, were questions for the jury. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

C. Arthur Nisson, Jr., Santa Ana, for appellant.

Robert W. Walker, Louis M. Welsh, Los Angeles, Henry M. Moffat, Palo Alto, and Charles D. Swanner, Santa Ana, for respondent.

MUSSELL, Justice.

Plaintiff brought this action, under the provisions of the Federal Employers' Liability Act, Title 45 U.S.C.A. § 51, for the recovery of damages for the wrongful death of her husband. The decedent was a track supervisor employed by defendant and was killed while operating a railway motor car at a crossing near Tustin in Orange county. The action was tried before a jury. Defendant's motions for a nonsuit and a directed verdict were denied and, after failing to arrive at a verdict, the jury was dismissed. Defendant then moved for judgment under section 630 of the Code of Civil Procedure and its motion was granted. From the judgment entered following the granting of the motion, plaintiff appeals.

At the time of the accident, decedent Wayne Carpenter was operating a railroad motor car and was crossing a surfaced roadway known as Red Hill Avenue. The motor car was mounted on four wheels, propelled by a single cylinder engine, weighed approximately 350 pounds, and was belt driven. It was not equipped with any bell, whistle or other device to give warning of its approach to a highway crossing and was insulated to prevent the wheels from setting up contact with the rails and thus activating the wig-wag signals at public crossings. As Carpenter approached Red Hill Avenue, he slowed down but did not see a truck, which was approaching the crossing in a northeasterly direction on the avenue, in time to stop and avoid a collision. The truck and motor car collided and Carpenter received fatal injuries from which he died 36 hours later.

There were wig-wag signals at the crossing, white lines on the pavement indicating it, and a signpost placed to warn approaching traffic. However, the driver of a vehicle approaching the crossing from the south could not get a full view along the tracks in both directions until within 27 feet of the southern rail of the railroad track. There was testimony that the motor car was moving between 15 and 20 miles per hour immediately prior to the accident. The railroad wig-wag crossing signals were not in operation at the time of the accident, which occurred at about 12:50 P.M. on June 14, 1948.

Mr. Shaw, the driver of the truck, testified that he was going 35 to 40 miles per hour; that he looked straight ahead for the last 200 feet approaching the crossing; that he did not see the motor car until he got out of the truck to see what he had hit; that he then turned around and saw the car.

Eleven or twelve days prior to the accident, Carpenter went to a Dr. Miller, employed by the Santa Fe Hospital Association, and had a small foreign object removed from his left eye. Carpenter kept the eye covered with a patch until the forenoon of June 14th, when the patch was removed by Dr. Miller. He found that the left eye was then nearly healed but that it did not react to light as actively as did the right eye.

Evidence was introduced that Carpenter, as track supervisor, was at the time of the accident covering a greater trackage than was commonly assigned to such employees; that the length of track usually covered by him was 52 miles and that on the day of the accident, it was approximately 100 miles.

The defendant's rules and regulations governing the operation of motor cars provided that (1) Railway motor cars must yield the right of way to highway traffic at grade crossings; (2) Motor cars must be run slowly over railroad crossings at a

speed of not to exceed 10 miles per hour; and (3) Operators of motor cars must flag over crossings where traffic is dense. Carpenter had been furnished with a copy of these rules and had passed a written examination based upon them.

Appellant argues that the conduct of the defendant as a whole should be examined to determine its negligence and that there are several elements from which negligence might be inferred: (1) The additional duties assigned Carpenter; (2) The physical handicap due to the decedent's eye injury; (3) The pressure of defendant railroad's work on the employee; (4) The failure of the defendant railroad to provide a safe place to work in that no warning devices were provided Carpenter who was required to travel great distances by railway motor car in relatively short periods of time; (5) Representations made to the general public by custom that when no wig-wag crossing warning signals are operating, the railroad track at an intersection is clear and it is safe for the motoring public to cross such railroad track.

[1, 2] The only question to be here determined is whether there was in the record any evidence of negligence which should have been submitted to a jury. Thompson v. Atchison, T. & S. F. Ry. Co., 96 Cal.App. 2d 974, 976, 217 P.2d 45. In determining this question the federal statutes and decisions are controlling. As was said in Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 1026–1027, 93 L.Ed. 1282, 11 A.L.R.2d 252:

"Section 1 of the Federal Employers' Liability Act provides:

"'Every common carrier by railroad while engaging in commerce * * * shall be liable in damages to any person *suffering injury* while he is employed by such carrier in such commerce * * * *for such injury or death resulting in whole or in part from the negligence* of any of the officers, agents, or employees of such carrier, *or by reason of any defect or insufficiency, due to its negligence,* in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.' 45 U.S.C. § 51, 45 U.S.C.A. § 51. (Emphasis added.)

"The section does not define negligence, leaving that question to be determined, as the Missouri Supreme Court said, 'by the common law principles as established and applied in the federal courts.' * * * What constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes. Federal decisional law formulating and applying the concept governs. * * *"

In Wilkerson v. McCarthy, 336 U.S. 53, 69 S.Ct. 413, at page 417, 93 L.Ed. 497, the court, in discussing the question here presented, said: "Much of respondents' argument here is devoted to the proposition that the Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. That proposition is correct, since the Act imposes liability only for negligent injuries. Cf. Coray v. Southern Pac. Co., 335 U.S. 520, 69 S.Ct. 275 [93 L.Ed. 208]. But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances. And a jury should hold a master 'liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances', bearing in mind that 'the standard of care must be commensurate to the dangers of the business.' Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67, 63 S.Ct. 444, 451, 87 L.Ed. 610, 143 A.L.R. 967."

And on page 418 of 69 S.Ct.: "Moreover, this Court stated some sixty years ago when considering the proper tribunal for determining questions of negligence: 'We see no reason, so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, V. & G. R. Co., 128 U.S. 443, 445, 9 S.Ct. 118, 32 L.Ed. 478. And peremptory instructions should not be given in negligence cases 'where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may

draw different inferences.' Washington & G. R. Co. v. McDade, 135 U.S. 554, 572, 10 S.Ct. 1044, 1049, 34 L.Ed. 235."

It was also there held that the Federal Employers' Liability Act is to be given a liberal construction in order to accomplish its humanitarian purposes.

[3–5] Under the Employers' Liability Act the duty which rests upon defendant is to use reasonable care in furnishing its employees with a safe place to work and safe tools and appliances. The term negligence, as used in the act, is a violation of that duty. The employer is liable for injuries which can be attributed to conditions under its control when they are not such as a reasonable man ought to maintain in the circumstances. Thompson v. Atchison, T. & S. F. Ry. Co., supra, 96 Cal.App.2d 977, 217 P.2d 45.

From the evidence before us it appears that the wig-wag signals at the crossing involved were not activated by motor cars such as that operated by the decedent; that the motor car was not equipped with a bell, whistle or other device by which the decedent could warn vehicular traffic of his approach to highway crossings.

[6, 7] The record indicates that the jury was unable to reach a verdict in the instant matter after deliberating for several hours and reported a deadlock at the count of seven to five when dismissed. The evidence is such that fair minded men might honestly draw different conclusions as to the existence of negligence on the part of the defendant. Under such circumstances, the question is not one of law but one of fact to be settled by the jury. Gunning v. Cooley, 281 U.S. 90, 50 S.Ct. 231, 74 L.Ed. 720. The rules governing the determination of a motion such as here made under Section 630 of the Code of Civil Procedure are the same as those applicable to motions for a judgment of nonsuit and a directed verdict. Such motions may be properly granted "when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff." Neel v. Mannings, Inc., 19 Cal. 2d 647, 650, 122 P.2d 576, 577; Gunning v. Cooley, supra.

[8, 9] The Federal Employers' Liability Act imposes a liability on a common carrier by railroad for injuries to or the death of an employee resulting in whole *or in part* from its negligence. We cannot say as a matter of law that the defendant railroad complied with its duties in a reasonably careful manner under the circumstances shown, nor that the conduct which a jury might find to be negligent did not contribute in whole or in part to the injuries received by the decedent.

Judgment reversed.

BARNARD, P. J., and GRIFFIN, J., concur.



109 Cal.App.2d 67

In re WEDEMEYER'S ESTATE (two cases).

WEDEMEYER et al. v. SULLIVAN et al.

Civ. 14929.

District Court of Appeal, First District, Division 2, California.

Jan. 31, 1952.

Rehearing Denied March 1, 1952.

Hearing Denied March 27, 1952.

Proceedings in the matter of the estates of Rupert G. Wedemeyer and Emma W. Wedemeyer, husband and wife, wherein identical petitions for determination of heirship with respect to one-half of insurance money not disposed of in previous proceedings were filed by Roland C. Wedemeyer and others, heirs of Rupert G. Wedemeyer, and Ethel W. Sullivan, administratrix of the estate of Mary Watson, alias, heir of Emma W. Wedemeyer. The Superior Court, Santa Clara County, M. G. Del Mutolo, J., entered order that wife's heir was entitled to the money and husband's heirs appealed. The District Court of Appeals, Nourse, P. J., held that the husband's estate was entitled to the entire proceeds of the policies and that as mak-

ing of identical orders in proceedings as to both estates was not assigned as error, court would not reverse order made in wife's estate.

Orders affirmed.

Goodell, J., dissented.

1. Statutes ⇐158

Repeal of statutes by implication is not favored.

2. Statutes ⇐223.2

Statutes relating to same subject are to be construed together and harmonized if possible.

3. Statutes ⇐223.2(9)

Statutes, which provide who for purpose of distribution is considered to have died first in simultaneous or nearly simultaneous death of insured and beneficiary and husband and wife, must be construed with statutes relating to succession of property to determine who is to succeed to estate. Probate Code, §§ 201, 228, 296.3, 296.4.

4. Husband and Wife ⇐254

Where during life of spouses choses in action represented by life insurance policies belonged to community because community funds had been paid as consideration for acquisition of policies, insured owned choses in action as community asset.

5. Husband and Wife ⇐274(1)

Where husband as insured owned choses in action represented by life policies, which named wife beneficiary, as community asset and husband and wife died intestate in airplane crash and husband, who was presumed to have survived wife, took choses in action, at husband's death proceeds of policies had to be distributed in his estate according to statute providing for distribution of community property belonging to deceased and previously deceased spouse by virtue of community character on the presumed prior death of wife. Probate Code, §§ 201, 228, 296.3.

6. Insurance ⇐589

Where husband as insured owned community asset consisting of choses in action represented by life policies, which named wife first beneficiary, and wife was presumed to have predeceased husband who died in same accident, at death of wife her appointment as beneficiary lapsed and provision in behalf of husband's estate as secondary beneficiary became operative. Probate Code, §§ 201, 296.3.

7. Husband and Wife ⇐274(1)

Where husband as insured owned choses in action represented by life policies, which named wife first beneficiary, as community asset and wife was presumed to have predeceased husband and wife's appointment as beneficiary lapsed and provision on behalf of husband's estate as secondary beneficiary became operative, change in beneficiary did not change character of property and did not change applicability of statute providing for distribution of community property belonging to deceased and predeceased spouse. Probate Code, §§ 201, 228, 296.3.

8. Husband and Wife ⇐274(1)

Where husband as insured owned as community asset chose in action represented by life policy, which named his estate as beneficiary, and husband and wife died intestate in airplane crash and statute provided for husband to receive one-half of chose in action to be distributed as if wife had died first, ultimate distribution would be controlled by statute regulating distribution of community property belonging to deceased and previously deceased spouse by virtue of community character on presumed prior death of wife. Probate Code, §§ 201, 228, 296.4.

9. Husband and Wife ⇐274(1)

Where husband as insured owned chose in action represented by life policy, which named his estate as beneficiary, as community asset and husband and wife died intestate in airplane crash and statutes provided for wife to receive one-half of chose in action as if husband died first, ultimate distribution would be controlled by statute regulating distribution of community property belonging to deceased and previously deceased spouse by virtue of community character on presumed prior death of husband. Probate Code, §§ 201, 228, 296.4.

10. Appeal and Error ⇐223, 1073(1)

Where identical petitions for determination of heirship of half of insurance money not disposed of in probate proceedings to settle estates of husband and wife, who died instantly in airplane crash, and previous identical proceedings had resulted in identical decrees of parcel distribution in both estates that one-half of proceeds of policies were distributable to heirs of husband, and identical orders were entered that wife's mother was entitled to remaining one-half of proceeds and no error was assigned as to making of identical orders and husband's estate was determined to be entitled to all proceeds of policies, District Court of Appeal would not reverse order made in wife's estate proceeding.

James P. Preovolos, San Francisco, for appellant.

Edward J. Lynch, San Francisco, for respondent.

NOURSE, Presiding Justice.

This appeal involves an interpretation of the Uniform Simultaneous Death Act, sections 296–296.8 of the Probate Code, enacted in 1945 to repeal section 1963, subd. 40, of the Code of Civil Procedure which created a disputable presumption as to survivorship when two persons met death in the same calamity.

Rupert G. Wedemeyer and his wife were instantly killed in an airplane accident in Scotland, October 21, 1948. Rupert left as heirs his two brothers and one sister, who are the appellants herein. The wife left as her sole heir her mother, who has since deceased. Her interest is represented by her administratrix, respondent herein. Both husband and wife died intestate and the controversy here relates solely to the disposition of the proceeds of four insurance policies on the life of the husband.

Three of the policies totalling approximately $80,000 named the wife as sole beneficiary and, in event of her death, the proceeds were to be paid to the husband's administrator or estate. The fourth in the sum of $19,100 named no beneficiary, the proceeds being made payable to the husband's estate. All the premiums on all four policies had been paid out of community funds.

Proceedings to probate both estates were held at the same time. Identical decrees of partial distribution in both estates determined that one-half of the proceeds of the four policies was distributable to the heirs of Rupert and left the determination of the right to the remaining one-half to further proceedings. Pursuant to order of the court the insurance money was jointly collected by the administrators of both estates. Identical petitions for the determination of heirship with respect to the half of the insurance money not disposed of were filed in both estates. After a consolidated hearing the court by identical orders in both estates determined that the wife's mother was entitled to the remaining one-half of the proceeds of all four policies. The consolidated appeals are presented on nearly identical agreed statements.

The appeal presents the question whether the Simultaneous Death Act changes the character of the proceeds of policies of insurance where the premiums were paid entirely from community funds. Concretely the question is whether, when all premiums on the policies are paid with community funds, the proceeds should be distributed in accordance with section 228 of the Probate Code or whether, under circumstances arising under section 296.3 of that code the provisions of the earlier section are suspended.

The following sections of the Probate Code are involved:

Section 201: "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of sections 202 and 203 of this code."

Section 228: "If the decedent leaves neither spouse nor issue, and the estate, or any portion thereof was community property of the decedent and a previously deceased spouse, and belonged or went to the

decedent by virtue of its community character on the death of such spouse, or came to the decedent from said spouse by gift, descent, devise or bequest * * * such property goes in equal shares to the children of the deceased spouse and their descendants by right of representation, and if none, then one-half of such community property goes to the parents of the decedent in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and their descendants by right of representation, and the other half goes to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of said deceased spouse and to their descendants by right of representation."

Section 296.3: "Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary."

Section 296.4: "Where a husband and wife have died, leaving community property and there is no sufficient evidence that they have died otherwise than simultaneously, one-half of all the community property shall be distributed as if the husband had survived and the other one-half thereof shall be distributed as if the wife had survived, except as provided in Section 296.3."

[1–3] We find nothing conflicting in these sections and no indication that the later sections 296.3 and 296.4 were intended to supersede the earlier sections cited in any respect. "It is well-established that the repeal of statutes by implication is not favored, see, 23 Cal.Jur. § 84, p. 694, and that statutes relating to the same subject are to be construed together and harmonized if possible. People v. Trieber, 28 Cal.2d 657, 661, 171 P.2d 1; 2 Sutherland, Statutory Construction, § 5201, p. 531." Ebert v. State of California, 33 Cal.2d 502, 509, 202 P.2d 1022, 1026. Sections 296.3 and 296.4 do not purport to do anything but solve the difficulty caused by the simultaneous or nearly simultaneous character of the deaths by providing who for purpose of distribution is considered to have died first. The person or persons who are to succeed are not designated in these sections and must be found in the other sections cited. In this manner the four sections can be construed together harmoniously and must be so construed as follows:

[4] During the life of the spouses the choses in action represented by the policies belonged to the community because of the fact that community funds had been paid as the consideration for their acquisition. The insured owned the property as a community asset. New York L. Ins. Co. v. Bank of Italy, 60 Cal.App. 602, 606, 214 P. 61; Estate of Castagnola, 68 Cal.App. 732, 737, 230 P. 188; Travelers' Ins. Co. v. Fancher, 219 Cal. 351, 353, 26 P.2d 482; Grimm v. Grimm, 26 Cal.2d 173, 175, 157 P.2d 841.

[5–7] With respect to the three policies in which the wife was the first beneficiary section 296.3, supra, of the Probate Code is applicable and the applicability of section 296.4, supra, expressly excluded. At the death of the wife, which is considered according to section 296.3 to have preceded that of the husband, the husband took the choses in action under section 201, Probate Code. At his death, which is considered to have occurred subsequently, the proceeds of the policies which took the place of the choses in action had to be distributed in his estate in accordance with section 228, supra, because they had been community property of the husband and his wife who is considered to have predeceased him and they went to him by virtue of the community character on the presumed prior death of the wife. At the death of the wife her appointment as beneficiary lapsed and the provision in behalf of the husband's estate became operative, but, as we held in Estate of Castagnola, 68 Cal. App. 732, 737, 230 P. 188, such did not change the character of the property and made no difference as to the applicability of section 228, Probate Code (then section 1386, subd. 8, of the Civil Code).

In the Castagnola case this court said, 68 Cal.App. at page 737, 230 P. at page 190: "The policy of insurance being a chose in action which was community property of the parties during their coverture, the proceeds of the policy would retain their community character, notwithstanding the fact that they were paid after the the dissolution of the community. When, therefore, the husband designated his estate as beneficiary, in the event of the death of his wife, it will not be presumed that he intended to change the character of the property from community to separate property, but it will be assumed, in the absence of any showing to the contrary, that he merely intended to designate his general estate as the successor to the proceeds of the policy."

[8, 9] With respect to the fourth policy in which the wife was not a beneficiary not section 296.3 but section 296.4, Probate Code, is applicable. In accordance with that section the half of the chose in action which is distributed as if the wife died first goes at her death to the husband under section 201, Probate Code, and its ultimate distribution takes place under section 228, Probate Code, as shown with respect to the other policies. Conversely the proceeds of the half which is to be distributed as if the husband died first goes to the wife under section 201, Probate Code, at the time of the husband's death and at her death, which is considered subsequent, is distributed in accordance with section 228, Probate Code. Compare for the general tendency to bring any benefit received by a spouse from an insurance policy paid for with community funds under section 228, Probate Code; Estate of Perkins, 21 Cal.2d 561, 571, 134 P.2d 231; Estate of Rattray, 13 Cal.2d 702, 716, 91 P.2d 1042, disapproving Estate of Miller, 23 Cal.App.2d 16, 71 P.2d 1117, and Estate of Lissner, 27 Cal.App.2d 570, 81 P. 2d 448. The result with respect to the fourth policy is therefore the same as with respect to the other three.

[10] As the husband's estate was entitled to the proceeds of all policies the decree determining heirship made in the wife's estate may well be superfluous. However the proceeds of the policies were jointly collected by both administrators, identical steps have all along been taken in both estates and appellant does not assign the making of two orders as error. We therefore see no reason to reverse the order made in the wife's estate.

Orders affirmed.

JONES, J. pro tem., concurs.

GOODELL, Justice.

I dissent.

Decedent Rupert G. Wedemeyer left neither spouse nor issue hence there are but two sections in the Probate Code which could possibly apply, namely §§ 225 and 228.

The prevailing opinion holds in substance that § 228 is controlling because the premiums had been paid out of community funds and the proceeds retained a community character after the beneficiary's death had dissolved the community. Section 228 is a re-enactment of § 1386, subd. 8, Civ.Code, and the theory underlying that section was, as the Supreme Court said in Estate of Brady, 171 Cal. 1, 3, 4, 151 P. 275, 276, "to provide for the inheritance of the property equally by the respective families of the two spouses by whose efforts it was accumulated."

Section 228 distributes in *two lines of succession—one-half to the family of each spouse.*

In 1945 § 296.4, Probate Code, was enacted, and when it says that distribution shall be "one-half * * * as if the husband had survived and the other one-half * * * as if the wife had survived" it, likewise, directs distribution *in two lines of succession—one-half to the family of each spouse.*

Section 296.4, however, contains an exception which cannot be ignored; it must be given some meaning. It says: "except as provided in Section 296.3."

The present litigation presents a set of facts squarely within § 296.3, since the husband was the insured, the wife the beneficiary, and both died at the same time. The exception in § 296.4 sends you to §

296.3, the language of which is in sharp contrast with that of § 296.4. Section 296.3 provides that the distribution of life insurance proceeds shall be "as if the insured had survived". If § 296.4 directs distribution *in two lines of succession* and life insurance (in the contingency existing here) is removed from the operation of § 296.4 by the exception, the purpose of the legislature seems to be that life insurance proceeds (within the contingency named in §§ 296.3 and 296.4) should be distributed *otherwise than in two lines of succession.*

If such had not been its purpose, all the legislature had to do was omit the exception from § 296.4 and tack it onto § 296.3, or by other appropriate language indicate that life insurance impressed with a community character should be distributed the same as all other community property.

If the prevailing opinion is correct in holding that the distribution is governed by § 228, then precisely the same result is reached as if the distribution were to be made as directed by § 296.4—*in two lines of succession* one-half to the family of each spouse—*a result which the legislature by the exception which it wrote into § 296.4 manifestly intended to prevent.*

It is not necessary to say whether or not §§ 296.3 and 296.4 are laws of succession. True, they do not prescribe the heirs entitled to succeed, but it cannot be gainsaid that they do superimpose new rules on the old succession sections and thus modify them.

The views now expressed do not touch in any way the settled rule of New York Life Ins. Co. v. Bank of Italy, 60 Cal.App. 602, 214 P. 61, and similar cases. That rule, as all the cases show, was designed to safeguard the rights of a wife during her lifetime, in her half of life insurance paid for with community funds. Emma Wedemeyer's community rights were never in jeopardy, since her husband had made her the beneficiary of three of the policies and had made the fourth payable to his estate, not to some other person. And if the legislature decided to remove life insurance (formerly impressed with a community character) from the realm of community property in cases where the beneficiary predeceases the insured, that was well within its power. Estate of Perkins, 21 Cal.2d 561, 569, 134 P.2d 231; 9 Cal.Jur. pp. 450–451.

Since, in my opinion, § 228 does not apply, then the proceeds of the three policies wherein Emma Wedemeyer was the beneficiary should be distributed as separate property pursuant to § 225, Probate Code, which reads: "If the decedent leaves neither issue nor spouse, the estate goes to his parents in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to his brothers and sisters and to the descendants of deceased brothers and sisters by right of representation."

The foregoing discussion has to do only with the first three policies. The exception in § 296.4 cannot, of course, be stretched beyond its own language. Such exception is confined to cases where there is a named beneficiary, hence it does not embrace the fourth policy, payable to the insured's estate, for that policy presents no problem of simultaneous deaths. Accordingly (and consistently) I am satisfied that under Estate of Castagnola, 68 Cal.App. 732, 230 P. 188, decided by this court in 1924, the proceeds of the fourth policy should be distributed as any other community property would be. Section 296.4, the most recent enactment on the subject, would send such proceeds in two lines of succession, one-half to the husband's heirs and one-half to the wife's, under § 225, Probate Code. The result, incidentally, as pointed out earlier, will be the same as if the distribution were under § 228.

The Castagnola case does not apply to the first three policies because of the enactment, 21 years after it was decided, of §§ 296.3 and 296.4. Except for those sections it would be controlling herein as to the first three policies as well as the fourth.

Another matter should be noted. Three of the policies were payable to Emma as beneficiary or to the insured's executor, administrator or estate. If she died first, then none of the policies ever became payable to her. On Rupert's death the proceeds went into his estate, not by virtue of the

laws of succession, but because of the plain terms of the insurance contracts themselves.

The proceeds of the fourth policy, payable directly to Rupert's estate, likewise became assets thereof under the contract and not by virtue of the laws of succession.

It follows that none of the insurance money went into Emma's estate, hence the order there in purporting to determine heirship with respect thereto was, to that extent, of no effect and in my opinion should be reversed.

I believe the order entered in Rupert's estate should also be reversed for the reasons stated above.



109 Cal.App.2d 145

HAMILTON v. HAMILTON.

Civ. 7999.

District Court of Appeal, Third District, California.

Feb. 7, 1952.

Action by Gertrude Hamilton against John S. Hamilton on a note and for the money allegedly furnished to defendant. The Superior Court, Sacramento County, John Quincy Brown, J., rendered judgment for defendant and plaintiff appealed. The District Court of Appeal, Peek, J., held that where findings and conclusions favorable to plaintiff, relative to note and indebtedness, were not included in interlocutory judgment in prior divorce action, judgment was not res judicata.

Affirmed.

1. Judgment ⇐23

Findings of fact and conclusions of law do not constitute a "judgment."

See publication Words and Phrases, for other judicial constructions and definitions of "Judgment".

2. Divorce ⇐171

Where findings and conclusions favorable to wife, relative to note and other indebtedness of husband, were not included in interlocutory judgment in husband's divorce action, judgment was not res judicata in subsequent action by wife on same note and indebtedness.

3. Appeal and Error ⇐907(2)

Where evidence is not before appellate court, all presumptions must be in favor of validity of judgment, and it is conclusively presumed that evidence warranted judgment of trial court.

A. M. Mull, Jr., Sacramento, for appellant.

Emerson W. Read, Sacramento, for respondent.

PEEK, Justice.

This is an appeal by plaintiff wife from a judgment in favor of defendant husband in an action on a promissory note and for money alleged to have been furnished by her to him at his special instance and request.

The present action is the third of a series between the parties, in each of which the wife has been represented by different counsel. The first was an action for divorce filed by her on September 2, 1948. On the same date a property settlement agreement was entered into whereby the husband agreed to assume and pay "an undetermined amount of indebtedness" to a number of creditors. The wife waived all right and interest in certain life insurance policies on the life of the husband and further waived any claims she might have against the husband for alimony or support, including any interest in his earnings and estate. The husband on his part waived all interest in the personal property of the parties and executed and delivered to the wife a grant deed covering the community property set forth in the complaint. Shortly thereafter the parties became reconciled and on December 23, 1948 the action was dismissed. But on February 23, 1949 a second action for divorce was instituted, this time by the husband against the wife upon the ground of extreme cruelty and alleged that the parties owned certain community property. He

further alleged that his wife was a trained business woman capable of supporting herself. By her answer the wife denied generally the allegations of cruelty, alleged that there was additional community property and by a cross-complaint sought the recovery of the sum of $684.00, represented by a promissory note executed by the husband and delivered to her, and in a second cause of action sought further recovery of the sum of $3,250.00 alleged to have been her separate property, which she alleged had been converted by the husband to his own use. Her cross-complaint concluded with the allegation that she was without funds to support herself or to prosecute her case and prayed for judgment accordingly. At the conclusion of the trial the court found that by an agreement in writing the parties had settled their respective rights in and to the community property; that the husband had not paid said promissory note; that he had not paid certain indebtedness referred to in the property settlement agreement, and that there was still owing from him "to various and sundry creditors the balance thereof", all of which he was bound to pay to keep the wife harmless therefrom. The court further found that the husband did not convert the sum of $3,250.00 to his own use, but that said sum was the amount received from the sale of the community property "which had been disposed of in connection with the Property Settlement Agreement". The interlocutory decree which was thereafter entered made no mention of the property settlement agreement. It merely provided that the wife was entitled to a divorce, that the husband should pay attorney's fees and court costs as therein set forth, and that he should pay the wife alimony in the sum of $100.00 per month for 24 months. No action was taken by the wife to vacate said judgment or to amend the same to conform to the findings.

Thereafter, on March 30, 1949, the wife instituted the present proceedings, wherein she alleged the note above mentioned was still due and unpaid, and as a second cause of action alleged she had furnished to the husband at his request the sum of $4,856.16 which he had refused to repay. The husband by his answer admitted the execution of the note as a part of the property settlement agreement and further alleged that the agreement was thereafter abandoned when the parties resumed their marital status following her original action for divorce and that the wife had agreed to destroy the note and had stated she had done so. In answer to her second cause of action he denied being indebted to her in the sum alleged or in any other sum and alleged that the subject matter contained in said cause of action had been adjudicated in the prior divorce proceeding.

The cause proceeded to trial and at the conclusion there of the trial judge in his memorandum opinion and in comment on the evidence noted the conflict between the findings and judgment in the prior divorce proceedings, remarking that said findings went no further than to say that a property settlement had been entered into between the parties; that he would consider the absence of anything in the judgment relative to said agreement as an implied finding that the parties by their conduct had rescinded such agreement and that the promissory note here in issue was thereby canceled, and that in regard to the wife's claim for the sum of $4,856.16 the judge observed that the items on which said claim was predicated were only vaguely described, that there was no convincing proof that the husband had agreed to repay such sums, and that to the contrary the proof appeared to be that said items consisted of checks made out in the ordinary course of the operation of their community affairs. The findings which were thereafter filed were to the same effect and judgment was entered accordingly.

The wife now contends on appeal that the findings of fact and conclusions of law in the second divorce proceeding (the one instituted by the husband) constituted the decision of the court and therefore the matters found therein are res judicata in the present proceedings and hence the trial court in the instant proceeding committed prejudicial error in allowing the husband to attack said findings and conclusions in this proceeding.

[1] We find no merit in the wife's first contention. In the case of San Diego Inv. Co. v. Crane, 40 Cal.App. 393, 180 P. 837,

the appeal was from "the judgment entered" in the trial court. The District Court commented that in its examination of the record it could find no judgment and concluded that, under such circumstances, it was impossible to determine to what appellant referred by the words "the judgment entered" unless it was to the findings and conclusions of law, which the court said "do not constitute a judgment". Again, it was held in Hume v. Lindholm, 85 Cal.App. 80, 84, 258 P. 1003, 1005, that "The findings of fact and conclusions of law did not constitute a judgment". These cases follow the general rule set forth in 1 Freeman on Judgments, 5th ed., page 6, section 3, wherein the textwriter states: "There is a distinction between the findings and conclusions of a court and its judgment. While they may constitute its decision and amount to the rendition of a judgment they are not the judgment itself. They amount to nothing more than an order for judgment, which must, of course, be distinguished from the judgment."

[2] It necessarily follows that since the trial court in the second divorce case did not carry the findings and conclusions into the interlocutory judgment that judgment was not res judicata on the question of the note, and hence the trial court in the present proceedings had jurisdiction to hear and determine, as it did, that the note had been canceled by the parties.

[3] The second contention of the appellant is likewise without merit. While it is true, as she argues, the property settlement agreement did mention "an undetermined amount of indebtedness" owing by the parties "to a number of creditors", it is also true that the court in its findings in that proceeding did find that the husband had not paid such amounts and that there was still "due, owing and unpaid * * * to various and sundry creditors the balance thereof", but it is also true the judgment of the trial court therein made neither itemization nor mention of such indebtedness. Again it necessarily follows that the rule herein enunciated relative to the cause of action predicated upon the alleged past-due promissory note is equally applicable to the question raised by the wife as regards the sum of money she now contends is owing by the husband. Furthermore, it should be noted that, since the evidence in the present proceeding is not before us, "all presumptions must be in favor of the validity of the judgment and it is conclusively presumed that the evidence warranted", Ramacciotti v. Ramacciotti, 131 Cal.App. 191, 196, 20 P.2d 961, 963, the decree as entered by the trial court. See, also, 2 Cal.Jur., sec. 395, p. 689.

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.



109 Cal.App.2d 81

CITY OF LOS ANGELES et al. v. LOS ANGELES BUILDING AND CONSTRUCTION TRADES COUNCIL et al.

Civ. 18538.

District Court of Appeal, Second District, Division 1, California.

Jan. 31, 1952.

Rehearing Denied Feb. 26, 1952.

Hearing Denied March 27, 1952.

The City of Los Angeles, a municipal corporation, and The Department of Water and Power of the City of Los Angeles, brought action against the Los Angeles Building and Construction Trades Council, an unincorporated association, and others, to restrain defendants from striking, or calling or inducing a strike for purpose of coercing plaintiffs to comply with defendants' demands. The Superior Court of Los Angeles County, Alfred L. Bartlett, J., entered a judgment making permanent a temporary injunction, and the defendants appealed. The District Court of Appeal, Doran, J., held that where defendants raised the same questions on appeal from the judgment as they had on appeal from order granting temporary injunction, defendants were estopped from questioning validity of the permanent injunction.

Judgment affirmed.

1. Appeal and Error ⇐1097(1), 1195(1)

Where the precise question before the court has been decided in a former appeal

in the same action and under substantially the same state of facts, parties are estopped from again litigating the question in any subsequent proceeding either before the trial or appellate court.

2. Appeal and Error ⇐1099(3)

Where order granting temporary injunction against labor unions to restrain striking, calling or inducing strike against city Department of Water and Power was affirmed on appeal, and thereafter trial court entered judgment making the temporary injunction permanent, labor unions which appealed from the judgment and which raised same questions as in the former appeal were estopped from litigating validity of the permanent injunction.

3. Labor Relations ⇐992

Injunction in favor of city Department of Water and Power and against labor unions was not too broad where plain meaning of language employed merely restrained the unions from striking, picketing and like activities where purpose is to intimidate or coerce city authorities in performance of their lawful duties and inducing employees of the Department to strike or otherwise interfere with work on the Department's specified projects, and did not impose restraints upon unions of exercise of any other means at their disposal to publicize their alleged grievances.

4. Labor Relations ⇐1001

Where city Department of Water and Power directly employed civil service labor and also independent contractors to construct additions to system, and injunction was granted against unions from striking and picketing where purpose is to intimidate or coerce city authorities in performance of their lawful duties and inducing employees of the Department to strike or otherwise interfere with the work, in absence of any showing as to existence of a labor dispute between independent contractors and employees, it could not be assumed the injunction was intended or would be construed to prohibit strikes or peaceful picketing by such private employees to enforce legitimate demands against private employers.

5. Labor Relations ⇐999

In framing the terms of injunctive relief in a labor controversy, all that the court can do is deal with those specific acts which by the evidence are shown to have been committed in furtherance of the particular labor dispute then before it.

6. Labor Relations ⇐992

In action for injunctive relief against labor unions by city Department of Water and Power which employed civil service labor and also independent contractors to construct additions to system, contention that injunction which restrained unions from striking and picketing where purpose is to intimidate or coerce city authorities in performance of their duties and inducing employees of the Department to strike or interfere with the work, was completely unrealistic, was not supported by the record.

7. Labor Relations ⇐837

The city, having been lawfully empowered by its charter to furnish water and electricity to its inhabitants, is thereby performing a municipal and public function, irrespective of whether it is acting in a proprietary or governmental capacity, and distinction made between governmental and proprietary functions of a municipality had no application in action to restrain labor unions from striking or calling or inducing a strike against the Department of Water and Power of the city.

8. Labor Relations ⇐341, 342

Furnishing of water, light and power by the city is a service involving health, safety and welfare of a vast number of people and one with which neither labor unions nor individuals have legal right to interfere.

9. Labor Relations ⇐1001

Injunction which restrained unions from use of coercive methods to secure compliance with demands for improvement in wages, hours and working conditions, would not restrain the unions from making such demands.

Arthur Garrett, Los Angeles, Todd & Todd, San Francisco, for appellants.

Ray L. Chesebro, City Atty., Gilmore Tillman, Chief Asst. City Atty., A. H. Driscoll, Deputy City Atty., and A. L. Lawson, Deputy City Atty., all of Los Angeles, for respondents.

DORAN, Justice.

The present appeal is from a judgment making permanent a temporary injunction prohibiting the appellants from "Striking, or calling or inducing a strike against the department of Water and Power of the City of Los Angeles at any of the projects hereinafter enumerated, or picketing any of said projects, or giving any notice stating or implying that a strike exists * * * or threatening to strike or picket any of said projects or hindering, delaying or interfering with, in any manner or by any means or device, the work upon any of said projects, for the purpose of intimidating or coercing the City of Los Angeles, the Department of Water and Power, the Board of Water and Power Commissioners, the Board of Civil Service Commissioners or any officer of said City in the performance of their or his lawful duties; and coercing, compelling, inducing or encouraging the employees of said Department of Water and Power, who are employed on said projects, to hinder, delay or interfere with the work on said projects, by strike, walk-out, cessation of work, or otherwise".

On a previous appeal from an order granting a preliminary injunction, the reviewing court in 94 Cal.App.2d 36, 46, 210 P.2d 305, 311, affirmed the order, holding that "no legitimate reason can be found for drawing any distinction, within the framework of the present case, between the governmental and proprietary functions of the City". The opinion further states: "we think it self-evident that defendants may not, consistently with the public policy expressed in the Los Angeles City Charter, lawfully either strike or picket for the purpose of enforcing demands as to conditions of employment in respect to which neither the city nor the Department of Water and Power is obligated to bargain collectively. To hold to the contrary would be to sanction government by contract instead of government by law."

It is argued in appellants' brief that "The decision on the appeal from the temporary injunction is not the law of the case"; that the decision and judgment "are completely unrealistic"; that the injunction is too broad, is invalid and unconstitutional; that defendants had the right to make demands upon their employer for improvement in wages, hours and working conditions; and that "defendants had a right to designate the project carried on by the Department of Water and Power as unfair".

The Department of Water and Power, a department of the city government of Los Angeles, is required and empowered by charter to construct and operate works and property for the purpose of supplying the city and its inhabitants with water and electricity, and to that end has invested approximately $450,000,000 in water and electric systems. Appellant labor unions are voluntary, unincorporated associations; appellant Los Angeles Building and Construction Trades Council is likewise a voluntary, unincorporated association consisting of delegates from the other appellants and at all times has acted for the other appellants.

In December, 1947, in order to meet increased demands, the Department was engaged in constructing several large additions to its water and electric systems, some of which had been completed at the time of trial. In part, the work was done by direct employment of labor and purchase of materials by the Department, and in part under contract with independent contractors. Originally about 420 persons were directly employed by the Department, all under civil service. At the time of trial approximately 248 were so employed, 219 being regular civil service appointees and the balance temporary civil service appointees. Of the 420 approximately 200 were members of the defendant labor unions, as were also all of the employees of the independent contractors.

Beginning in November, 1947, the appellant Trades Council made repeated demands upon the Department for changes in working conditions on such projects, chief among which was a demand for a union shop. Other demands included a classification of civil service positions in conformity with craft

jurisdictions and job classifications recognized by appellants; that the Department provide craft foremen to supervise work in conformity with collective bargaining agreements had with private employers; and that wages and salaries be fixed in accordance with appellants' standards and rules. The trial court found that respondents had offered to discuss such matters with appellants except the demand for a union shop, and did in good faith discuss such subjects.

The appellants, as found by the trial court, repeatedly threatened that if respondents did not meet such demands, appellants would strike and picket the projects, declare the projects unfair, and take such other "economic action" as deemed necessary to bring about a stoppage of work. Thereafter appellants did declare the projects unfair, struck and picketed, and ordered all union men to stop work. This conduct continued until the date of the temporary restraining order. As a result of such acts, "some hundreds of persons * * * including all members of the * * * unions, ceased such work", with the result that "work on said projects was hampered and delayed * * * until said restraining order was issued".

Appellants' contention that "The decision on the appeal from the temporary injunction is not the law of the case", appears to be predicated on the theory that the issues were not the same; that the Court "on the issuance of a temporary injunction, exercises a wide discretion", and that "an injunction looks to the future". The respondents' brief, however, calls attention to the fact that "The pertinent language of the permanent injunction * * * is identical with that of the preliminary injunction", and that "The two differ only in matters of form and detail".

[1, 2] As said in Penziner v. West American Finance Co., 10 Cal.2d 160, 169, 74 P.2d 252, 256, "It is clearly established by the decisions in this state that when the precise question before the court has been decided in a former appeal in the same action and under *substantially* the same state of facts, the parties are estopped from again litigating this question in any subsequent proceeding either before the trial or appellate courts." (Italics added.) That such is the situation in the present case cannot be doubted. And, as hereinbefore indicated, the appellate court held on the former appeal, 94 Cal.App.2d 36, 46, 210 P.2d 305, 311, that "defendants may not, consistently with the public policy expressed in the Los Angeles City Charter, lawfully either strike or picket for the purpose of enforcing demands as to conditions of employment in respect to which neither the city nor the Department of Water and Power is obligated to bargain collectively."

Upon appeal from the temporary injunction, appellants raised the same questions which are now presented, namely that the injunction terms were too broad; that the same rules should apply as in the case of a private employer, and that the injunction denied to appellants the right of free speech and the opportunity to publicize the claimed grievances. It is now contended that the decision and judgment appealed from are "completely unrealistic". Even if such arguments had not already been presented to the appellate court on the former appeal and there decided adversely to appellants' contentions, the same result would necessarily be reached on the present appeal.

[3] As the reviewing court said on the former appeal, 94 Cal.App.2d 36, 49, 210 P. 2d 305, 313, "We find no merit in defendants' further claim that the injunctive relief granted is too broad. Reasonably construed, the plain meaning of the language employed merely restrains the defendant unions from conduct we have held to be unlawful, namely, striking, picketing, and like activities where the purpose is to intimidate or coerce the City authorities in the performance of their lawful duties and inducing the employees of the Department of Water and Power to strike or otherwise interfere with the work on the Department's specified projects."

[4] No restraints are imposed upon the exercise by defendants of any other means at their disposal to publicize the alleged grievances. It may also be noted that in the absence of any showing as to the existence of a labor dispute between any of the independent contractors and employees, it

cannot be assumed that the injunction was intended or would be construed to prohibit strikes or peaceful picketing by such private employees to enforce legitimate demands against private employers.

[5, 6] As stated in Lisse v. Local Union No. 31, 2 Cal.2d 312, 323, 41 P.2d 314, 319, "in framing the terms of injunctive relief it is, of course, * * * impossible to define comprehensively or with exactness each and every act which may or may not be legally done in carrying on a labor controversy; * * *. All that the court can do is to deal with those specific acts which by the evidence are shown to have been committed in furtherance of the particular dispute then before it". The assertion that the present injunction is "completely unrealistic" finds no support in the record.

[7] Appellants argue that the controversy herein is not with a sovereign power, the City of Los Angeles, but "is with a proprietary arm of the city", the Department of Water and Power. While it is quite true that for certain purposes, a distinction has sometimes been made between governmental and proprietary functions of a municipality, such a distinction, under the facts of the present case, is inapplicable and beside the point. The distinction in question "was developed by the courts for application chiefly in cases involving the tort liability of municipal corporations". Again quoting from the previous appeal, 94 Cal.App.2d at page 46, 210 P.2d at page 311, "It has no rational application in the present situation. The City, having been lawfully empowered by its charter to furnish water and electricity to its inhabitants, is thereby performing a municipal and public function, irrespective of whether it is acting in a 'proprietary' or 'governmental' capacity. Irish v. Hahn, 208 Cal. 339, 344, 281 P. 385, 66 A.L.R. 1382."

[8] Water, light and power are furnished by the city to private citizens, to private commercial enterprises, and to public offices. It can hardly be argued that such service is not a vital necessity without which neither the city itself nor its citizens could well subsist. It is, indeed, a service involving health, safety and welfare of a vast number of people; one with which neither labor unions nor individuals have a legal right to interfere. That this situation was recognized and considered by the trial court and by the reviewing court on the former appeal seems clear. No valid argument has been here presented which would justify a reversal of that position.

[9] Appellants' argument that the right exists to "make demands upon their employer for improvement in wages, hours and working conditions" etc., is answered by the statement in respondents' brief that "the injunction does not restrain appellants from making demands". Appellants are only restrained from the use of coercive methods seeking to secure compliance with such demands. To judicially sanction the use of such methods would, as respondents say, be to approve "the control of the functions of government, not by law but by men".

The material findings of the trial court all find support in the evidence and the record indicates that appellants were duly accorded a fair trial and full opportunity to present their contentions. These contentions, not fundamentally different from those presented on the appeal from the preliminary injunction, are untenable.

The judgment is affirmed.

DRAPEAU, J., concurs.

WHITE, Presiding Justice.

I concur in the judgment. A review of the record herein makes it manifest that the facts before the court when it granted the preliminary injunction herein, see City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council, 94 Cal.App.2d 36, 210 P.2d 305, were practically the same as here presented to the court upon the trial, from the judgment in which this appeal was taken. Though it be conceded that the evidence in part was different, there was no difference in any material respect. Consequently the holding in the former appeal became the law of the case, and both the trial court and this court are without authority to reconsider the rulings made on the former appeal, Wells v. Lloyd, 35 Cal. App.2d 6, 11, 94 P.2d 373.

Hearing denied; CARTER, J., dissenting.

MARTIN v. LAMPTON, Director of Department of Motor Vehicles, et al.

REDWINE v. LAMPTON, Director of Department of Motor Vehicles, et al.

Civ. 7947.

District Court of Appeal, Third District, California.

Jan. 21, 1952.

Rehearing Denied Feb. 13, 1952.

Hearing Granted March 20, 1952. *

Separate mandate proceedings by Andrew W. Martin and by George H. Redwine against Edgar E. Lampton, Director of the Department of Motor Vehicles for the State of California, and others to compel approval of claims for overtime work between 1939 and 1943 which had not been compensated for prior to petitioners' separation from the California Highway Patrol. The cases were consolidated for trial. The Superior Court, Sacramento County, John Quincy Brown, J., rendered a judgment directing a peremptory writ to issue requiring respondents to approve the claims and respondents appealed. The District Court of Appeal, Schottky, J. pro tem, held that petitioners were entitled to cash payments for overtime work for which compensating time off had not been granted, that claims were not barred by statute of limitations and that petitioners were entitled to be compensated for overtime at the rate of compensation being received at the time of their separation from employment.

Judgment affirmed.

1. States ⇐61

Orders of chief of Highway Patrol that highway patrolmen required to work on their regular days off or on legal holidays would be allowed a day in lieu thereof to be taken at convenience of service, that employees required to work overtime hours could be allowed compensating time off, and that overtime hours should be adjusted by employees' immediate superior and should not become a part of headquarters' record, were effective to grant compensating time off and did not merely grant authority of an immediate superior to allow compensating time off. Government Code, § 18005.

2. Limitation of Actions ⇐58(1)

Where orders of chief of Highway Patrol provided that highway patrolmen required to work on their regular days off or on legal holidays would be allowed a day in lieu thereof to be at convenience of service, and that employees required to work overtime hours could be allowed compensating time off, one-year limitation statute did not begin running as to patrolmen until their separation from service, since patrolmen, while still employed, could not have compelled granting of compensating time off, but could take it only at convenience of service and at times deemed convenient by their superiors. Government Code, § 19630.

3. Limitation of Actions ⇐58(1)

Bulletin issued by Department of Motor Vehicles and purporting to cancel all claims of highway patrolmen for overtime hours worked prior to certain date did not start one-year statute of limitations running against patrolmen while still employed, when right to payment in cash for overtime could only be enforced by patrolmen on their separation from service. Government Code, § 19630.

4. States ⇐61

Former highway patrolmen were entitled to compensation for overtime work which had not been compensated for by compensating time off prior to their separation from highway patrol based on salary as of time of their separation. Government Code, § 18005.

5. States ⇐59

Rules of State Personnel Board that rate of compensation for overtime for employees shall be hourly equivalent of employees' monthly salary as of time overtime was worked and rule that when employee leaves employment of one state agency and enters employment of another, and has overtime to his credit, for which compensating time off may be granted, he may be paid in cash therefor, in which event rate of compensation for overtime shall be hourly equivalent of employee's monthly salary as of time overtime was worked, must be considered along with statute providing that on separation from state service a person is entitled to lump sum payment as of time of separation for any previous overtime work for which he

* Subsequent opinion 255 P.2d 416.

has not received any compensating time off. Government Code, § 18005.

Wilmer Morse, Deputy Atty. Gen., for appellants.

James H. Phillips, Sacramento, for respondents.

SCHOTTKY, Justice pro tem.

Petitioners Martin and Redwine, former State Traffic Sergeant and State Traffic Officer, respectively, brought separate mandate proceedings on April 21, 1948 and March 11, 1948, respectively, to compel approval of claims for overtime worked between 1939 and 1943 which had not been compensated for by compensating time off prior to their separation from the California Highway Patrol. The cases were consolidated for trial and resulted in a judgment directing a peremptory writ to issue requiring the respondents below to approve claims in the sum of $872.95 and $512.44, respectively, the cash value of the claimed overtime. From this judgment respondents have appealed.

There is no conflict as to the facts and we shall summarize briefly the factual situation as shown by the record and as found by the court.

During all times the salary of each petitioner was fixed on a monthly basis and the monthly salary was fully paid. Pursuant to Bulletin No. 323 issued on June 5, 1945, by the Chief of the Highway Patrol, petitioner Martin filed a claim for overtime, but at the time of his separation from the service on April 30, 1947, he had received no compensating time off for such overtime. Likewise petitioner Redwine filed a claim for overtime in 1945 but had received no compensating time off for this overtime at the time of his separation from the service on March 16, 1947.

During the period between February, 1941 and September, 1943, petitioner Martin worked 513½ hours in excess of his regular hours of duty, 100½ hours of which were worked after February 6, 1943; and during the same period petitioner Redwine worked 332¾ hours in excess of his regular hours of duty, 33 hours of which were worked after February 6, 1943.

During the period that Martin worked the extra hours claimed by him his monthly salary was first fixed at $245, then at $260, then at $275, then at $290, and finally at $300 per month, and at the time of his separation from state service by retirement, his monthly salary was $340 per month. During the same period Redwine's salary was first fixed at $220, then at $230, then at $245, and finally at $255 per month, and at the time of his separation from service his monthly salary was $310 per month. The salaries used by the trial court as a basis for figuring the cash value of the extra hours were the salaries at the time of separation rather than the salaries at the time the work was performed. That petitioners worked the overtime hours for which they claim compensation is not denied by respondents nor is it claimed that compensating time off was ever allowed them.

On September 28, 1939, effective October 1, 1939, the Chief of the Highway Patrol issued Headquarters General Order No. 295, with reference to "Regular Days off, Accumulative Days, and Overtime," stating therein that it superseded and cancelled Information Bulletin No. 52, issued May 17, 1933, and other previous orders in reference thereto. This order provided that in the future employees ordered by their superiors to work on their regular days off or legal holidays, would be allowed days off in lieu thereof which would be termed accumulative days, and that such accumulative days, must be taken as soon thereafter as practicable and at the convenience of the service. It also provided that "Employees ordered to work beyond the hours ordinarily required or hours overtime in addition to what is considered their regular full day's work, may be allowed time off on the day following or at some other convenient time in lieu of the overtime hours worked. Overtime hours shall be adjusted by the immediate superior of the employee affected and shall not become a part of the Headquarters' record."

On August 5, 1942, Headquarters General Order No. 394 was issued, effective

that day, providing that: "Employees ordered to work beyond the hours ordinarily required and considered as a full days work may be allowed compensating time off in lieu of such overtime worked. Such overtime hours may be granted and adjusted by the immediate superior of the employee affected and shall not become a part of the Headquarters record."

On June 5, 1945, the Chief of the Highway Patrol, with the approval of the Acting Director of the Department of Motor Vehicles, issued "Information Bulletin No. 323," addressed to all members of the Highway Patrol. It provided that any claims for overtime hours accumulated prior to September 29, 1943, should be reported to the department in writing, accompanied by evidence in affidavit form in support thereof, on or before June 30, 1945.

Section 18005 of the Government Code, which in 1945 codified a portion of Chapter 20 of the Statutes which became effective on February 6, 1943, provides: "Upon separation from service under Part 2, without fault on his part, a person is entitled to a lump sum payment as of the time of separation for any unused or accumulated vacation or for any time off to which he is entitled by reason of previous overtime work where compensating time off for overtime work is provided for by the appointing power or by rules of the State Personnel Board."

Respondents make an earnest and forceful argument for a reversal of the judgments. They base their argument on three major contentions:

First, that under the law as it stood at the time the work was performed, payment of the monthly salary of an officer was payment in full for all services that might be required of him; that there can be no such thing in the absence of statute as extra hours so as to give rise to a monetary obligation over and above his monthly salary.

This contention is made only with respect to the hours worked prior to February 6, 1943, the effective date of Section 150.5 of the act; and respondents do not attack the judgment as to hours worked after February 6, 1943.

Second, that the claims of petitioners are barred by the statutes of limitation, irrespective as to whether the hours were worked prior to or subsequent to February 6, 1943.

Third, that, in any event, the cash value of overtime worked prior to February 6, 1943, should be based on the salary at the time it was worked rather than the salary at the time of separation.

In Pohle v. Christian, 21 Cal.2d 83, 130 P.2d 417, decided in October, 1942, the right of a civil service employee on separation from the service without fault on his part, to compensation in cash for unused vacation time was established; and in Clark v. State Personnel Board, 56 Cal. App.2d 499, 133 P.2d 11, decided in January, 1943, a like right to a cash payment for overtime worked for which compensating time off had not been granted was decided. Also in an opinion of the Attorney General, rendered on July 26, 1944 (N. S. 5597), it was stated that "The right of a State employee, separated from service without fault, to a lump sum payment upon separation for accrued vacation rights was established in Pohle v. Christian (Oct. 1942), 21 Cal.2d 83 [130 P.2d 417]. The right to payment under similar circumstances for overtime worked, when departmental rules provided for compensating time off was established in Clark v. Personnel Board (Jan. 1943), 56 Cal.App.2d 499 [133 P.2d 11]."

Statutory recognition of the principles enumerated in those decisions appears in Section 18005 of the Government Code, hereinbefore quoted.

[1] Respondents attack the soundness of the decision in the Clark case and cite earlier cases which they contend are contrary to the holding of the Clark case. It would serve no useful purpose to discuss the decisions cited by respondents because this court, in the case of Howard v. Lampton, 87 Cal.App.2d 449, 197 P.2d 69, not only cited the Clark case but reaffirmed what was held therein, and a hearing was denied by the Supreme Court. We do not

agree with the contention of respondents that our decision in the Clark case is basically unsound, but even if we did agree with such contention, we believe that any overruling of the Clark case should be by the Supreme Court, and that we should follow the Clark case until it is overruled. However, we cannot refrain from stating that the Legislature in enacting said Section 18005 as an urgency measure so soon after the decisions in Pohle v. Christian and Clark v. State Personnel Board, no doubt believed that the doctrine of those cases was sound and should be written into the statutory law of our State.

There is considerable similarity between the instant case and the case of Howard v. Lampton, supra. In that case petitioners sought a writ of mandate against the same respondents to compel payment of the claims of petitioners for overtime worked by them between January 1, 1939, and September 28, 1943, while employed as members of the State Highway Patrol, and for which no compensating time off was allowed them. In affirming the judgment granting the writ of mandate, this court referred to and approved the cases of Pohle v. Christian, supra, and Clark v. State Personnel Board, supra, and said at page 454 of 87 Cal.App.2d., at page 71 of 197 P.2d:

"As to the effect of Orders No. 295 and No. 394, appellants contend that they did not grant compensating time off, but merely granted authority of an immediate superior to allow it, that petitioners did not show that their immediate superiors had allowed them such time off; and that it was demonstrated, by the provision that overtime hours were not to become part of headquarters records, that it was not intended to make the allowance of compensating time off a *right* under the terms of employment. In short, that whether or not compensating time off should be granted an employee was a matter of discretion on the part of his superior, and that it was not shown by petitioners that such discretion had been exercised in their behalf by their superiors. We find no merit in this contention. The two orders aforesaid were a recognition of the right of an employee to be allowed time off for hours worked in excess of his regular hours of duty. And while such orders left it to the immediate superiors to determine *when* such time off should be taken, they did provide that 'overtime *shall* be adjusted' by such superiors, thus making it the duty of such superiors to so adjust them. If such orders were not intended as recognizing a right to compensating time off for all overtime worked, then superiors might grant it to one and not to another, a discrimination which would have been devastating to the morale of the employees and which could not reasonably have been intended.

"Nor do we attach any significance to the provisions that overtime hours should not become a part of the headquarters' record, in so far as the right of employees to such time off is concerned. It is not contended that petitioners did not work the overtime hours for which they claim compensation, or that such overtime was not made a matter of record with their immediate superiors. It is quite as reasonable to assume that this provision had for its purpose a desire not to increase the burden of keeping such headquarters' records as it is to assume that it was meant thereby to limit the right of employees to such compensating time off or leave it to the whim of immediate superiors.

"Furthermore, Bulletin No. 323, issued on June 5, 1945, the subject matter of which was declared to be 'overtime hours accumulated prior to September 29, 1943,' was a recognition by the department itself that employees were entitled by previous orders to such accumulated time off; and the provision therein for the making of such proof indicates that the fact that same had not theretofore been made a part of headquarters' records was not considered as having affected the rights of employees thereto."

[2, 3] Respondents' second main contention is that the findings do not support the judgment in that they show petitioners' causes of action to be barred by the statute of limitations; and respondents assert that on August 21, 1945, the California Highway Patrol repudiated all liability on the part of the State for the overtime

hours claimed to have been worked prior to September 29, 1943, and denied petitioners the right to take any compensating time off whatsoever therefor or to receive the cash equivalent on separation. They thus point out that the actions were not commenced either within one year after the overtime was worked or within one year after the obligation was denied, and argue that such actions were barred by Section 52 of the State Civil Service Act (now Government Code Section 19630).

This same contention was made in Howard v. Lampton, supra, and in deciding against respondents' contention this court said, 87 Cal.App.2d at page 455, 197 P.2d at page 72:

"As for the application of any statute of limitations, the general orders above mentioned contained no provision that time off in lieu of overtime worked must be taken within any specified time. When it should be taken was left to the discretion of the immediate superior; and an employee obviously could not have demanded or taken it except at such time as his superior might allow, depending upon what was deemed by him to be convenient under conditions of the service then existing. Statutes of limitations are not intended to apply to any person when the performance of an act by him is not within his right or power.

"Appellants rely upon section 52 of the State Civil Service Act as amended (now Gov. Code, sec. 19630), which provided that 'No action or proceedings shall be brought by any person having or claiming to have a cause of action or complaint or grounds for issuance of any complaint or legal remedy for wrongs or grievances based on or related to any civil service law in this state or the administration thereof unless such action or proceeding is commenced and served within one year after such cause of action or complaint or ground for issuance of any writ or legal remedy first arose. * * *'

"Plainly, under the circumstances shown by this record, and the decisions in the Pohle and Clark cases, no right in petitioners for the issuance of any writ of legal remedy arose until their separation from the service; they could not have compelled the granting of compensating time off; it was only to be taken at the convenience of the service and at times deemed convenient by their superiors. Therefore, such compensating time off might have been given to petitioners by their superiors at any time before their services terminated. Surely it cannot be said that if such superior officer had not deemed it convenient to give compensating time off within a year or even three years of the time when overtime was worked, petitioners could have compelled it, since it might still be given them by such superior.

"Appellants also argue that in any event a cause of action on behalf of respondents as to overtime worked prior to October 1, 1939, must be held to have arisen on *August 21, 1945,* when Information Bulletin No. 329 was issued by the department. That bulletin purported to deny and cancel all claims for overtime hours worked prior to September 29, 1943, which had been presented by 46% of the members of the patrol pursuant to instructions contained in Bulletin No. 323. It was recited in said bulletin that considerations upon which the denial and cancellation were based were that it was the general understanding that an officer's salary was in full for all services performed by him, including overtime worked; that it was never intended that overtime hours worked should accumulate indefinitely; that headquarters had no record against which to verify the claims submitted; that it was believed that by failure of an officer to arrange with his superior for compensating time off at the earliest possible date constituted a waiver of overtime; that it was believed that some of the claims or some portion thereof were barred by statutes of limitation; that 60% of the claims filed did not comply with Bulletin No. 323, and that it was believed that in legal effect this may have constituted a waiver; that the fact that officers who had left the service had not been allowed compensating time off or paid a cash equivalent indicated an understanding by the officers themselves that they had no

claim for overtime worked prior to September 29, 1943; and that there was no legislative provision for compensating employees for overtime.

"This bulletin did not base its refusal to recognize the claims filed on the ground that the appellants were without power to grant cumulative time off, nor deny the tacit recognition in Bulletin 323 that they had such power; and it is a little difficult to arrive at the motive behind its pronouncements in view of the decisions in the Pohle and Clark cases, the opinion of the Attorney General herein previously mentioned, and the enactment in 1943 of the legislation now embodied in section 18005 of the Government Code, all of which preceded the issuance of Bulletin 329. But whatever motivated it, it did not start a statute of limitations running against petitioners, since any right to payment in cash for overtime could only be enforced on separation from the service, and, as hereinbefore stated, claimants could not have compelled the granting of time off the allowance of which was discretionary with their superiors as to time and convenience. Nor do we believe that such bulletin was effective to cancel claims which had been filed pursuant to Bulletin No. 323 which preceded it, the filing of which was, in effect, an acceptance by employees of the offer made by the department in that bulletin.

"Petitioners had the right, then conferred by statute, to payment for overtime upon separation from the service, which statute did not limit the time within which such overtime should have been worked; and Order No. 295, which allowed time off in lieu of overtime worked, was still in effect. These petitioners had the right to continue their employment notwithstanding this pronouncement, and to rely upon their statutory right to compensation in cash if and when they might terminate their employment."

Respondents' third main contention is that the trial court erred in not basing the cash value of the overtime worked prior to February 6, 1943, the effective date of sec. 18005, on the salary as of the time when overtime was worked rather than as of the time of separation.

Although this point was not raised or discussed in the Howard case, that case appears to have been presented and tried on the theory that an employee who is entitled to cash for unused overtime at the time of separation is entitled to be paid as of the rate of pay on his last day of work, and the judgment was rendered and the petitioners paid upon that basis in that case.

[4] We believe that the trial court correctly determined that petitioners were entitled to have their lump sum payments based on the salary as of the time of separation. During the period between the working of such overtime and the time of separation it was within the power of the respondents to grant compensating time off, and such compensating time off could only be taken at times deemed convenient by respondents. As to the overtime involved in the instant cases, compensating time off might have been granted to petitioners at any time prior to their separation from the service. If respondents did not grant said compensating time off prior to petitioners' separation from the service because they did not deem it for the convenience of the service, or for any other reason, we see no escape from the conclusion that at the time of such separation from service petitioners would be entitled to payment for such overtime at the rate of salary received at the time of separation.

Respondents concede that Section 18005 of the Government Code specifies that upon separation from service an employee is entitled to a lump sum payment as of the time of separation for previous overtime work, but point out that this section did not become effective until February 6, 1943. Stats. 1943, ch. 20. We do not believe that Section 18005 effected any change in the law, but that it merely clarified the law and wrote it into our statutes. Respondents state that common practice in private industry is that workmen are paid overtime at a rate based on their rate of pay at the time the overtime was worked but respondents fail to point out that it is the common

practice of industry to pay the employee the cash value of said overtime at the payday following its performance. We entertain no doubt that if an employee in private industry were entitled to be given compensatory time off in lieu of cash payment, and he did not receive compensating time off prior to his separation from such employment, he would, upon such separation, receive lump sum payment at the rate he was earning at the time of separation.

Respondents also state: "When the State, itself, adopted the first true overtime statute (Stats. 1943, Chap. 1041) it provided that the employee 'shall receive overtime compensation *based on his regular rate of pay* for all such overtime.' By Rule 133 the State Personnel Board has provided under that statute that 'The rate of compensation for overtime for employees * * * shall be the hourly equivalent of the employee's monthly salary *as of the time the overtime was worked*,'" and by Rule 136 it has provided that when an employee leaves the employment of one state agency and enters the employment of another state agency, and has overtime to his credit, for which compensating time off may be granted, he may be paid in cash therefor, in which event the rate of compensation for the overtime shall be the hourly equivalent of the employee's monthly salary *as of the time the overtime was worked*, as provided in Rule 133."

But respondents fail to point out that said rules were adopted after petitioners separated from State service and also fail to point out that Rule 134 provides that if no compensating time off is granted within 12 months following the working of the overtime the employee shall be paid for such overtime on the next payroll.

[5] These rules referred to by respondents must be read and considered along with Section 18005 of the Government Code, supra, which is in accordance with the rule laid down in Clark v. State Personnel Board and Howard v. Lampton, supra, which rule is that upon separation from State service a person is entitled to lump sum payment *as of the time of separation* for any previous overtime work for which he has not received any compensating time off.

Respondents also argue that it is unfair that the State should have to pay a State employee at a different rate from the going rate at the time the services were performed. The Legislature, in enacting Section 18005 of the Government Code, did not think so, but evidently believed that it would be unfair to an employee to withhold from him payment for overtime, and to not grant him compensating time off, and then, upon separation from service, pay him at the rate of compensation at the time the overtime work was performed. For in such a case the employee has not only been deprived of the benefit of the use of the money during the intervening period but he would be receiving it at a time when its purchasing power was greatly reduced.

No other points raised require discussion.

In view of the foregoing the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



JARVIS v. HENDERSON, Director of Department of Motor Vehicles, et al. *

Civ. 7948.

District Court of Appeal, Third District, California.

Jan. 21, 1952.

Rehearing Denied Feb. 13, 1952.

Hearing Granted March 20, 1952.

Mandate proceeding by L. J. Jarvis against A. H. Henderson, Director of the Department of Motor Vehicles for the State of California and others to compel payment to him by the State of claims for overtime worked by him between 1935 and 1939 while acting as chauffeur and bodyguard for the then Governor of the State. The Superior Court, Sacramento County, Van Dyke, J., rendered judgment in favor of petitioner and both parties appealed. The District Court of Appeal, Schottky, J. pro tem., held that petitioner,

* Subsequent opinion 255 P.2d 426.

a member of the California Highway Patrol, remained a member of that patrol while serving Governor, that he was entitled to be paid out of funds appropriated for the Department and that refusal to allow petitioner to amend his petition twenty months after petition was filed and nine months after case was tried, without good reason being shown for the delay, was not an abuse of discretion.

Judgment affirmed.

Appeal from order denying motion to vacate judgment dismissed.

1. States ⇐61

Former state traffic officer assigned by his superior officers in Highway Patrol to report to Governor to act as Governor's personal bodyguard and chauffeur and who acted in that capacity from July, 1934, to January 25, 1939, and whose salary was fixed on a monthly basis, was entitled to a lump sum award for overtime hours and extra days worked for which no compensating time off had been granted, based on his final compensation. Government Code, § 18005.

2. Limitation of Actions ⇐58(1)

Where orders of chief of Highway Patrol provided that highway patrolmen required to work on their regular days off or on legal holidays would be allowed a day in lieu thereof to be at convenience of service, and that employees required to work overtime hours could be allowed compensating time off, one-year limitation statute did not begin running as to patrolmen until their separation from service. Government Code, § 19630.

3. Evidence ⇐23(1)

It is a matter of common knowledge that for many years a member of the Highway Patrol has been assigned by the department to the Governor.

4. States ⇐61

Assignment of petitioner, a member of Highway Patrol as chauffeur and bodyguard for Governor was not in excess of powers of chief of Highway Patrol, and petitioner did not by virtue of such assignment and performance of such service while wearing uniform of a traffic officer lose his status as member of Highway Patrol and as such member petitioner was an employee of that department and entitled to be paid out of funds appropriated therefor for overtime work by him between 1935 and 1939 for which no compensating time off had been allowed prior to his separation from the service. Government Code, § 18005.

5. Pleading ⇐236(4)

The matter of allowing an amendment to a pleading after the issues have been formed is ordinarily within discretion of trial court.

6. Appeal and Error ⇐959(1)

To justify an appellate court in holding that a denial of an application to amend a petition by trial court was prejudicial error requiring reversal for such error, there must appear to be a clear abuse of discretion.

7. Appeal and Error ⇐946

In a legal sense discretion is abused whenever in exercise of its discretion court exceeds bounds of reason, all of the circumstances before it being considered.

8. Appeal and Error ⇐948

An abuse of discretion is never presumed but must be affirmatively established by party complaining of provisions of order.

9. Appeal and Error ⇐948

The burden is on party complaining of order to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice an appellate court will not substitute its opinion and thereby divest trial court of its discretionary power.

10. Pleading ⇐236(6)

Where application to amend petition in which recovery of overtime compensation was sought from state for work performed by petitioner while member of State Highway Patrol was made 20 months after petition was filed and nine months after case was tried and no good reason was shown for delay and effect of amendment would have been to very substantially increase amount which petitioner was seeking to recover from state, denial of petitioner's motions to amend petition and set

aside submission of case was not an abuse of discretion.

Wilmer W. Morse, Deputy Atty. Gen., for appellants.

Desmond, Miller & Artz, Sacramento, for respondent.

SCHOTTKY, Justice pro tem.

Petitioner, a former State Traffic Officer, brought mandate proceedings to compel payment to him by the State of claims for overtime worked by him between 1935 and 1939 while acting as chauffeur and bodyguard for the then Governor of the State, he having been assigned to perform said duties by his superior officers in the State Highway Patrol.

Following a trial, judgment was rendered in favor of petitioner for $7,225.82 as a lump sum payment for overtime hours worked by him between January 1, 1935 and August 31, 1939 as a State Traffic Officer, and for an additional sum of $788.90 as a lump sum payment for days worked by petitioner between January 1, 1935 and December 31, 1938, which days should have been days off or holidays. Both parties have appealed from the judgment, the appeal of petitioner being upon the grounds (1) that he was entitled on separation in 1948 to a lump sum payment for all overtime, based on his final compensation; and (2) that the trial court abused its discretion in denying his motion to amend his petition.

There is no dispute as to the facts, which, as found by the trial court, are as follows:

Petitioner was appointed a state traffic officer in 1931, and until July, 1934, he performed the regular and usual duties of that office, namely, patrolling the highways in connection with enforcement of laws regulating the operation of vehicles.

In July, 1934, in response to an order of the Governor to furnish him with a personal bodyguard and chauffeur, petitioner's superior officers in the California Highway Patrol directed him to report to the Governor's Office; accordingly, the petitioner reported to Captain Castle of the California Highway Patrol, who was then stationed in the Governor's Office, and then presented himself to the Governor, who directed him to act as his personal bodyguard and chauffeur. Continuously from July, 1934, to January 5, 1939, the petitioner acted as bodyguard and chauffeur to the Governor, working such days and hours as the Governor directed. On January 6, 1939, petitioner's assignment to the Governor's Office terminated, and he then returned to the regular and usual duties of state traffic officer, which he continued to perform until January 31, 1948, when he resigned. During all times petitioner's salary was fixed on a monthly basis, and it has been duly and regularly paid.

During the period petitioner worked as bodyguard and chauffeur for the Governor, eight hours of work in any 24-hour period was established by the appointing authority for the California Highway Patrol as a normal day's work for all members of the Patrol, and all time worked beyond eight hours was overtime; during the same period it was the understanding and agreement that traffic officers should have one day off a week plus a day off for each holiday worked; hours and days worked in addition to this schedule were to be compensated for by compensating time off to be taken at such times as, in the opinion of the immediate superior officer, would not jeopardize the efficiency of the service. These matters were elements of the employment contract which the appointing power for the Patrol had with the petitioner from the time of his original employment in 1931.

During the period between January 1, 1935, and August 31, 1939, petitioner worked 7,682 extra hours; between January 1, 1935, and December 31, 1938, he worked, in addition, 129 extra days. On August 21, 1945, the appointing power for the Patrol, on the grounds, among others, that it was the general understanding among members of the Patrol during the period prior to September 29, 1943, that an officer's salary was in full for all services performed by him including any performed beyond the hours ordinarily worked, and that there was no law pro-

viding for compensation for overtime worked prior to 1943, denied liability for the extra hours and notified the petitioner that overtime credit would not be recognized or entered, on the books of the department. All overtime hours claimed to have accumulated prior to September 29, 1943, were canceled. The appointing power further on August 5, 1942, denied compensating time off for the 129 extra days on the grounds that the use of said days had previously been suspended.

We shall first discuss respondents' appeal from the judgment.

Respondents' Appeal

Respondents' first and second main contentions are:

[1] *First,* that under the law as it stood at the time the work was performed, payment of petitioner's monthly salary was payment in full for all services that might be required of him; that there can be no such thing *in the absence of statute* as "extra" hours or days so as to give rise to a monetary obligation over and above an employe's monthly salary.

Second, that the employer-employee relationship in public service is governed by statutory law and administrative regulation, and the appointing power was without jurisdiction to contract with the petitioner in any manner so as to obligate the State for compensation in addition to his fixed salary.

These same contentions were made by counsel representing respondents in the case of Martin v. Lampton (Redwine v. Lampton), Cal.App., 240 P.2d 21. In those cases the petitioners were likewise Highway Patrol officers, and the factual situations, so far as these contentions are concerned, were not substantially different from the instant case. Upon the authority of Pohle v. Christian, 21 Cal.2d 83, 130 P.2d 417, Clark v. Personnel Board, 56 Cal.App.2d 499, 133 P.2d 11, and Howard v. Lampton, 87 Cal.App.2d 449, 197 P.2d 69, we decided adversely to respondents' contentions, and we refer to our opinion in those cases for a discussion of these contentions of respondents.

[2] Respondents' third main contention is that if, as found, a valid contract was made for compensating time off, petitioner's claims for the cash value on separation from service are barred by the statutes of limitation.

This same contention was made in the Martin (Redwine) case. We discussed it fully in those cases and determined it adversely to respondents' contention, and we refer to our opinion therein.

Respondents' fourth major contention is: That under the law, petitioner, in the Governor's Office, was not working as a state traffic officer but rather as an employee of the Governor, and compensation for the work there performed must be paid from the appropriation for the support of that office; that petitioner does not have a valid claim against the funds of the California Highway Patrol for services rendered to the Governor, and particularly he does not have a claim over and beyond his fixed salary as state traffic officer.

This contention has little merit and it is difficult to understand how, in view of the record in this case, it can be urged seriously.

The findings clearly show that the petitioner held the position or office of a state traffic officer in the California State Highway Patrol for the whole of the period in question. They further show that the petitioner reported to Captain Castle of the Highway Patrol, who was then stationed in the Governor's Office, upon orders from petitioner's immediate superior, Captain Little. Captain Castle then directed petitioner to the Governor personally and apparently told him to take further specific orders from the Governor himself.

The findings further show that continuously from the period January 1, 1931, to August of 1939, petitioner was paid a salary through the Highway Patrol as a state traffic officer. The evidence made it clear that he wore the uniform of such an officer at all times. A stipulation on file herein indicates that petitioner prepared daily activity reports which were sent to Headquarters of the California

Highway Patrol showing his hours on duty and the days he worked which should have been holidays or days off.

The evidence further proved that within the California Highway Patrol "general duty" was regarded as patrolling the highways, making arrests, keeping the peace, etc.; "special duty," on the other hand, might consist of any particular job assigned to a traffic officer—for example, strike duty, fire duty, earthquake or riot duty or duty involving a particular traffic tie-up. Both types of duty were recognized as normal to the work of the State Highway Patrol. Certainly one did not lose his status as a member of said Patrol simply because his type of duty was changed from general to special.

[3, 4] It is a matter of common knowledge that for many years a member of the Highway Patrol has been assigned by the Department to the Governor, and we do not believe that such assignment is in excess of the powers of the chief of the California Highway Patrol, or that, by virtue of such assignment and the performance of service as chauffeur and bodyguard for the Governor while wearing the uniform of a traffic officer, petitioner was any less a member of the California Highway Patrol. And as such member of the Highway Patrol he was an employee of that department and entitled to be paid out of the funds appropriated therefor.

No other contentions of respondents require discussion.

Petitioner's Appeal

The petition filed in this case alleges 7,711 hours of overtime work at $1.20 per hour based on a salary of $230 per month, and 129 days of overtime work worth $9.60 per day. A writ is prayed for to compel payment on that basis.

It was stipulated that during the period the alleged overtime was worked the petitioner's salary was fixed on a monthly basis in amounts ranging from $175 per month at the beginning to $220 per month at the end. The court found accordingly. The trial court found the value of the overtime to be in accordance with these amounts and ordered a writ to issue accordingly.

Following the submission of the cause for decision and after the court made its minute order that judgment be for plaintiff, the petitioner filed a notice of motion to amend his petition and to set aside the submission of the cause for purposes of introduction of such evidence in support of the amendments as should be necessary. The purpose of the proposed amendments was to obtain a recovery on the basis of a salary of $325 per month for a five-day week rather than on the basis of a salary ranging from $175 to $220 per month for a six-day work week. These motions were denied.

The petitioner has appealed from so much of the judgment as denied him an additional recovery on the basis of his proposed petition, contending that under Government Code Section 18005 he was entitled, on separation in 1948, to a lump sum payment for all overtime based on his final compensation, and that the trial court abused its discretion in denying his motions to amend his petition and set aside the submission.

Respondents, in answer to petitioner's contention, argue first that the trial court did not abuse its discretion in denying petitioner's motions, and second, that even if the amendment were permitted petitioner could not recover the additional amount.

The record shows that the action was filed on May 3, 1948, and that it was tried on March 30, 1949. The court ordered judgment for petitioner as prayed for, on December 14, 1949. On January 3, 1950, petitioner filed his motion to amend his petition.

It thus appears that a year and eight months elapsed in this case between the filing of the petition and the application to amend it. There appears to be no excuse for the delay. The trial had been completed and the court had ordered judgment in accordance with the prayer of the petition. The granting of the motion would have required the reopening of the case for further testimony. Upon this state of the record petitioner urges this

court to hold that the trial court abused its discretion when it denied his motion to amend his petition and to set aside the submission of the cause.

[5] It is too well settled to require the citation of authorities that the matter of allowing an amendment to a pleading after the issues have been formed is ordinarily within the discretion of the trial court. To justify an appellate court in holding that a denial of such an amendment by the trial court was prejudicial error requiring a reversal of such order, there must appear to be a clear abuse of discretion.

[6–9] The general rule is well expressed in Berry v. Chaplin, 74 Cal.App. 2d 669, at page 672, 169 P.2d 453, at page 456: "In a legal sense discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered. Makzoume v. Makzoume, 50 Cal.App.2d 229, 231, 123 P.2d 72. An abuse of discretion is never presumed but must be affirmatively established by the party complaining of the provisions of the order. Wilder v. Wilder, 214 Cal. 783, 785, 7 P.2d 1032; Kaiser v. Hancock, 25 Cal.App. 323, 328, 143 P. 614; Lynch v. Lynch, 69 Cal.App. 66, 71, 230 P. 462. The burden is on the party complaining of the order to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice an appellate court will not substitute its opinion and thereby divest the trial court of its discretionary power. Hale v. Hale, 55 Cal.App.2d 879, 883, 132 P.2d 67; Sharpe v. Sharpe, 55 Cal.App.2d 262, 265, 130 P.2d 462."

In the instant case the application to amend was made 20 months after the petition was filed and 9 months after the case was tried. No good reason was shown for the delay, and the effect of the amendment would be very substantially to increase the amount which petitioner was seeking to recover from the State. As we view the matter it was for the trial court to decide whether or not the motion to amend the petition should be granted. The language of our Supreme Court in Scholle v. Finnell, 167 Cal. 90, 138 P. 746, in which case a motion was made during trial to amend the complaint a year after the answer had been filed, is apropos. The court said, 167 Cal. at page 102, 138 P. at page 751: "Without considering whether the proposed amendment embraced new causes of action, the order was justified on the ground that the motion was made too late. It appears that the facts upon which the proposed amendments were based were known to plaintiff for over a year. There was no satisfactory showing why leave to amend was not sought earlier, and it was within the discretion of the court to refuse to allow them for this unreasonable and unexplained delay."

[10] We therefore hold that the trial court did not abuse its discretion in denying petitioner's motions to amend the petition and to set aside the submission of the case.

In view of the foregoing the judgment is affirmed. The appeal from the order denying the motion to vacate the judgment is dismissed.

ADAMS, P. J., and PEEK, J., concur.



TREU v. KUCHEL, State Controller, et al.*

Civ. 8010.

District Court of Appeal, Third District, California.

Jan. 21, 1952.

Rehearing Denied Feb. 13, 1952.

Hearing Granted March 20, 1952.

Mandate proceeding by Florenz Treu against Thomas H. Kuchel, State Controller, and another to compel respondents to allow a claim filed by petitioner for a cash value of compensating time off which she alleged was promised to her for overtime work while employed by the Lieutenant Governor, but which was not received prior to her separation. The Superior Court, Sacramento County, John Quincy Brown, J., rendered judgment directing the claim to be paid and re-

* Subsequent opinion 255 P.2d 409.

spondents appealed. The District Court of Appeal, Schottky, J. pro tem., held that evidence sustained finding that petitioner was promised compensatory time off for overtime work, that compensation for overtime was not an increase in salary which required the approval of the Department of Finance and that the petitioner was entitled to the cash value of overtime worked but not compensated for her prior to her separation from the State service.

Judgment affirmed.

1. Evidence ⇐83(1)

There is a presumption that public officials perform their duties in a regular manner and that presumption is itself a species of evidence. Code Civ.Proc. § 1963, subd. 19.

2. States ⇐61

Where Lieutenant Governor in order to fulfill duties of his office and to carry on work of state found it necessary for his secretary to work overtime and informed her that because of increased amount of work it would be impossible for her to take any time off and that she would be paid for overtime, such statement necessarily implied that if situation in office became such that compensating time off could be given she would receive such compensating time off.

3. Mandamus ⇐168(4)

In mandate proceeding against State Controller and State Treasurer to compel them to allow petitioner's claim against state for cash value of compensating time off which she alleged was promised her for overtime work while employed by Lieutenant Governor but which was not received prior to her separation, evidence sustained finding that petitioner was promised compensating time off for overtime hours worked in addition to her normal hours of work. Government Code, § 18005.

4. States ⇐61

Cash value of compensating time off to which former secretary of Lieutenant Governor was entitled after her separation from state service was not "salary" or "compensation" within meaning of quoted words in statute requiring the approval of the Department of Finance before any state agency fixes salary or compensation of an employer or officer, which salary is payable in whole or in part out of state funds. Government Code, § 18004.

See publication Words and Phrases, for other judicial constructions and definitions of "Compensation" and "Salary".

5. States ⇐61

Former secretary of Lieutenant Governor who was promised compensating time off for overtime work while employed by Lieutenant Governor was entitled to lump sum payment for overtime work not compensated for prior to her separation from state service. Government Code, §§ 12101, 18004, 18005.

Wilmer W. Morse, Deputy Atty. Gen., for appellants.

James H. Phillips, Sacramento, for respondent.

SCHOTTKY, Justice pro tem.

Petitioner brought mandate proceedings in the Superior Court of Sacramento County against the State Controller and the State Treasurer to compel them to allow a claim filed by her against the State in the sum of $3,076.53, being the cash value of compensating time off which, she alleged, was promised her for overtime worked while employed by the Lieutenant Governor of California, but which was not received prior to her separation. This appeal is from a judgment directing the claim to be paid.

The petitioner is a former employee of the Lieutenant Governor. She was appointed on March 1, 1947, to the position of secretary. She served in it until March 1, 1948, when she was appointed to the position of executive secretary. On August 1, 1949, she terminated her employment with the Lieutenant Governor. She was exempt from civil service in both positions. Authority for her appointment is contained in Government Code Section 12101, which provides that "The Lieutenant Governor may appoint and, subject to the approval of the Director of Finance, fix the salaries

of one secretary and such clerical assistants as the Lieutenant Governor deems necessary for his office."

During the two years and five months she worked for the Lieutenant Governor her salary was fixed with the approval of the Department of Finance on a monthly basis in amounts which progressively increased from $275 per month, as of the date of her first employment, to $436 per month as of the date of her final separation. This salary has been paid.

The Lieutenant Governor established the hours of 9 o'clock a. m. to 5:30 o'clock p. m. Mondays through Fridays and 9 to 12 on Saturdays as normal office hours.

The petitioner kept a record showing the extra hours she worked, which were recorded on the monthly attendance report forms. These extra hours were authorized to be worked by the Lieutenant Governor and are supported by Authorization for Overtime Form 682.

Prior to the time petitioner separated from service with the Lieutenant Governor she had not received compensating time off for the extra hours. Following her separation a claim for payment for the overtime was prepared, approved by the State Personnel Board, presented to the State Controller and by him rejected. Thereafter, on April 4, 1950, these proceedings were commenced.

Other material facts will be set forth in the course of this opinion.

Appellants make a vigorous attack upon the judgment. In their opening brief they state:

"The petition is carefully drafted to bring the case within the rule of Clark v. State Personnel Board, 56 Cal.App.2d 499, 133 P.2d 11. The rule of that case is that a state civil service employee has the right to a lump sum payment upon separation from service in lieu of compensatory time off which he was promised for overtime worked but which he did not receive prior to separation. In Howard v. Lampton, 87 Cal.App.2d 449, 197 P.2d 69, the rule of the case is said to be codified in Section 18005 of the Government Code. That section in effect provides that upon separation from service a civil service employee is entitled to a lump sum payment as of the time of separation for any time off to which he is entitled by reason of previous overtime work where compensating time off for overtime work is provided by the appointing power. Under the Clark case the payment of the lump sum on separation is based on breach of contract, namely, a contract to allow compensating time off prior to separation.

"The petitioner, in order to bring her case under the rule of the Clark case, alleges that the appointing power established normal hours of work for the petitioner, that he 'promised petitioner compensating time off for overtime hours worked in addition to her normal hours of work', that 'said promise was made prior to the time said overtime hours were worked,' that the petitioner was authorized by the appointing power to and did work the hours claimed, that petitioner 'has not received compensating time off or other compensation for the overtime hours worked,' that she did not waive compensating time off by refusing to take it when offered, and that the amount claimed is the cash equivalent of the overtime standing to her credit at the time of separation and for which she was not granted compensating time off.

"The findings of the trial court incorporate by reference the allegations of the petition and find them to be true."

Appellants first contend that the finding that petitioner was promised compensatory time off for overtime work is not supported by the evidence. The particular finding is "that said Lieutenant Governor, Goodwin J. Knight, promised petitioner compensating time off for overtime hours worked in addition to her normal hours of work."

The record shows that at the time petitioner was employed by the Lieutenant Governor she was told that "there was a terrific amount of work in the office and he knew I was going to work a lot of overtime" and that "at the time the overtime was worked Miss Treu (petitioner) was told that she would be paid for the

overtime as it would be impossible for her to take any time off because of the increased amount of work."

Respondents argue that this evidence does not support a finding that petitioner was promised compensating time off for overtime worked. The Assistant Director of Finance upon the same evidence wrote respondent State Controller: "The seven items which he [the Attorney General] set forth in his letter [item 2 being that he did promise the employee compensating time off for extra hours worked] already have been substantiated, and there is available in our files the required letters and affidavits making the required substantiation." The trial court also was satisfied that the evidence justified the finding above set forth.

[1, 2] It must be borne in mind that we have here a case where the Lieutenant Governor, an important and responsible State official, in order to fulfill the duties of his office and to carry on the work of the State of California, found it necessary for his secretary, the petitioner, to work overtime. When he told her that because of the increased amount of work it would be impossible for her to take any time off and that she would be paid for the overtime, such statement, in our opinion, necessarily implied that if the situation in the office became such that compensating time off could be given she would receive such compensating time off. There is a presumption that public officials have performed their duties in a regular manner, C.C.P., Sec. 1963, subd. 19, and this presumption is itself a species of evidence. It is a fair assumption that the Lieutenant Governor was familiar with the rule of the Clark case and the applicable statutes, and that he was not trying to word his statement to petitioner in language that would prevent her from being paid for the overtime that the record without dispute shows that she worked.

[3] If the trial court had found in accordance with appellants' contention, it may be that such conclusion would be supported by the evidence, but the evidence does not compel such a conclusion. It was for the trial court to weigh the evidence, and there is sufficient evidence, and reasonable inference therefrom, to support his finding that petitioner was promised compensating time off for overtime hours worked in addition to her normal hours of work.

Appellants' second contention is based on the theory that the trial court may be considered to have found that a contract to pay cash compensation was entered into.

[4] We have hereinbefore held that the finding that petitioner was promised compensating time off for overtime hours worked is supported by the record, so little discussion of respondents' second contention is required. The record shows that the salary of petitioner was fixed with the approval of the Department of Finance and that the Lieutenant Governor did establish normal hours of work. If respondents intend to argue that the Department of Finance must approve overtime before a State department can order the overtime worked and give compensating time off or pay cash for the same, we believe it is in error. We agree with the following language of the trial judge in his memorandum opinion:

"Respondent further argues that even though petitioner was promised that she would be paid for the overtime; that, (A) She was paid by a salary increase of $50.00 a month, and (B) that if there was anything further than the increase in salary expected, there was no approval of the Department of Finance, and accordingly, this being additional 'compensation', would be ineffective without such approval.

"Section 18,004 of the Government Code provides in part: 'Unless the Legislature specifically provides that approval of the Department of Finance is not required whenever any state agency or court *fixes the salary or compensation* of an employee or officer, which *salary* is payable in whole or in part out of state funds, the *salary* is subject to the approval of the Department of Finance before it becomes effective and payable.'

"It will be noted that respondent includes a lump sum compensation in lieu of compensating time off in this requirement. It

is true that the statute states 'salary or compensation' but later each one of the clauses refers only to the word 'salary'. This court does not feel that that statute is subject to the broad interpretation which respondent puts upon it. We are of the opinion that the words 'salary or compensation' are used as interchangeable terms, but that a lump sum to be paid in lieu of compensating time off is not such 'compensation' as is meant there. It is admitted that in the ordinary case where an employee is promised compensating time off for overtime and fails to receive the full amount of this, that a lump sum payment may be given upon separation from the service without regard to any action by the Department of Finance. Section 12,101 of the Government Code refers specifically to the fixing of the *salaries* of one secretary and such clerical assistance as the Lieutenant Governor deems necessary by the appointing power with the Director of Finance. This Court feels that there was no evidence in the case that the question of overtime was in any way a factor in granting the pay raise to petitioner in this matter. The letter of July 16, 1947, (respondent's Exhibit A written to Mr. Fred Links by Lieutenant Governor Knight) states in part, 'and I feel their *salaries* should be increased to * * * $3900 per year for Miss Treu.' This the court believes is entirely separate and apart from the question of any lump sum payment for overtime, which is the sole matter to be decided in this action."

In Howard v. Lampton, 87 Cal.App.2d 449, at page 459, 197 P.2d 69, 74, the court quoted with approval the opinion of the Attorney General that making provision for overtime and compensation therefor does not increase the monthly salary of the employee. Said opinion, dated April 9, 1940, No. 1-ES2496, stated: "Situations will arise from time to time where certain employees in an office may be required in certain emergencies to work a number of hours of overtime for one or more days in a week. The emergency may be such that the officer or board cannot procure the services of some other person to do this overtime work. It seems entirely reasonable and in accord with efficient and humane office management that the head of the office should grant to such an employee compensating time off for the extra hours worked under such circumstances. Such compensating time off does not constitute additional payment for overtime. The monthly salary of the employee is not increased."

[5] The third major contention of respondents is that the judgment is invalid in that petitioner has been paid her fixed monthly salary, which under the law was payment in full for all services required of her.

Respondents' argument in support of this contention consists very largely of an attack upon the soundness of the decision of this Court in Clark v. State Personnel Board, 56 Cal.App.2d 499, 133 P.2d 11. Virtually the same argument was made by these respondents as was made by respondents, represented by the same counsel, in the cases of Martin v. Lampton (Redwine v. Lampton) Cal.App., 240 P.2d 21. Though the factual situations in those cases were somewhat different, the issues and principles involved are not substantially different from the instant case. Upon the authority of Pohle v. Christian, 21 Cal.2d 83, 130 P.2d 417; Clark v. State Personnel Board, supra, and Howard v. Lampton, supra, we decided adversely to respondents' contention, and we refer to our opinion in those cases.

We do not agree that our decision in the Clark case is basically unsound and should be reversed, for our decision in the Clark case was cited and reaffirmed in Howard v. Lampton, supra, and a hearing was denied by the Supreme Court in the Howard case. The fact that the Legislature enacted Section 18005 of the Government Code as an urgency measure so soon after the decisions in Pohle v. Christian and Clark v. State Personnel Board, supra, and thus wrote the doctrine of those cases into the statutory law of our State strengthens us in the belief that the doctrine of the Clark case is sound and should be adhered to unless and until it is overruled by the Supreme Court.

In his memorandum opinion the trial judge stated: "Respondent takes the position that the Clark case, supra, was wrongly decided, but that does not lie within the province of this court. It is the law of this state at this time, and that is all that we are here concerned with. This court feels that to place a strained interpretation on rules involving the labor of public employees is entirely out of line with our common knowledge of today. In the case at bar the actual hours of 9:00 a. m. to 5:30 p. m. five days per week, with an additional three hours on Saturday, were explained to petitioner and certainly there is not greater reason why an employer who happens to be an agent of the sovereign power should have any greater latitude to exact more hours of work than such normal hours, where they are in fact fixed, than a private employer, and it would be absurd to say today that a private employer could refuse to give an employee lump sum payments for overtime worked. We all know that for any overtime the employee is usually compensated on a time and a half or double time basis in private industry. The statutes and the rules, with regard to public employment, are proceeding along the same lines; therefore, when an employee accepts a position with a sovereign power and there is a definite contract of employment, then any time worked over those normal hours entitled the employee to compensating time off and if this is not given, under the rules of the cases cited in the Howard case, supra, the employee is entitled to a lump sum in lieu thereof."

We agree with this analysis.

No other points raised require discussion.

In view of the foregoing we conclude that the trial court correctly determined that petitioner was entitled to a judgment directing that she be paid the sum of $3,076.73 as the cash value of overtime worked but not compensated for prior to her separation from State service, and that the judgment should be and the same is hereby affirmed.

ADAMS, P. J., and PEEK, J., concur.

109 Cal.App.2d 63

NYMAN et al. v. DESERT CLUB et al.

Civ. 4436.

District Court of Appeal, Fourth District, California.

Jan. 30, 1952.

Bernard Nyman and others brought action against the Desert Club, a California corporation, and others for declarations of rights of plaintiffs in the Desert Club, for damages, and for injunctive relief. The Superior Court of Riverside County, O. K. Morton, J., entered an order granting a preliminary injunction, and the defendants appealed. The District Court of Appeal, Griffin, J., held that granting of preliminary injunction was not an abuse of discretion.

Order affirmed.

1. Injunction ⇐132

The purpose of a temporary injunction is to preserve the status quo until the merits of the action can be determined.

2. Appeal and Error ⇐954(1)
Injunction ⇐135

The granting or refusing of a preliminary injunction is a matter generally resting in discretion of trial court, and will not be reviewed on appeal except on a showing of abuse of discretion.

3. Declaratory Judgment ⇐258

In action by expelled members of club against club and others for declaration of rights in club, for damages, and for injunctive relief, order for preliminary injunction restraining defendants from interfering with plaintiffs' full use and enjoyment of club facilities pending determination of case on merits was not an abuse of discretion, where the preliminary injunction was conditioned on the proper behavior of plaintiffs while using club facilities.

Thompson & Colegate, Riverside, Samuel W. Newman, Hollywood, for appellants.

Best, Best & Krieger and Arthur L. Littleworth, all of Riverside, and Eugene L. Wolver, Los Angeles, for respondents.

GRIFFIN, Justice.

The order here involved arises out of an action brought by plaintiffs and respondents individually and as representatives of various classes of members of defendant and appellant The Desert Club, for a declaration of their rights in that club, for damages for being deprived of such claimed rights, and for injunctive relief.

A preliminary injunction was ordered, based upon the first amended complaint, the answer thereto, certain affidavits filed in connection therewith, and one exhibit. The order from which this appeal was taken merely restrains appellants from interfering with the full use and enjoyment of the club facilities by respondents pending the determination of the case on its merits, conditioned that respondents conduct themselves properly in the use of the club's facilities while the order is in effect. The propriety of this class action is now being tested by demurrer in the Superior Court. Appellants contend that the relationship between the respondent club members and the appellant club was purely contractual, and that under sec. 526, subd. 5 of the Code of Civil Procedure, an injunction cannot be issued to prevent the breach of a contract; that a by-law adopted by appellant club permitted it to expel a member at any time without cause, notice or hearing. In support of this contention appellants cite Jackson v. The Gables, 113 Cal.App. 80, 297 P. 983; and Forest Lawn Memorial Park Ass'n v. DeJarnette, 79 Cal.App. 601, 250 P. 581.

It is respondents' position that the relationship was not simply contractual, but that the club members had a property right in the club's assets as well as a personal right to enjoy the club's facilities for the life of the club; and that they could not be expelled without cause and/or proper notice and hearing, citing such cases as Grand Grove of U. A. O. of Druids v. Garibaldi Grove, 105 Cal. 219, 38 P. 947; Ellis v. American Federation of Labor, 48 Cal.App. 2d 440, 120 P.2d 79; Taboada v. Sociedad Espanola etc. 191 Cal. 187, 215 P. 673, 27 A.L.R. 1508; Oroloff v. Los Angeles Trust Club, 30 Cal.2d 110, 180 P.2d 321, 171 A.L.R. 913; Berrien v. Pollitzer, 83 U.S. App. D.C. 23, 165 F.2d 21; and 3 Cal.Jur. p. 352, sec. 6.

The amended complaint is quite voluminous and alleges generally, in 19 separate counts, that appellants, The Desert Club, a corporation, and Palm Springs-La Quinta Company, a corporation, whose entire stock was ultimately owned by appellant Frank Stone, advertised the sale of certain lots owned by the corporations; that within the tract was erected a club, consisting of club rooms, swimming pool, garden lounging facilities, tennis courts, etc., which club was operated by the appellant The Desert Club, and that such club is open only to members thereof; that certain named respondents purchased lots in the tract, predicated upon a certain brochure published by the development company inviting the general public to visit and see the property and visit The Desert Club, "the rendezvous where winter never comes", where "broad, fully improved lots are offered for sale at $695 * * *. Your membership in The Desert Club is included * * *. All improvements are in and paid for * * * including membership in the exclusive Desert Club"; that after the purchase of these lots certain of these respondent members were purportedly expelled from said club without the preferring of charges, etc.

Appellants deny generally the allegations of the complaint and allege, as justification for their acts, that a certain number of respondents were expelled under the claimed authority set up in the rules of the club adopted by the officers and stockholders, which rules provide in general for memberships designated as "life members", "pioneer members", and "invitational members"; that the annual dues are $10 per year; that under such rules if a member fails to pay dues his membership may be terminated; and "Whenever the conduct of a member is contrary to the rules set forth herein, or he has otherwise conducted himself so as to cause annoyance or embarrassment to the Club or its members, the Club may, by notice * * * prefer charges against the member * * *." It then provides: "Notwithstanding any other rules herein, concerning the right of the

Club to terminate membership, the Club reserves the right to terminate a membership if deemed by it to be for the best interests of the Club. And provided such membership is not terminated for cause, shall refund to that member all cost of such membership plus a pro rata portion of the dues that have been paid in advance."

Rule X provides: "Each and every member agrees to be bound at all times by these by-laws, any amendment thereof, and any rules and regulations hereafter established by the Club."

Appellants deny generally that the memberships of approximately 1700 members which respondents claim to represent, as well as most of the named respondents, have been canceled or that the members have been expelled, but claim that the memberships which were canceled and the members who were expelled were properly expelled under the rule above mentioned.

Respondents set up a copy of a certain criminal proceeding had in the Federal Court and allege that on January 31, 1934, by order of that court, the appellant herein, Frank Stone, was required to transfer and convey by deed to the *members* of The Desert Club, the real and personal property of the club; that pursuant to an agreement dated February 11, 1944, appellants The Desert Club and Palm Springs-La Quinta Company, as grantors, conveyed to appellant Stone, as trustee, "for the benefit of those persons who were then or who may hereafter become members of The Desert Club, including the named plaintiffs herein", the "real and personal property herein described, which includes the club and facilities above mentioned"; that by said instrument the trustee was to keep and maintain said property as a club, to make it available to the club members in good standing for a certain prescribed period and thereafter transfer to the *members* the property mentioned; that this instrument was subsequently amended to read that the trustee was to convey the property to the appellant Palm Springs-La Quinta Company, after August 14, 1950; that this amendment was brought about by an agreement between the trustee Stone, and the members of the club, and that as consideration for their consent, appellants agreed to hold said club property thereafter, for the use and benefit of persons who were then or might thereafter become members; that appellants have, through misrepresentation and false promises, resorted to the means here employed to divest these respondent members of their rights and property thus declared by said decree and by the transaction here involved.

Appellants set up a purported judgment of the Superior Court of Riverside County, wherein that court determined, in an action for declaratory relief instituted by Palm Springs-La Quinta Company against Frank Stone, The Desert Club, and a certain number of its members, that all the parties to the trust agreement and amended agreement were bound by the terms thereof. Appellants claim that the present action is a collateral attack on these purported judgments and should therefore not be considered. We will not determine this issue.

[1–3] It does appear that some claimed property right might be involved, depending upon the force and effect of these decrees, the misrepresentations claimed, and the evidence which might be produced on the hearing of the action on its merits. We will not endeavor to make a determination of these issues on this appeal from the order allowing a temporary injunction. The purpose of such an injunction is to preserve the status quo until the merits of the action can be determined. Stewart v. Superior Court, 100 Cal. 543, 35 P. 156, 563; Tulare Irrigation Dist. v. Superior Court, 197 Cal. 649, 242 P. 725. The granting or refusing of a preliminary injunction is a matter generally resting in the discretion of the trial court and will not be reviewed upon appeal except upon a showing of abuse of discretion. Piper v. Hawley, 179 Cal. 10, 75 P. 417; Miller & Lux v. Madera Canal & Irr. Co., 155 Cal. 59, 99 P. 502, 22 L.R.A.,N.S., 391; Riviello v. Journeymen Barbers etc. Union, 88 Cal.App.2d 499, 199 P.2d 400. Since the court was careful to condition the preliminary injunction upon the proper behavior of respondents while using the club facilities, and since it serves to protect the

rights of the members, if any, until their claim of some equitable ownership in the club is determined, no abuse of discretion appears. Ohio Oil Co. v. Conway, 279 U.S. 813, 49 S.Ct. 256, 73 L.Ed. 972; Ellis v. American Federation of Labor, 48 Cal. App.2d 440, 120 P.2d 79; Smith v. Mendonsa, 108 Cal.App.2d 540, 238 P.2d 1039.

Order granting temporary injunction affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



108 Cal.App.2d 827

PEOPLE v. DOYLE.

Cr. 2310.

District Court of Appeal, Third District, California.

Jan. 25, 1952.

James Gerald Doyle was convicted in the Superior Court, Solano County, Joseph M. Raines, J., for second degree burglary and probation was denied and he was sentenced to imprisonment in the state prison for the term prescribed by law and he appealed from the judgment of conviction and from order denying motion for new trial. The District Court of Appeal, Van Dyke, J., held that the record showed that no motion for a new trial was made and that the purported appeal from the order denying new trial must be dismissed and that the refusal to refer 20 year old defendant to Youth Authority was not abuse of discretion.

Judgment affirmed and purported appeal from order dismissed.

1. Criminal Law ⇐1131(4)

Where no motion for new trial was made, purported appeal from order denying new trial would be dismissed.

2. Infants ⇐69

The word "may" in statute providing that court "may" refer certain youthful offenders to Youth Authority is used in the permissive sense, and certification to Authority is discretionary and not mandatory. Welfare and Institutions Code, § 1731.5.

See publication Words and Phrases, for other judicial constructions and definitions of "May".

3. Infants ⇐69

Abuse of trial court's discretion in the matter of referring youthful offender to Youth Authority can be reviewed on appeal. Welfare and Institutions Code, § 1731.5.

4. Infants ⇐69

Where defendant exhibited recidivistic tendencies, and his criminal career started early and included various offenses, and he was charged with automobile theft and declared ward of juvenile court, and he was expelled from school for truancy, and subsequent charge of automobile theft resulted in his commitment to Youth Authority, and he was unruly and difficult to handle while in juvenile hall before he was delivered to Youth Authority, and he was subsequently fined for assault and battery and arrested for drunkenness, refusal of trial court to refer 20 year old defendant convicted of second degree burglary to Youth Authority was not abuse of discretion. Welfare and Institutions Code, § 1731.5.

James Gerald Doyle, San Quentin, for appellant.

Gail A. Strader, Deputy Atty. Gen., for respondent.

VAN DYKE, Justice.

[1] Appellant, who is 20 years of age, was accused in the Superior Court of Solano County of the crime of burglary to which he plead guilty. The degree of the burglary was fixed as of the second degree. Reference followed to the probation officer who reported against the granting of probation. His report was approved by the trial court and probation was denied. Thereupon appellant was sentenced to imprisonment in the State prison for the term prescribed by law. The notice of appeal states that the appeal is taken from the final judgment of conviction and from the

order denying defendant's motion for a new trial. The record shows that no motion for a new trial was made and consequently that appeal must be dismissed.

[2] The sole contention advanced by appellant in his brief, which he filed in pro per, is that the court erred in not referring him to the Youth Authority, which referral appellant apparently contends was mandatory under the statute. In this appellant is mistaken. Certification to the Authority is not mandatory at the present time, but is discretionary. Since 1945 Section 1731.5 of the Welfare and Institutions Code has provided that the court *may refer* certain youthful offenders to the Authority. The Authority if it decides to accept them "shall so certify to the court and the court shall thereupon commit said person to the authority." The italicized word "may" is used in the permissive sense. In re McInturff, 37 Cal.2d 876, 236 P.2d 574; People v. Walker, 82 Cal.App.2d 196, 202, 185 P.2d 842; People v. Balt, 78 Cal. App.2d 171, 173, 177 P.2d 362.

[3, 4] It does not appear from appellant's brief that he contends the trial court abused its discretion in refusing to refer him to the Authority. Abuse of the trial court's discretion can be reviewed on appeal. In re McInturff, supra; People v. Walker, supra. However, the record shows it could not be held that the trial court abused its discretion here. Appellant has exhibited recidivistic tendencies. His criminal career started early and had included various offenses. In March, 1947, he was charged with car theft in San Mateo County and declared a ward of the juvenile court; he was expelled from school for truancy in October of the same year, and in January following was again charged with car theft. This charge resulted in his commitment to the Youth Authority. He was unruly and difficult to handle while in juvenile hall before he was delivered to the Youth Authority. In August, 1949 he was fined for assault and battery, arrested for being drunk, and in June, 1950 he was charged with assault and battery, found guilty and sentenced to 30 days in the county jail. He has used marijuana, although claiming to have stopped its use a year before he was arrested for the crime herein involved. It appears that a parole officer connected with the Authority did state to the trial court that it appeared to him appellant could benefit from a new commitment to the Youth Authority and defendant urges that he made restitution of the personal property he feloniously took from the victim of the burglary and offered to make restitution of the cash involved.

All these matters are shown by the record to have been considered by the trial court which thereupon decided that he should not be sent back to the Authority but on the contrary should be sentenced to the State prison. It is clear that there was nothing approaching an abuse of discretion in this case.

The purported appeal from the order denying new trial is dismissed. The judgment appealed from is affirmed.

ADAMS, P. J., and PEEK, J., concur.



108 Cal.App.2d 793

SAN JOSE ABSTRACT & TITLE INS. CO. v. ELLIOTT et al.

Civ. 14780.

District Court of Appeal, First District, Division 1, California.

Jan. 24, 1952.

Action to recover a deposit made under a contract for sale of realty by San Jose Abstract and Title Insurance Co., a corporation, against Clayton Elliott and Marguerite M. Elliott, and J. Orwitz and S. D. Orwitz who filed cross-complaints. From a judgment in the Superior Court in and for the County of San Mateo, Murray Draper, J., J. Orwitz and S. D. Orwitz appealed. The District Court of Appeal, Peters, P. J., held that where the court failed to find on the issue of fraud and the findings actually made could be true and yet if fraud existed the purchasers would be entitled to the deposit and the evidence on the issue of fraud was conflict-

ing and the findings on waiver were unsatisfactory, reversal was required and a retrial on all the issues.

Judgment reversed and cause ordered retried on all issues.

1. Vendor and Purchaser ⇐141

Under contract allowing purchaser 30 days from date of approval of offer to purchase, to examine title and report objections thereto, the 30-day period had no application to defects in title allegedly fraudulently concealed by the vendors and unknown to the purchasers.

2. Vendor and Purchaser ⇐232(3)

Where purchasers knew of occupancy by city of property sought to be purchased by them, such knowledge, so far as the city was concerned, put the purchasers on notice of the city's rights.

3. Vendor and Purchaser ⇐35

Where broker was under no duty to speak with respect to occupancy of city of property sought to be sold the purchasers, having undertaken to do so, he was not only bound to tell the truth but also bound not to conceal relevant facts that might qualify what he did say.

4. Vendor and Purchaser ⇐334(2)

Under contract for sale of realty subject to occupancy by a city and requiring the purchasers 30 days from date of approval of offer to examine title and to report objections thereto, where broker described the nature of the city's occupancy as temporary and that the city would move therefrom within 30 days, broker was under duty not to conceal the existence of a lease by city, and if broker made the representations they amounted to a misrepresentation and concealment of the material facts authorizing purchasers to recover the deposit made.

5. Vendor and Purchaser ⇐141

Under a contract for sale of realty subject to occupancy by a city, if broker made representations that the city was merely temporarily occupying the premises and would move therefrom within 30 days when in fact the city had a lease on the premises, the 30-day provision in the agreement for the making of objections to the title had no application to the representations, if the purchasers, in fact, were ignorant of them.

6. Appeal and Error ⇐1071(6)

Where a court renders a judgment without making findings upon all material issues of fact, reversal is required, provided there is evidence introduced as to such issues, and the evidence is sufficient to sustain a finding in favor of the party complaining, and such rule applies to issues raised by the answer as affirmative defenses and as to issues raised in cross-complaints.

7. Appeal and Error ⇐1071(6)

In action to recover deposit made under a contract for sale of realty on the ground of alleged default of the purchasers who set up a claim for alleged fraud where the trial court apparently decided against purchasers but made no findings on the issue of fraud, reversal was required.

8. Trial ⇐391

Trial court must find on issues, unless findings are waived. Code Civ.Proc. §§ 632, 647.

9. Trial ⇐389

Under the code sections respecting findings providing the circumstances under which findings may be waived, the only ways in which findings may be waived are in the statutory manner. Code Civ.Proc. §§ 632, 647.

10. Appeal and Error ⇐219(2)
Trial ⇐389

Under the code section respecting the service of proposed findings upon parties and the making of objections, if the court finds on an issue, and the appellant fails to object to the form of the finding, he cannot contend on appeal that the finding made was not sufficiently specific, but the failure to object is not a waiver of the failure to find at all on a material issue. Code Civ.Proc. § 634.

11. Appeal and Error ⇐219(2)
Trial ⇐405(1)

Failure of appellants to object to findings of the trial court after they were served was not a waiver of any objection

they might otherwise have. Code Civ.Proc. §§ 632, 634, 647.

12. Appeal and Error ⇐1071(6)

In action to recover a deposit made under a contract of sale of realty on the ground of default of purchasers who set up defense of fraud, finding of ultimate fact to the effect that the vendors had fully performed did not amount to a finding that there was no fraud so as to preclude reversal where the trial court failed to make a finding thereon.

13. Appeal and Error ⇐1122(2)

Appellate court can and should make findings where the evidence is uncontradicted but where there is a total failure to find on a material issue and the evidence on that issue is highly conflicting, the appellate courts will not make findings.

14. Appeal and Error ⇐1177(8)

In action to recover a deposit made under a contract for sale of realty on the ground of default of the purchasers who claimed fraud, where the court failed to find on the issue of fraud and the findings actually made could be true and yet if fraud existed, the purchasers would be entitled to the deposit, and the evidence on the issue of fraud was conflicting and the findings on waiver were unsatisfactory, reversal was required and a retrial on all the issues.

Varnum Paul, San Francisco, Bullock, Wagstaffe & Daba, Redwood City, for appellants.

John P. Wilson, Menlo Park, Thomas Pierce Rogers, San Francisco, for respondents.

PETERS, Presiding Justice.

S. D. Orwitz and Jack Orwitz agreed to purchase certain property from the Elliotts for $50,000, paying $5,000 down and the balance to be paid within thirty days. The balance was not paid. The buyers and sellers each claimed the $5,000 deposit. The title company interpleaded the claimants. Each claimant cross-complained, claiming the deposit. The trial court found that S. D. and Jack Orwitz were in default and that, under the contract, the Elliotts were entitled to the deposit. S. D. and Jack Orwitz appeal. Their main contention is that the trial court committed reversible error in failing to find on material issues presented by the answer and cross-complaint. We agree with this contention.

The Pleadings:

The answer and cross-complaint of the Elliotts aver that S. D. and Jack Orwitz agreed to purchase the property for $50,000 pursuant to the terms of a written agreement which is attached to the pleading. It is averred that this offer was made on August 14, 1948, and that the Elliotts approved this offer on August 19, 1948; that the money was deposited ($1,000 with the real estate agent on August 14th, and $4,000 with the title company on August 23rd) by the purchasers; that under the terms of the agreement the purchasers were allowed thirty days from the date of approval to examine the title and to report in writing any objections thereto, and if no such objections were made the balance of the purchase price ($45,000) was to be paid to the title company on or before the expiration of the thirty days; that if not so deposited the down payment was to be retained by the Elliotts as liquidated and agreed damages; that the thirty-day period expired on September 18, 1948; that the purchasers failed to make written or any objections to the title and failed to pay the balance due within the thirty-day period; that the Elliotts have performed and the purchasers have not.

The answer and cross-complaint of S. D. and Jack Orwitz admit the existence of the pleaded agreement and the making of the deposit, but deny that the pleaded agreement constitutes the entire agreement between the parties. They aver that notice of acceptance of the contract was not communicated to the purchasers on August 19th but on August 23, 1948, so that the thirty-day period did not expire until September 23, 1948, and aver that on September 20, 1948, the parties extended the time of performance until October 21, 1948. This

then was the first defense set up—that the purchasers were not in default under the terms of the agreement as modified.

By far the greater portion of this pleading is devoted to a second and separate defense, namely, that the purchasers were induced to enter into the contract in question by reason of the false and fraudulent representations of the real estate broker representing the Elliotts, Merryman by name. In this portion of the pleading the purchasers set forth in detail the circumstances under which the contract was entered into and the misrepresentations claimed to have been made by Merryman. Briefly, these allegations are that the property was advertised "for sale or lease" and as being "Now temporarily occupied as Menlo Park City Hall—which is moving soon to new Community Center"; that before the purchasers made their offer to buy, Merryman represented that the premises were merely "temporarily occupied" by the city and that the city "would move therefrom within thirty days and not to exceed sixty days"; that, relying on these representations, the purchasers entered into the contract; that such representations were false in that the City occupied the premises pursuant to the terms of an unrecorded lease, the term of which did not expire until January 1, 1950; that Merryman intentionally concealed and failed to reveal the existence of this lease to the purchasers with the intent and purpose of inducing them to enter into the contract; that the purchasers discovered the existence of the lease on September 20, 1948, and immediately notified Merryman and the title company, and demanded that the premises be made free of the occupants in accordance with the representations made, or that the deposit made be returned.

The Findings:

These allegations were denied by the Elliotts and the cause proceeded to trial. A major portion of the trial was devoted to evidence, pro and con, on this fraud issue. The trial court, however, made no findings at all on this issue. It simply found that the offer was made on August 14, 1948, accepted on August 19, 1948, and that it contains the entire agreement of the parties; that the purchasers deposited their $5,000 pursuant to the contract; that under the terms of that contract the purchasers had thirty days to examine title and report any objections thereto to the sellers, or to pay the balance of the purchase price; that if such were not done the deposit was to be retained by the sellers; that the thirty-day period expired September 18, 1948; that the purchasers did not make written objections to the title or tender the purchase price within these thirty days; that the sellers have performed under the contract and the buyers have not. The court concluded that the buyers had breached the contract and that the sellers were entitled to the deposit, and judgment was entered accordingly.

The Facts:

Clayton Elliott, who is an attorney, and his wife, owned the property in question. They authorized Merryman, a real estate broker, to sell the property. He caused an advertisement to be inserted in the Wall Street Journal offering the premises for "sale or lease." The advertisement contains a picture of the building and states, among other things, "Now temporarily occupied as Menlo Park City Hall—which is moving soon to New Community Center." In fact, the building was then occupied as a city hall and also by the library and by certain attorneys. The advertised price was $65,000.

S. D. Orwitz, a dentist with offices in San Francisco, Sacramento and Palo Alto, was desirous of securing a more central location for his Palo Alto office. He saw the advertisement and believed that the building in question would meet his needs, and that he could advantageously lease to others the portion of the building not desired by him for his offices. His brother, Jack Orwitz, is a real estate broker who handles the doctor's business affairs. Jack agreed that the purchase of the building might constitute a good investment.

On August 14, 1948, the doctor and Jack looked at the property. They observed, of course, that it was then occupied as a city hall and by other tenants. They called on Merryman at his home. Most of the conversation was between Merryman and Jack,

but Dr. Orwitz was present. Jack testified, and was corroborated by the doctor, that Merryman stated that the city had purchased some property from the Federal government and was constructing a civic center thereon; that the city would be out of the building here involved within thirty days, or within sixty days at most. Merryman also stated that the attorneys who were tenants were month-to-month tenants and would vacate at any time. He also stated that the library would vacate no later than September 15th. Merryman failed to mention that any of the tenants had a written lease. After some discussion Dr. Orwitz offered to purchase the property for $50,000. This offer was on a form furnished by Jack. He and Merryman made the necessary corrections and insertions. It is entitled "Uniform Agreement of Sale and Deposit Receipt," and is dated August 14, 1948. It acknowledges receipt of $1,000 from Dr. Orwitz on account of the $50,000 purchase price. It contains the following: "Conditions of Sale: *30* days from the date of approval are allowed the purchaser to examine the title to said property and to report in writing any valid objections thereto, to the agent for the seller. If no such objections to title be reported the balance of said purchase price shall be paid by said purchaser on or before the expiration of said time to *San Mateo Co. Title Insurance Co.* for account of the seller and said seller shall deliver to said office a properly executed and acknowledged deed of grant, bargain and sale of said property." The sellers were given ninety days to clear up any objections to the title, and if they could not be removed the deposit was to be returned to the buyers. The agreement expressly provided that in case the "purchaser shall fail to comply with any conditions at the time or in the manner herein provided for, said seller shall be released from all obligations hereunder. In that event all rights hereunder, legal and equitable, of said purchaser shall cease, and said deposit shall be retained by said seller, as liquidated and agreed damages, or said seller may, if he so elects, apply said deposit on account of the purchase price of said property and enter suit against said purchaser to compel the specific performance of this contract." Time was made the essence of the agreement. It further provided that the sellers were allowed fifteen days for approval. Two signed copies of the offer were left with Merryman.

Merryman testified that the sellers signed the deposit receipt on August 19th; that on that date he telephoned to Jack and informed him that the sellers had approved; and that on the same date he wrote to Jack giving him the same information. The Elliotts signed both copies of the offer. They kept one copy and the other copy was retained by Merryman. No copy was sent to the buyers. The letter stating that the Elliotts had signed the agreement was received by Jack on August 23rd, and on that date the purchasers deposited with the title company the additional $4,000 called for by the agreement.

On September 10, 1948, the Elliotts deposited a proper deed with the title company subject to appropriate instructions. In the meantime, Dr. Orwitz was experiencing some difficulty in financing a loan for the balance of the purchase price, largely because of a change of policy by the banks in reference to the procedure adopted to approve such loans. As late as September 18th, Jack Merryman and the Elliotts were discussing various alternative proposals for financing the purchase, including a possible extension of time. On September 20th Dr. Orwitz proposed that he would increase the deposit to $12,500 if the balance of $37,500 could be paid in thirty days. This proposal was accepted by the Elliotts and, in fact, on the 21st of September they deposited new instructions with the title company to so provide and the old instructions were marked "cancelled."

After the Elliotts had orally agreed to the extension on September 20th, Jack, according to his testimony, on that day arrived at Merryman's office with two checks totalling $7,500, prepared to make the additional deposit. He testified that he called to the attention of Merryman that the library, which Merryman had represented would evacuate by the 15th, was still in possession, and was told by Merryman that

there was nothing to worry about because "they are not on the lease." According to Jack, this was the first information he ever had that there was a lease. Merryman testified that Dr. Orwitz and his brother knew at all times of the lease, although he admitted that he had not, until this date, shown it to them. Jack demanded to see the lease. Merryman then produced, according to Jack, a lease with the attorneys that still had a long time to run, and a lease with the city. This latter lease was to run until January 1, 1950, and provided for a small rental. It also provided that the tenant—the city—could terminate by giving a six months' notice. Jack immediately demanded to know whether this six months' notice had been given, and was informed that it had not. He protested and left without making the additional deposit called for by the modified agreement. On the same day he wrote to the title company (sending a copy to Merryman) informing it that he had been informed that the city would move within sixty days; that he now discovered it had this lease, and that he had been informed that the six months' termination notice had not been given; that the library and attorneys were still in occupancy. The letter stated that upon these objections being cleared the escrow could be closed.

Merryman testified that this conversation about the lease occurred on September 21st, and that he received the letter of Jack's dated September 20th shortly after Jack left his office on the 21st.

The Elliotts lost no time in declaring a default. On September 22, 1948, Elliott wrote to the title company demanding the deposit on the ground that the purchasers had defaulted. The title company informed the purchasers of this demand and, on September 24, 1948, they wrote to the title company denying any default, calling attention to their objections to the title, and offering to complete the purchase upon the removal of their objections. This action was filed September 27, 1948.

Reference should be made to several other items of evidence. In August of 1948, Merryman ordered a title search. A preliminary report was secured and a copy sent to the purchasers. This report does not mention the unrecorded lease of the city, although a prior report of the title company issued when the Elliotts purchased the property showed the existence of this lease. Merryman testified that, in the last week of August, 1948, he notified the title company of the omission and arranged with it to have the lease appear in the final report. The purchasers, of course, knew nothing of these arrangements.

So far as the lease to the attorneys is concerned, such a lease was drawn up but apparently never signed by the attorneys. The library had no lease.

The city passed a resolution on October, 13, 1948, to cancel the lease by giving the six-month notice required, and actually vacated the premises on December 13th or 14th, 1948.

Dr. Orwtiz testified that, at all times, including up to the time of trial, he was willing and able to go on with the transaction if he could secure occupancy of the premises.

[1–5] As already pointed out, the trial court made no findings on the issue of fraud. That issue is pleaded and evidence was introduced which, if believed, would support a finding of fraud. From the remarks of the trial judge during the trial he seemed to feel that the purchasers had to make written objections to the title on or before September 18, 1948, the date he found the thirty days provided in the agreement expired, and that such written objections were not made on or before that date. Obviously, the thirty-day period could have no application to defects in the title fraudulently concealed by the sellers and unknown to the buyers. The purchasers, of course, knew of the occupancy of the city, and such knowledge, so far as the city is concerned, put them on notice of the city's rights. Had Merryman made no representations about the nature of that occupancy, it would have been the duty of the purchasers to investigate and to object within the thirty days if they so desired. But, according to appellants' testimony, Merryman did not remain silent. According to this testimony, he repre-

sented as a fact that the city would evacuate within thirty and not to exceed sixty days, and that the library would evacuate by September 15th. These representations, if made, were bolstered by the advertisement. The preliminary title report failed to disclose the lease. Merryman was under no duty to speak, but, having undertaken to do so, he was not only bound to tell the truth, but also bound not to conceal relevant facts that might qualify what he did say. Rogers v. Warden, 20 Cal.2d 286, 125 P.2d 7; Milmoe v. Dixon, 101 Cal.App.2d 257, 225 P.2d 273. Having elected to describe the nature of the city's occupancy he was under a duty not to stop half way and thus conceal the existence of the lease. If these representations were made they amounted to misrepresentation and concealment of material facts. The thirty-day provision had no application to such matters, if the purchasers were, in fact, ignorant of them.

It should be noted that the evidence shows that the parties as late as September 20th, two days after the trial court found the purchasers were in default, were still discussing terms. We find the sellers accepting an offer for a modification of the payment plan called for by the original agreement by cancelling the original instructions and submitting modified ones on September 21st. We find Jack calling attention to the claimed misrepresentations by a letter dated September 20th. At that time, according to appellants' testimony, they were ready to proceed with the modified agreement. Then we find the sellers immediately declaring a forfeiture. Aside from the question of waiver, which the trial court apparently decided against the buyers, the trial court made no findings at all on the main defense of appellants, namely, fraud.

[6, 7] This was error of a most serious, prejudicial, and reversible nature. "It has been repeatedly affirmed that where a court renders a judgment without making findings upon all material issues of fact, the decision is against law, and constitutes ground * * * for reversal upon appeal, provided it appears that there was evidence introduced as to such issue and the evidence was sufficient to sustain a finding in favor of the party complaining." 24 Cal.Jur. p. 940, § 186. Many cases are cited in the footnotes to support these fundamental principles. In addition, see Parker v. Shell Oil Co., 29 Cal.2d 503, 175 P.2d 838; Fairchild v. Raines, 24 Cal.2d 818, 151 P.2d 260; Severance v. Knight-Counihan Co., 29 Cal.2d 561, 177 P.2d 4; James v. Haley, 212 Cal. 142, 297 P. 920; Bolton v. Logan, 46 Cal.App.2d 739, 116 P.2d 801; Herman v. Glasscock, 68 Cal.App.2d 98, 155 P.2d 912; Powell v. Johnson, 50 Cal.App.2d 680, 123 P.2d 875; O'Reilly v. Johnson, 91 Cal.App.2d 729, 205 P.2d 716. This rule applies to issues raised by the answer as affirmative defenses and to issues raised in cross-complaints. Wilcox v. West, 45 Cal.App.2d 267, 114 P.2d 39.

[8, 9] Respondents do not challenge this rule of law. Their main contention is that because appellants failed to object to the findings after they were served, they waived any objections they might otherwise have made. In support of these contentions respondents cite Del Ruth v. Del Ruth, 75 Cal.App.2d 638, 171 P.2d 34; Tooke v. Allen, 85 Cal.App.2d 230, 192 P.2d 804, and Matlin v. Crescent Commercial Corp., 93 Cal.App.2d 8, 207 P.2d 873. All these were cases where general findings on an issue were made and the objection on appeal was that such findings as had been made were not sufficiently specific. The cited cases held that failure to object in the trial court amounted to a waiver. Those cases were undoubtedly correctly decided, but they are not authority on the problem here presented. They involved findings on all issues, but appellant believed that the findings actually made should be more specific. Here we are involved with a total failure to find on a material issue. The law is clear that the trial court must find on all issues, unless findings are waived. Section 647 of the Code of Civil Procedure expressly provides that "the final decision" (which includes the findings) is "deemed to have been excepted to." Under section 632 of that code findings in non-jury contested cases are required. The same section provides the circumstances under which findings may be waived, that is, by written

consent filed with the court, oral consent in open court and entered in the minutes, and by failure to appear. These are the only ways in which findings may be waived. See cases collected 24 Cal.Jur. p. 955, § 194.

[10] While under section 634 of the Code of Civil Procedure a copy of the proposed findings must be served upon all parties and the court must allow five days to elapse before signing them, during which objections to them can be made, the only effect of the section on the problem presented in the instant case is that, if the court finds on an issue and the appellant fails to object to the form of the finding, he cannot contend on appeal that the finding made was not sufficiently specific. The failure to object, however, is not a waiver of the failure to find at all on a material issue.

[11] These principles are well settled. In Wilcox v. Sway, 69 Cal.App.2d 560, 564, 160 P.2d 154, 156, the court, in a case where no objection to the findings had been made in the trial court, stated: "Appellant was not required to move the court below to amend its findings, or to make a motion for a new trial; nor was he required to except to the findings, as they are deemed excepted to." See, also, Palpar, Inc., v. Thayer, 82 Cal.App.2d 578, 584, 186 P.2d 748.

[12] Respondents next argue that the finding of ultimate fact to the effect that the sellers have fully performed, necessarily amounts to a finding that there was no fraud, citing such cases as Tower v. Wilson, 45 Cal.App. 123, 188 P. 87, and Gillons v. Turner Oil Co., 46 Cal.App. 678, 190 P. 185. Those cases did not involve separate and distinct issues raised by answer and cross-complaint, but simply dealt with failure to find on probative facts. Findings on the ultimate facts there involved were made.

[13] Respondents also suggest that this court, under its constitutional and statutory powers, has power to supply the omission by making findings on the issue. This court can and should make findings where the evidence is uncontradicted. Yokohama Specie Bank v. Higashi, 56 Cal.App.2d 709, 133 P.2d 487. But where there is a total failure to find on a material issue, and where, as here, the evidence on that issue is highly conflicting, the appellate courts will not make findings. In re Estate of Pendell, 216 Cal. 384, 14 P.2d 506.

[14] The court failed to find on the material issue of fraud. All of the findings actually made could be true and yet, if fraud existed, the purchasers would be entitled to the deposit. The evidence on the issue of fraud was conflicting. The findings on waiver are unsatisfactory. These factors require a reversal, and justice requires that the case be retried on all issues. The judgment is reversed, and the cause ordered retried on all issues.

BRAY and FRED B. WOOD, JJ., concur.



108 Cal.App.2d 878

RAISCH et al. v. SANITARY DIST. NO. 1 OF MARIN COUNTY et al.

Civ. 14759.

District Court of Appeal, First District, Division 2, California.

Jan. 29, 1952.

Suit by Albert G. Raisch and others against Sanitary District No. 1, of Marin County and others to obtain an adjudication that an assessment of benefits for construction of a sewer system was void because of interest in contract and property within district of engineer employed by sanitary district. From a judgment of the Superior Court, Marin County, Edward I. Butler, J., in favor of the defendants, the plaintiffs appealed. The Court of Appeal, First Appellate District, Goodell, J., held that the fact that the engineer while employed by the district accepted employment to subdivide property of property owners within the district did not invalidate assessment in absence of any allegation of specific misconduct by en-

gineer or of any discrimination in making assessments.

Judgment affirmed.

1. Municipal Corporations ⇐491

Property owners claiming that sanitary district's engineer in making assessment of benefits from construction of sewer system had been guilty of discrimination as between property owners should have made complaint to sanitary board as provided by statute, and if they had done so they would have had burden of proving their claims. Streets and Highways Code, §§ 5341–5343, 5362, 5366.

2. Municipal Corporations ⇐513(7)

In suit by property owners seeking annulment of assessment of benefits from construction of sewer system, where complaint failed to allege specific conduct of sanitary district's engineer indicating discrimination in method of assessment, it was to be presumed, under rule that a pleader states his case in its strongest and most favorable light, that property owners were unable to make such allegations. Streets and Highways Code, §§ 5343, 5362, 5366.

3. Pleading ⇐8(15)

In suit by property owners to annul an assessment of benefits from construction of sewer system, allegation that conduct of sanitary district's engineer, who made assessments, in also accepting employment to subdivide properties of other property owners within assessment district constituted constructive fraud upon plaintiffs was a conclusion of the pleader, in absence of specific allegation of conduct showing discrimination. Streets and Highways Code, §§ 5341–5343, 5362, 5366.

4. Pleading ⇐8(15)

Fraud must be pleaded in specific language descriptive of acts which are relied upon to constitute fraud, and it is insufficient to allege it in general terms, or in terms amounting to mere conclusions.

5. Municipal Corporations ⇐445

Rule that officers shall not be interested in any contract made by them in their official capacity, or by any board of which they are members, could not be invoked as basis for nullifying assessment of benefits from construction of sewer system merely because engineer employed by sanitary district to make assessment was at the same time employed to subdivide property belonging to property owners within the district, since engineer was not a public officer and there was no showing of any conduct of engineer other than in performance of his duties. Government Code, §§ 1090, 1097; Streets and Highways Code, §§ 5343, 5362, 5366.

6. Municipal Corporations ⇐445

Assessment of benefits from construction of sewer system was not void because of alleged interest in the contract and in property within district of engineer employed by sanitary district to make assessments, in absence of allegations that engineer had any interest in land within the district or of any improper dealings of engineer in connection with contract with sanitary board. Government Code, §§ 1090, 1097; Streets and Highways Code, §§ 5343, 5362, 5366.

7. Municipal Corporations ⇐445

The fact that engineer employed by sanitary board to supervise construction of sewer system was required by statute to sign contract between district and contractor did not make engineer a party to contract so as to invalidate assessment of benefits because of engineer's alleged interest in contract. Streets and Highways Code, §§ 5254, 5280; Health and Safety Code, § 6511.

8. Municipal Corporations ⇐352

Property owners within improvement district are not parties to contract between district and contractor for making the improvements. Streets and Highways Code, § 5000 et seq.

9. Municipal Corporations ⇐445

Assessment of benefits from construction of sewer system was not void because of alleged interest in contract between property owners and holders of assessment warrants of engineer employed by sanitary district to make assessments, since that contractual relationship did not come into existence until after sanitary board had made engineer's preliminary assess-

ment its own and engineer could have had no interest therein. Streets and Highways Code, §§ 5343, 5362, 5366.

10. Municipal Corporations ⇐445

Where engineer employed by sanitary district to supervise construction of sewer system and make assessments was not a public officer and had no interest in what happened other than in performance of duties of his employment, assessments were not void on ground of engineer's interest in contracts as a quasi public officer. Streets and Highways Code, §§ 5343, 5362, 5366.

11. Municipal Corporations ⇐445

The fact that engineer employed by sanitary district to supervise construction of sewer system and make assessments was also employed to subdivide property by property owners within district did not invalidate assessment of benefits on theory that engineer's position was that of a trustee, in view of adequate provision made by statutes for raising question of irregularities. Streets and Highways Code, §§ 5003, 5367–5369.

Eugene K. Sturgis, John D. Den-Dulk, Oakland, for appellants.

R. M. Sims, Jr., Dist. Atty. of Marin County, San Rafael, Robert W. Harrison, San Francisco, for respondents.

GOODELL, Justice.

This appeal is from a judgment in favor of defendants for costs after their demurrer to the amended complaint had been sustained without leave to amend.

In 1948 proceedings were commenced under the Improvement Act of 1911, Streets & Highways Code, § 5000 et seq., for the construction of a sewer system in the neighborhood of San Anselmo. The board employed respondent Oglesby as "engineer of work" on the project. The cost of the work was $150,130.92, which included $16,751.97 of incidental expenses, $10,670.31 of which represented fees paid to Oglesby in accordance with his contract with the district. To cover the cost of the work an assessment was spread over the district according to benefits, $11,250.28 of which was against the lands owned by the plaintiffs.

Plaintiffs sought an adjudication that the assessment was void and unenforceable "by reason of the interest of * * * Oglesby in the contract and the property within the * * * district * * * while acting as trustee for all of the property owners" therein. The prayer was that the assessment be annulled and a reassessment ordered; that the fees of $10,670.31 paid to Oglesby be repaid, and that the defendants be enjoined from enforcing collection of any assessments on plaintiffs' property and from causing bonds to be issued representing any unpaid assessments thereon.

Respondent Oglesby is a civil engineer who practices his profession in Marin county, where he is County Surveyor. His connection with this project, however, was not as such county officer, nor was it as an officer of the district. The district had no engineer of its own and employed him just on this particular project.

A. J. Peters & Son, a corporation, submitted the best bid for the construction of the sewer system, and on September 28, 1948 a contract was entered into between the district and Peters for that work. It was Oglesby's duty under his own contract with the district to see that Peters' contract was properly performed, and the record herein raises no issue as to the performance of that contract by Peters, or as to Oglesby's proper performance of his own contract in supervising Peters' work. The complaint, in fact, alleges that Peters' contract was duly performed.

Harold and Hazel Lang were the owners of a considerable acreage within the assessment district, which they decided to subdivide and it is reasonable to assume that they reached this decision when they did, so that the new system would serve their properties as subdivided rather than as "acreage". They employed Oglesby as the civil engineer to make the subdivision and prepare and file for them a subdivision map. He did this work while also serving as engineer for the district and while Peters was building the sewer system, and the subdivision map was filed on April 27,

1949, some six months before the assessment was made. Appellants' contention is that the acceptance of this outside employment and the doing of this work by Oglesby for the Langs, vitiated the whole assessment. They allege that the subdividing was done without their knowledge and had they known about it they would not have consented to it.

Under the act it is the duty of the engineer, after the contractor's work is completed "to estimate upon the lots or parcels of land within the assessment district, as shown by the diagram, the benefits arising from such work" and to assess the total amount of the costs and expenses of such work "upon the several lots or parcels * * * benefited thereby, in proportion to the estimated benefits to be received by each * * *." § 5343, Streets & Highways Code; see, also, §§ 5341, 5342, 5360, 5361, 5364 thereof.

Section 5362 of the same code requires the filing of the assessment with the clerk, who shall give by posting and publication not less than 15 days notice of hearing to "all persons interested in the work done or in the assessment".

Section 5366 provides: "*The owners,* the contractor, or his assigns, *and all other persons interested* in any work done under this division, or *in the assessment, feeling aggrieved by any act or determination of the * * * engineer in relation thereto,* or who claim that the work has not been performed according to the contract in a good and substantial manner or who claim that any portion of the work for any reason was omitted or illegally included in the contract *or having or making any objection to the correctness of the assessment or diagram or other act, determination or proceedings of the * * * engineer,* shall prior to the day fixed for the hearing upon the assessment *appeal to the legislative body by briefly stating in writing the grounds of appeal.*" (Emphasis added.)

The complaint alleges that Oglesby as engineer of work duly made an assessment as required by the act and filed it with the secretary of the district on November 2, 1949; that due notice of the hearing was given, and that plaintiffs in due time filed an appeal from the assessment upon the following grounds: "1. That each * * * of the assessments levied against lands of the plaintiffs * * * is unjust, unfair, unreasonable, arbitrary, discriminatory and wholly lacking in uniformity with respect to assessments levied on other lands assessed; 2. That no uniform, equal, nondiscriminatory, or any rational basis has been used or followed in fixing said assessments; 3. That the assessments levied upon each * * * of the parcels of land belonging to plaintiffs * * * are arbitrary, confiscatory and not in accordance with benefits received."

[1] Appellants thus had ample opportunity to specify and set forth, as § 5366 invited, the reasons why the assessments were such as they asserted them to be. Instead of setting forth specific reasons, they stated their grounds of appeal in the broadest kind of generalization. That was the place to assert, if they could, that when Oglesby made the subdivision he gerrymandered the lines so as to give the Langs a more favorable assessment than their neighbors were getting, or in some other way favored his clients. The plaintiffs not only had the opportunity to make that charge, but if they had made it they had the burden of proving it before the board. That was the forum to which they were directed by the law. See §§ 5341–5369, Streets & Highways Code; see, also, Hannon v. Madden, 214 Cal. 251, 259–260, 265, 5 P.2d 4.

The amended complaint alleged "That * * * upon the hearing of the protests filed by plaintiffs, testimony oral and documentary was received; that at said hearing * * * Oglesby, testified that during the period of between the time of the execution of the contract * * * and the * * * hearing of the assessment, to-wit, the 30th day of November, 1949, that he had been in the employ for compensation of one of the owners of property within the * * * district, and had engaged in the subdivision of a portion of the lands within the * * * district during said period for compensation."

[2] Under the familiar rule that a pleader states his case in its strongest and most favorable light, it must be presumed that the plaintiffs could not allege either at the hearing of their appeal before the board, or in their pleading in this action, any act or conduct of Oglesby which was at all questionable or which reflected in the least on the fairness and honesty of the assessment. This failure is accentuated by appellants' further allegation "that the subdivision of property from acreage to lots can make a basic difference in the method of assessment of property for benefits * * *; that it is possible to so plan a subdivision that the property so subdivided will receive less assessment than if it had been left and remained as acreage, according to the manner in which said subdivision is planned or designed." The pleader, if he could have done so, should have followed this generalization with a statement of how and why and in what manner the assessment *did in fact* make a difference detrimental to the plaintiffs or other owners; in other words, an allegation showing just how the Lang subdivision was planned so "that the property so subdivided" did actually "receive less assessment than if it had been left and remained as acreage." There is no allegation whatever that Oglesby improperly laid out the subdivision to the advantage of the Langs or the disadvantage of the other owners. Moreover there is no allegation that in his preliminary connection with the spreading of the assessment or at any other time he favored the Langs in any way whatever.

[3, 4] These allegations, concluding with the statement that Oglesby by accepting the Langs' employment while at the same time he was being paid by plaintiffs and others "operates as a constructive fraud upon plaintiffs" and others, and renders the assessment void, is nothing but a bare conclusion of the pleader. "It is a cardinal rule of pleading that fraud must be pleaded in specific language descriptive of the acts which are relied upon to constitute fraud. It is not sufficient to allege it in general terms, or in terms which amount to mere conclusions." Hannon v. Madden, supra, 214 Cal. 251, 267, 5 P.2d 4, 11.

It is obvious from appellants' pleading and briefs that the real theory of their case is that the fact (by itself) that Oglesby accepted private employment from a landowner within the district, automatically constituted constructive fraud without any illegal act, favoritism, collusion or discrimination on the part of Oglesby, the board, its members, or anybody else.

[5] This is apparent from appellants' reliance on the rule respecting public officers. They cite § 1090, Government Code (formerly § 920, Political Code) which reads: "Members of the Legislature, State, county, township and city officers shall not be interested in any contract made by them in their official capacity, or by any body or board of which they are members." This is a strict rule with severe penalties consequent on its violation. § 1097, Gov.Code, formerly § 71, Penal Code. The operation of the rule is well illustrated by such cases as Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal.App. 592, 229 P. 1020; Moody v. Shuffleton, 203 Cal. 100, 262 P. 1095, and County of Shasta v. Moody, 90 Cal.App. 519, 265 P. 1032, all of which are cited by appellants. However, those cases show that that rule is inapplicable (1st) because Oglesby was not a public officer, Brooks v. City of Gilroy, 219 Cal. 766, 29 P.2d 212 and (2nd) there is nothing alleged which attempts to show any dealings or transaction between him and the Sanitary Board, or any of its members, other than the proper carrying out of his contract with them; nor is there anything alleged which attempts to show any dealings or transactions between him and Peters, the contractor, other than the proper supervision of Peters' contact with the district.

[6] This brings us to the language of the complaint respecting the vitiating of the assessment. It is there said that the assessment was void and unenforceable "by reason of the interest of * * * Oglesby in the contract and the property within the * * * district * * * while acting as trustee for all of the property

owners" therein. There is no allegation that Oglesby owned, or had any interest in, a square foot of land in the district, or that any of the board members did so. Parenthetically it might be noted that even if the board members were property owners in the district they could not have been disqualified from acting in this assessment proceeding, Federal Construction Co. v. Curd, 179 Cal. 489, 177 P. 469, 2 A.L.R. 1202. It would seem that when the pleader speaks of Oglesby's interest in property within the district he must necessarily mean the Langs' property.

The pleading, moreover, is vague, if not wholly evasive, when it speaks of Oglesby's interest in "the contract", since there were three different contractual relationships arising out of these proceedings, each distinct from the others, (1st), Oglesby's contract of employment by the district as its engineer for this project; (2nd), the contract between the district and Peters for the construction of the sewer system, and (3rd), the contract between the property owners within the district and the holders of the assessment warrants or the bonds.

Oglesby's contract of employment was made on July 14, 1948 and is evidenced by the board's resolution appointing him as "engineer of work". No issue is raised by the complaint respecting any improper dealings or transactions of Oglesby, the board, or any of its members, in connection with that contract.

[7] The second contract, that between Peters and the district for the construction of the sewer system, was dated September 28, 1948. Peters was of course required to furnish a faithful performance bond, which ran to the district as obligee, § 5254, Streets & Highways Code, and a bond for labor and materials. Both bonds had to be lodged with Oglesby under the provisions of § 5280 requiring the engineer "to make all written contracts, and to receive all bonds authorized by this division". Oglesby had to sign the Peters' contract on behalf of the district because of that statutory requirement, but that did not make him a contracting party or a trustee; he was merely a special agent of the district, designated by the act to sign for it, instead of its president or secretary. Obviously, if Peters had failed in the performance of his contract, any action against him would have had to be prosecuted by the district, and in its name, § 6511, Health & Safety Code, not in Oglesby's name.

[8] Appellants say: "The property owners * * * are the actual parties who are the parties to the contract with the contractor * * *." This is not correct. Instead of the California cases being, as counsel say, "very clear in the establishment of this principle", they hold just the opposite.

In Hannon v. Madden, supra, 214 Cal. 251, 258, 5 P.2d 4, 7, a case arising out of the Improvement Act of 1911, the Supreme Court cited approvingly the case of Heft v. Payne, 97 Cal. 108, 31 P. 844, and said that therein it had been "held that the property owner has nothing to say in determining whether the work shall or shall not be done by the contractor, nor, in the absence of fraud, whether the work has been done according to the contract." In Heft v. Payne, 97 Cal. at page 109, 31 P. at page 844, the court in speaking of street assessment cases says: *"The lot owner, in such cases, is in no sense a party to the contract,* except as one of the public upon whose property the burden of payment for the improvement is placed. *The city does not act as his agent* to bind him personally, but in its sovereign capacity, as in matters of taxation * * *. His liability arises out of no agreement, express or implied, between him, in his individual character, and the street contractor. He has nothing to say in determining whether the work shall or shall not be done by the contractor, nor—in the absence of fraud—whether the work has been done according to the contract; but *he can 'question the regularity of the proceeding resulting in the assessment, in the same manner and upon the same principles as the validity of a tax may be questioned.'* Emery v. Bradford, 29 Cal. [75] 84; Meuser v. Risdon, 36 Cal. [239] 245; Dyer v. Barstow, 50 Cal. [652] 654." (Emphasis added.)

In County of San Diego v. Childs, 217 Cal. 109, 121, 17 P.2d 734, 739, the court says: "The petitioner necessarily concedes that if it prevail the cases of Chapman v. Jocelyn, supra [182 Cal. 294, 187 P. 962], Jeffreys v. Point Richmond Canal [& Land] Co., supra [202 Cal. 290, 260 P. 548], and other cases in this state to the same effect, must be overruled. It is insisted that they be not followed for the stated reason that they are ill considered, are contrary to the doctrine of other cases in this state, and contrary to decisions in other jurisdictions. The California cases cited as authority for the statement are not in point. *Three of them correctly hold that the property owner is not a party to the improvement contract* and the others are not inconsistent with the declared doctrine that when the special assessment proceedings are completed a contractual relation arises as between the bondholder and the property owner to such an extent that the substantial rights of either may not be impaired by subsequent legislation." (Emphasis added.) See, also, County of Los Angeles v. Rockhold, 3 Cal.2d 192, 201–202, 44 P.2d 340, 100 A.L.R. 149.

[9] The third contractual relationship came into existence on December 9, 1949, when the assessment was confirmed by the board after a hearing, Childs case, supra. Appellants do not question this. However, Oglesby had nothing to do with this. The contractual relationship which then, and only then, arose, was between the property owners and the holders of the district's warrants or bonds and they were not contracts "voluntarily entered into between the contracting parties", Bradley Co. v. Ridgeway, 14 Cal.App.2d 326, 334, 58 P. 2d 194, 198, but were "forced upon the parties by the compulsion of law enacted in pursuance of the taxing power of the state", Chapman v. Jocelyn, 182 Cal. 294, 298, 187 P. 962, 963. This contractual relationship came into existence *after the board had made the engineer's preliminary assessment its own,* following the hearing of the appeals.

[10] After discussing the public officer rule at some length, appellants expressly concede that Oglesby was *not* a public officer. They then proceed to argue that he was, nevertheless, performing the same functions in this proceeding as an office-holding superintendent of streets or city engineer would have had to perform, the argument being, in effect, that as such quasi public officer he was a trustee for the land-owners. The public officer rule has been already discussed, at least far enough, we think, to make it clear that nothing was done by Oglesby in these proceedings, *and nothing was alleged or charged to have been done,* to show a violation of that rule. In short, he had no interest in Peters' contract with the district (other than his interest as "engineer of work" to see that Peters performed up to the letter of the contract, plans and specifications) and there were no transactions between Oglesby and the board, or any of its members, other than his strict performance of his own employment contract. This being so, there would seem to be no point at all in laboring either the public officer rule or the quasi public officer rule.

[11] Appellants repeatedly state the *conclusion* that Oglesby was a trustee. There can be no doubt that the duties of an engineer on such a project are serious and important ones and call for fidelity as well as skill, but the proceedings are strictly statutory, and just what such engineer has to do is fairly well defined by statute and by the decisions. Appellants concede that "there is no case previously decided in California applying this principle or this express rule, and therefore no direct citation of authority can be made to the court in support of the principle." They are speaking there of their quasi public officer theory, but the same may be said with respect to their trustee theory. They have cited no case—out of all the reported cases in this state dealing with public improvements—where an engineer has been held to be a trustee for the land-owners.

They rely on City of Oakland v. DeGuarda, 95 Cal.App. 270, 272 P. 779, 273 P. 819, decided by this court. There DeGuarda, the contractor for street work under the 1911 Act, made default, and the City sued him and his bondsman. His contract was with the City, and in the sec-

ond count the City alleged that it sued as trustee for the land-owners. This court held that the City could maintain the action as such trustee. It is obvious that the land-owners could not have sued, for, as we have seen, they were not parties to the contract with DeGuarda. Appellants say: "In the case above, the court came to the conclusion that the municipality was acting as trustee for the property owners in the district". That is true, but that does not mean that its street superintendent or city engineer was a trustee. It is clear that whatever was recovered as damages against DeGuarda or his bondsman on the second count would not go into the City's general funds but would be held for the land-owners in the assessment district who suffered pecuniary loss by the contractor's default.

There is no need or reason to invoke or have recourse to a trust relation since the engineer's duties and obligations are defined by statute and if he violates them the property owner can "question the regularity of the proceeding resulting in the assessment, in the same manner and upon the same principles as the validity of a tax may be questioned." Heft v. Payne, supra; see, also Irish v. Hahn, 208 Cal. 339, 346, 281 P. 385, 66 A.L.R. 1382.

The statute itself has provided the forum where such questions are to be raised and presented, and that is an open hearing before the legislative body after proper notice.

Section 5003, Streets & Highways Code (headed "* * * Remedy of persons aggrieved") reads: "This division shall be liberally construed in order to effectuate its purposes. No error, irregularity, informality, and no neglect or omission of any officer, in any procedure taken under this division, which does not directly affect the jurisdiction of the legislative body to order the work or improvement, shall avoid or invalidate such proceeding or any assessment for the cost of work done thereunder. The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the legislative body in accordance with the provisions of this division."

Section 5367 provides: "Upon such appeal, the legislative body may remedy and correct any error or informality in the proceedings, and revise and correct any of the acts or determinations of the * * * engineer relative to said work; may confirm, amend, alter, modify or correct the assessment or diagram in such manner as to it shall seem just, and require the work to be completed according to the directions of the legislative body; *and may instruct and direct the street superintendent* [engineer here] *to correct the* warrant, *assessment, or diagram* in any particular." (Emphasis added.)

Section 5368 provides: *"All the decisions and determinations of the legislative body,* upon notice and hearing as aforesaid, *shall be final and conclusive* upon all persons entitled to appeal to the legislative body, as to all errors, informalities, and irregularities which the legislative body might have avoided, or have remedied during the progress of the proceedings or which it can at that time remedy." (Emphasis added.)

Section 5369 provides: "No assessment, warrant, or diagram, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or other defect in the same, where the resolution of intention of the legislative body to do the work, has been actually published as provided in this division. When no appeal is taken or when the orders and determinations of the legislative body upon appeal have been complied with, *and the legislative body is satisfied with the correctness of the assessment,* the legislative body shall forthwith confirm the proceedings and the assessment and the street superintendent [engineer here] shall attach thereto a warrant bearing the date of such confirmation." (Emphasis added.) See Hannon v. Madden, supra, 214 Cal. at page 256, 5 P.2d 4, where substantially the same provisions as those now found in §§ 5368–9 are quoted.

The case of Hannon v. Madden, supra, 214 Cal. 251, 5 P.2d 4, is controlling. A few excerpts from that opinion will suffice. At page 257 of 214 Cal., at page 6 of 5

P.2d it is said: "In their protests filed with the board of trustees, the particulars wherein the work did not meet the requirements of the contract are not stated, but the complaint specifies several alleged deficiencies. Where a city council or board of trustees acts dishonestly and fraudulently to the detriment of the district, there is no doubt that its action may be the subject of judicial inquiry. Plaintiffs must fail in the instant case, for the reason that the case as presented falls short of establishing fraud on the part of the town's officials who were charged with the duty of making the public improvements." The same statement fits this case. At page 258 of 214 Cal., at page 7 of 5 P.2d: "This court and the courts of all other states of the Union, as a matter of public policy and necessity, have zealously guarded the power and jurisdiction of municipal public bodies in the performance of the duty with which they are specially charged, and have limited the jurisdiction of courts to declare their action invalid to extreme cases." At pages 259–260 of 214 Cal., at page 7 of 5 P.2d: "Speaking to the question as to the case presented to the council as distinguished from the case made in the Superior Court, the decision above cited [Lambert v. Bates, 137 Cal. 676, 678, 70 P. 777] holds that *the Legislature did not intend that the appeal to the council should be prosecuted in a perfunctory manner or should be a mere formality. It devolves upon protestants to show that sufficient evidence was adduced to support the appeal,* and, if the council should overrule the appeal because of its misapplication of the law to the facts, it is incumbent upon the party seeking the review to clearly present to that tribunal the questions of law which he claims to have been misconstrued or erroneously applied, *and show that they have been presented upon the appeal to the council.* It cannot be presumed that the council made an erroneous decision upon the evidence which he did present. Continuing, the court said: 'If he failed or omitted to present to that body the evidence which he afterwards presented to the superior court upon the trial herein, he is in the same position as any litigant who has rested his case upon insufficient evidence. If the statute does not authorize a new trial or a re-examination of such evidence, he must abide the decision of that tribunal.' See, also, Cutting v. Vaughn, 182 Cal. 151, 187 P. 19." (Emphasis added.) And at page 265 of 214 Cal., at page 9 of 5 P.2d: "As this court said in Johnson v. City of Los Angeles, 210 Cal. 240, 291 P. 395, 396: '* * * When the roll [assessment roll] is lodged with the clerk for presentation to the council and notice is duly given to the property owners to be affected thereby of the specified date of hearing thereon, the whole assessment roll is in a state of flux and each property owner is charged with knowledge of the number of pieces of property to be assessed, the amount to be raised, the interdependence of the properties upon each other, and the fact that power to modify necessarily carries with it power to increase as well as decrease any assessment made by the board of public works'. * *" When the Supreme Court uses the expression "state of flux" it says, in apt and concise language, that the whole matter of the assessment is wide open for all purposes of attack in open hearing. This court had occasion to follow the Hannon case in Garibaldi v. City of Daly City, 63 Cal.App.2d 480, 487, 1047 P.2d 122, 127, where we quoted therefrom as follows: "Where an appeal has been taken to the council, its decision may be attacked in a legal proceeding only upon pleading and proof that the board acted fraudulently or that its action is so palpably unreasonable and arbitrary as to raise an inference of plain abuse of discretion as a matter of law. Cutting v. Vaughn, 182 Cal. 151, 187 P. 19; Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 148 P. 217, L.R.A. 1918E, 197; Lambert v. Bates, 137 Cal. 676, 70 P. 777; Hutchinson Co. v. Coughlin, 42 Cal.App 664, 184 P. 435." To which we added: "This ruling is cited with approval in the late case of City and County of San Francisco v. Boyd, 22 Cal.2d 685, 690, 140 P.2d 666. The Hannon case was followed to the same point in Richardson v. City of Redondo Beach, 132 Cal.App. 426, 433, 22 P. 2d 1073, and also in support of another rule which is controlling here—the failure

to properly raise the issue of fraud." Hannon v. Madden was discussed at some length by respondents in their brief, but appellants in their closing brief have made no attempt to distinguish the two cases. They do not mention it.

The judgment is affirmed.

NOURSE, P. J., and JONES, J. pro tem., concur.



109 Cal.App.2d 54

KAISER CO., Inc., et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 15026.

District Court of Appeal, First District, Division 1, California.

Jan. 30, 1952.

As Modified on Denial of Rehearing

Feb. 26, 1952.

Proceeding by Kaiser Company, Inc., a corporation, and Hartford Accident and Indemnity Company, a corporation, against the Industrial Accident Commission of the State of California, R. F. Baskin by his guardian ad litem, and others, to review a decision of the Commission which awarded compensation for permanent total disability and found claimant's mother and sister entitled to the reasonable value of nursing services rendered. The District Court of Appeal, Fred B. Wood, J., held that refusal to grant petitioner's motion to permit taking of depositions of newly discovered witnesses living in other states was a denial of due process of law.

Decision annulled, and proceeding remanded for further hearing.

1. Administrative Law and Procedure ⇐466
Constitutional Law ⇐318

Denial by referee and Industrial Accident Commission of compensation claimant's motion to take deposition of newly discovered witnesses in two states as persons who had known claimant for many years and knew whether he needed any personal care for purpose of supporting claim for nursing services and showing what proportion of employee's present condition was due to injury and what was preexisting deprived claimant of due process of law.

2. Administrative Law and Procedure ⇐107
Workmen's Compensation ⇐1079

Under constitutional provision authorizing its creation, Industrial Accident Commission exercises portion of judicial powers of the state in legal sense as a court.

3. Administrative Law and Procedure ⇐473
Constitutional Law ⇐318
Workmen's Compensation ⇐1079

Even if regarded as a purely administrative agency, in exercising adjudicatory functions Industrial Accident Commission is bound by due process clause of Fourteenth Amendment to give parties before it a fair and open hearing. U.S.C.A.Const. Amend. 14.

4. Constitutional Law ⇐305

Reasonable opportunity to meet and rebut evidence produced by opponent is essential requirement of fair hearing under due process clause of the Fourteenth Amendment.

5. Workmen's Compensation ⇐1989

Under the Workmen's Compensation Act providing that employee shall be reimbursed for expenses necessarily incurred for X-rays, laboratory fees, and medical reports required to successfully prove contested claim, benefits are in nature of allowance for costs incurred by employee in proceeding before Industrial Accident Commission. Labor Code, § 4600.

6. Workmen's Compensation ⇐1989

Provision of the Workmen's Compensation Act that employee shall be reimbursed for expenses necessarily incurred

for X-rays, laboratory fees, and medical reports required to successfully prove contested claim applies to pending proceeding such as application for adjustment of claim. Labor Code, § 4600.

7. Workmen's Compensation ⇐62

Amendment to the Workmen's Compensation Act providing that employee shall be reimbursed for expenses necessarily incurred for X-rays, laboratory fees, and medical reports required to successfully prove contested claim applied to costs incurred prior to effective date of amendment. Labor Code, § 4600.

R. P. Wisecarver, San Francisco, for petitioners.

Edmund J. Thomas, Jr., T. Groezinger, San Francisco, for respondents.

FRED B. WOOD, Justice.

This is a proceeding brought by the employer and the insurance carrier to review a decision of the Industrial Accident Commission which awarded R. F. Baskin, the employee, compensation for permanent total disability and found his mother and sister, Mrs. Mary Baskin and Mrs. Catherine Dunn, entitled to the reasonable value of nursing services, custodial care and supervision rendered the employee since January 20, 1946.

The questions presented are: (1) Was the commission's denial of petitioners' application to take testimony outside of California a deprivation of due process? (2) Is an award of practical nursing care and supervision permissible under the statute and is such an award in this case sustained by the evidence? (3) Should the employee's disability have been prorated against his pre-existing condition? (4) Did the increased medical benefits accorded by the 1949 amendment of section 4600 of the Labor Code operate retroactively and apply to costs therefor incurred by an injured employee prior to that amendment?

(1) *In considering the due process question,* it is desirable to review briefly the history of the case.

The employee was injured December 10, 1945. The carrier furnished hospital service until January 20, 1946, when he was discharged to the care of his mother, at her request. Medical service continued for some time thereafter. March 1, 1947, the family, including the employee, returned to their home state, Tennessee, and have resided there ever since. The carrier has been paying the employee compensation at the rate of $25 per month since the injury.

The employee's application for adjustment of his claim was dismissed March 31, 1948, by order of respondent commission, for lack of jurisdiction, as a subject exclusively within the federal jurisdiction. That order was affirmed by the state District Court of Appeal, but its judgment was vacated by the Supreme Court of the United States and the cause remanded for reconsideration. Upon such reconsideration, the state court annulled the order of dismissal and directed the commission to proceed with the hearing and determination of the employee's application, Baskin v. Industrial Acc. Commission, 97 Cal.App. 2d 257, 217 P.2d 733; remittitur issued June 28, 1950, a judgment which was affirmed November 27, 1950, Kaiser Co., Inc., v. Baskin, 340 U.S. 886, 71 S.Ct. 208, 95 L.Ed. 643. The mandate of the United States Supreme Court was received by respondent commission April 11, 1951, by remittitur from the state court.

Upon the request of petitioners for an early and final decision, a further hearing before a referee of the commission was set for September 13, 1950. At that hearing, petitioners indicated their desire for an award, that they might take it up to the United States Supreme Court for determination, there then being no outstanding award. The case was submitted for decision by the commission.

September 27, 1950, Mrs. Baskin and Mrs. Dunn filed their claim of lien for nursing services at the rate of $10 per day for the period commencing on or about February 15, 1946, and continuously thereafter. The record indicates that they had not mentioned the subject of compensation for such services until September 15, 1950, when their counsel wrote the commission he had ascertained the status of their claims and that they would cover the period com-

mencing in February, 1946, and continuing indefinitely thereafter. On September 13, the referee had asked him if any claim was being made for recovery of the value of nursing services, and he replied, "Well, I think maybe you better give me a chance to consider that."

October 24, 1950, the commission, in view of the pendency of proceedings before the United States Supreme Court, ordered the case "off calendar and all further action on the matters now pending herein suspended, subject to being reset upon request of any of the parties hereto."

December 15, 1950, counsel for the employee and the lien claimants informed the commission of the decision of the United States Supreme Court and requested that the matter go back on the calendar and be set down for the taking of evidence in respect to the claims for nursing services. December 18, petitioners requested that the case be restored to the calendar "for a full hearing on the questions of disability, wage and medical expense," stating "This will necessitate hearings at San Francisco and at the home of applicant in Tennessee," hearings "both at San Francisco and Memphis."

January 9, 1951, the commission gave notice that "further hearing" (without limitation as to scope of the issues) would be held at San Francisco January 31. At that hearing, which continued into February 1, the lien claimants testified concerning the nursing services rendered and the need therefor, including the physical and mental condition of the employee. Petitioners moved for a hearing or the taking of depositions of newly discovered witnesses, whose names they gave, at Memphis, Tennessee, and Clarksdale, Mississippi, as persons who have known the employee for many years and have observed his actions and his ability to get about and whether or not he needs any personal care, and whether or not he has any greater need for such care than before the injury, evidence which petitioners stated would be contradictory to that given by the lien claimants. Counsel for petitioners represented that this evidence was necessary upon the issues presented by Mrs. Baskin and Mrs. Dunn under the claim for nursing services, and also upon the question of what proportion of the employee's present condition is due to the injury and what was pre-existing. In conclusion, counsel said, "If you wish, I'll file an affidavit." The referee forthwith denied the request for further hearing, and ordered, "The matter will stand open for seven days, and thereupon submitted." Within the seven days, petitioners filed a renewal of their motion for the taking of testimony in Mississippi and Tennessee, by a writing duly verified, which gave the names of the proposed witnesses and other relevant facts, and invoked the due process of law requirements of the state and federal constitutions.

By a decision filed April 11, 1951, the commission (1) awarded the employee compensation for permanent disability rated at 100 per cent, (2) found Mrs. Baskin and Mrs. Dunn entitled to the reasonable value of nursing services, custodial care and supervision of the employee from and after January 20, 1946, the value thereof to be later determined, and (3) denied petitioners' application to take testimony outside of California, except on the question of the reasonable value of the services of Mrs. Baskin and Mrs. Dunn, the need for such testimony on that issue to be determined later.

[1] The facts we have narrated require no embellishment to demonstrate that the denial of petitioners' motion by the referee and by the commission was a deprivation of due process of law, and that the decision under review must be annulled.

[2-4] The governing principles, and their application to proceedings before the respondent commission when functioning as a court, were clearly and cogently defined and declared by Justice Dooling, in Massachusetts Bonding & Ins. Co. v. Industrial Accident Commission, 74 Cal.App.2d 911, at 913-914, 170 P.2d 36 at page 37:

"* * * it should be borne in mind that the Industrial Accident Commission under the constitutional provision authorizing its creation, art. 20, § 21, exercises a portion of the judicial powers of the state and 'in legal sense is a "court".' Bankers'

Indemnity Ins. Co. v. Industrial Accident Comm., 4 Cal.2d 89, 97, 47 P.2d 719; Lyydikainen v. Industrial Accident Comm., 36 Cal.App.2d 298, 304, 97 P.2d 993. Even if regarded as a purely administrative agency, however, in exercising adjudicatory functions the commission is bound by the due process clause of the fourteenth amendment to the United States Constitution to give the parties before it a fair and open hearing. 'The right to such a hearing is one of "the rudiments of fair play" (citation) assured to every litigant by the Fourteenth Amendment as a minimal requirement.' Ohio Bell Telephone Co. v. Public Utilities Comm., 301 U.S. 292, 57 S.Ct. 724, 730, 81 L.Ed. 1093, 1102; Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129, 1130, 1131.

"The reasonable opportunity to meet and rebut the evidence produced by his opponent is generally recognized as one of the essentials of these minimal requirements (Ohio Bell Telephone Co. v. Public Utilities Comm., supra; United States v. Abilene & S. R. Co., 265 U.S. 274, 44 S.Ct. 565, 68 L.Ed. 1016; Olive Proration, etc., Comm. v. Agricultural, etc., Comm., 17 Cal. 2d 204, 210, 109 P.2d 918) and the right of cross-examination has frequently been referred to as another, Interstate Commerce Comm. v. Louisville & N. R. Co., 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431, 434; Olive Proration, etc., Comm., v. Agricultural, etc. Comm., supra; Carstens v. Pillsbury, 172 Cal. 572, 578, 158 P. 218; Walker Mining Co. v. Industrial Acc. Comm., 35 Cal.App. 2d 257, 262, 95 P.2d 188; Holmes Eureka L. Co. v. Industrial Acc. Comm., 41 Cal. App.2d 150, 153, 106 P.2d 23; Young v. Industrial Acc. Comm., 38 Cal.App.2d 250, 257, 100 P.2d 1062; Pacific Employers Ins. Co. v. Industrial Acc. Comm., 47 Cal. App.2d 713, 118 P.2d 848.

"The classic statement of the rule applicable to such proceedings is found in Interstate Commerce Comm. v. Louisville & N. R. Co., supra, 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. at page 434: 'All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.'"

(2) *As to the award of private practical nursing services, custodial care and supervision, or institutional care or maintenance,* including the award for services rendered by the lien claimants, it is unnecessary and inappropriate for this court at this time to undertake to determine the precise scope of the applicable statute or to consider whether the evidence supports the award, in view of the present state of the record and our conclusion that the proceeding must be remanded for further hearing.

(3) *Whether or not the employee's disability should be prorated against his preexisting condition,* is likewise a question for consideration in the first instance by respondent commission upon the further hearings which it will conduct.

[5-7] (4) *The increased medical benefits accorded by the 1949 amendment of section 4600 of the Labor Code,* are really in the nature of an allowance for costs incurred by an employee in a proceeding before the commission when prosecuting his claim for compensation. By that amendment, the Legislature added the following to section 4600: "In accordance with the rules of practice and procedure of the commission, the employee, or the dependents of a deceased employee, shall be reimbursed for expenses reasonably, actually, and necessarily incurred for X-rays, laboratory fees, and medical reports required to successfully prove a contested claim." Such a provision relates to procedure and applies to a pending proceeding such as this one, and to such costs incurred prior to the effective date of the amend-

ment. See Record v. Indemnity Ins. Co. of North America, 103 Cal.App.2d 434, 229 P.2d 851; Turner v. East Side Canal & Irr. Co., 177 Cal. 570, 171 P. 299; and Wilson v. Nichols, 55 Cal.App.2d 678, 682, 131 P.2d 596.

The decision under review is annulled and the proceeding remanded to the commission for further hearing.

PETERS, P. J., and BRAY, J., concur.



109 Cal.App.2d 1

STALEY v. BOARD OF MEDICAL EXAMINERS.

Civ. 18637.

District Court of Appeal, Second District, Division 1, California.

Jan. 29, 1952.

Action by John M. Staley against the Board of Medical Examiners of the State of California for declaratory and injunctive relief with respect to the right of plaintiff to carry on his business of manufacturing and selling corrective shoes and recommending corrective shoes or appliances to correct manifest abnormalities of customers' feet. From an adverse judgment in the Superior Court of Los Angeles County, J. A. Smith, J., the defendant appeals. The District Court of Appeal, Drapeau, J., held that the plaintiff was not engaged in "diagnosis" so as to require a certificate and that the injunction granted was not too broad.

Judgment affirmed.

1. Physicians and Surgeons ⇐6(7)

Plaintiff engaged in carrying on the business of manufacturing and selling corrective shoes for human feet and who used a device known as a pedograph to recommend the purchase of corrective shoes was not engaged in "diagnosis" of foot ailments so as to require a certificate from the Board of Medical Examiners as required by the statute. Business and Professions Code, §§ 2141, 2148; Code Civ. Proc. § 1060.

See publication Words and Phrases, for other judicial constructions and definitions of "Diagnosis".

2. Appeal and Error ⇐989, 1010(1)

Where record discloses substantial evidence in support of findings, and appellate court will not weigh evidence or consider whether trial judge should not, perhaps, arrive at a different conclusion.

3. Injunction ⇐189

Where Board of Medical Examiners was enjoined from interfering with respondent's right to point out to customers abnormalities of their feet, and judgment exempted respondent from the operation of the statute and injunction went no further than to preserve his right to carry on his business under the statute and did not restrain the Board from enforcing it, injunctive relief granted was not improper. Business and Professions Code, §§ 2141, 2148; Civ.Code § 3423, subd. 4; Code Civ. Proc. § 526, subd. 4.

4. Declaratory Judgment ⇐387

In an action for declaratory relief, an injunction ancillary to the relief sought is appropriate and may issue to preserve the rights of the parties. Code Civ.Proc. § 1060.

5. Declaratory Judgment ⇐386

In action for declaratory relief, both declaratory and coercive or executory relief may be granted in the same action.

6. Declaratory Judgment ⇐385

In declaratory judgment action, future rights may be determined when a declaration of the present and actual controversy is dependent upon an adjudication thereof.

Edmund G. Brown, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for appellant.

William Prather, San Marino, for respondent.

DRAPEAU, Justice.

For approximately twenty years plaintiff has been in the business of fitting and

selling shoes. In connection therewith he has been manufacturing, recommending and selling corrective shoes and appliances for the human foot, to-wit: arch supports. He uses a conventional measuring rule to get the customer's shoe size, and with a pedograph he takes a footprint "to get the curve of the arch." With this information he proceeds to make a "support to fit in the shoe, so the shoe fits better." If the customer is not pleased with the supports, he is free to return them and get his money back.

By his complaint for declaratory and injunctive relief, plaintiff alleges that defendant board has filed a complaint with the office of the City Attorney of Los Angeles charging him with a violation of section 2141 of the Business and Professions Code which reads as follows: "Any person, who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this State, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury or other mental or physical condition of any person, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, is guilty of a misbehavior."

Section 2148 of the same code exempts from the operation of section 2141 "the manufacture, the recommendation or the sale of either corrective shoes or appliances for the human feet."

Plaintiff contends that under the terms of section 2148, supra, he is permitted to take an impression of customers' feet by means of a pedograph, to suggest the type of corrective shoes or appliances the customers need, to give his reasons therefor, and to point out to customers the manifest abnormalities of their feet in connection with his recommendations and sales of such shoes and appliances without obtaining a license from defendant board.

By its judgment the trial court decreed "that plaintiff has the right to carry on his business of manufacturing, recommending and selling corrective shoes and appliances for the human feet without obtaining a certificate from defendant Board * * *; that the plaintiff has the right, in carrying on such business, to use a mechanical device known as a pedograph, to read the imprint made by such pedograph and upon the basis thereof, to recommend the purchase by prospective customers of corrective shoes or appliances for the feet of such customers; and in connection with such recommendation, to point out to such customers the manifest abnormalities of their feet and state to them his reasons for making such a recommendation; that such acts by plaintiff shall not be interpreted and construed by defendant Board * * * as a 'diagnosis' in violation of Section 2141 of the Business and Professions Code of the State of California.

"It is further ordered, adjudged and decreed that the defendant Board * * * be and it is hereby permanently enjoined and restrained from:

"(a) interfering with the right of the plaintiff to carry on the business of manufacturing, recommending and selling corrective shoes and appliances for the human feet;

"(b) interfering with the right of the plaintiff in carrying on such business, to use a mechanical device known as a pedograph, to read the imprint made by such pedograph and upon the basis thereof, to recommend the purchase by prospective customers of corrective shoes or appliances for the feet of such customers and in connection with such recommendation, to point out to such customers the manifest abnormalities of their feet and to state to them his reasons for making such a recommendation;

"(c) from annoying, harrassing or threatening to prosecute the plaintiff and from filing and prosecuting criminal complaints against the plaintiff on account of any of the foregoing acts."

Defendant board appeals from the judgment, urging that "The law permitting the recommendation of appliances for the human feet does not directly or by implication authorize the diagnosis of a physical ailment or condition without a license."

In this connection, appellant points out that respondent testified at the trial that he never told his customers what was wrong

with their feet, but had them try several samples of arch supports, and when one was found that was comfortable, he proceeded to make a pair to order. That, on the other hand, one of the investigators for the Board testified that respondent told her precisely what was wrong with her feet, to-wit: that the trouble was in the heel and a long arch; that the arch slid or rolled forward, causing the feet to be out of line, which was apt to result in backache or some sacroiliac trouble. And that the other investigator testified that respondent told her that her metatarsals were in bad shape and that "whether you know it or not, you are a subject for neuritis because you are injuring the nerves, the nerve endings in your feet, by walking on these metatarsals."

[1] This evidence, says appellant, shows that "respondent did not confine his sales talk to 'a recommendation' but on the contrary attempted to diagnose and tell the investigators of the Board exactly and precisely what was wrong with their feet. In doing so he went beyond the scope permitted by sections 2148 and 2141."

It should not be overlooked that this is a civil proceeding, initiated under section 1060, Code of Civil Procedure, by which respondent seeks a declaration of his rights and duties under sections 2141 and 2148, supra, together with an interpretation of the meaning of those sections.

Upon the issues duly joined and heard, the trial court found that section 2148 "specifically exempts from the term 'diagnose' as used in said section 2141, the acts of plaintiff in connection with recommending and selling corrective shoes and appliances." The court then concluded that respondent "has the right * * * to recommend the purchase by prospective customers of corrective shoes and appliances * * * and in connection with such recommendation, *to point out to such customers the manifest abnormalities* of their feet and state to them his reasons for making such a recommendation; that such acts by plaintiff should not be interpreted and construed by the defendant Board as a 'diagnosis' in violation of section 2141 of the Business and Professions Code of the State of California." (Emphasis added.)

Both sides cite the case of People v. Dr. Scholl's Foot Comfort Shops, Inc., 1938, 277 N.Y. 151, 13 N.E.2d 750, 753, wherein it was stated: "Clearly the use of the pedograph as a mechanical aid in determining the proper size of the shoe required does not constitute the practice of chiropody. Whether the statements by the salesman, in answer to the inquiries of the customer, constituted a diagnosis, is a more difficult question. It would be an unreasonable and harsh construction of the statute to hold that it was intended to prohibit shoe salesmen from pointing out to customers the manifest abnormalities of their feet when questions are put to them by the customers. It is clear from the record that the salesman at no time held himself out as being a podiatrist or being able to practice chiropody. On the contrary, he referred the customers to the duly licensed chiropodist. Some of the salesman's remarks may have verged close to diagnosis, but we should not hold that a mere remark concerning an obvious fact or a loose use of language concerning a manifest abnormality constitutes a practicing podiatry."

Likewise here, the court held that pointing out a manifest abnormality in a customer's feet, does not amount to a diagnosis. The evidence produced on behalf of respondent supports such a finding, even though the testimony of the investigators, if believed would have supported a different finding.

[2] As stated in Goldberg v. Underhill, 95 Cal.App.2d 700, 702, 213 P.2d 516, 517: "It is fundamental that, where the record discloses substantial evidence in support of the findings, an appellate court will not weigh the evidence or consider whether the trial judge should not, perhaps, have arrived at a different conclusion."

[3] Appellant contends that the injunctive relief here granted is improper. It is pointed out that permanently enjoining the Board from interference with respondent's right "to point out to such customers the manifest abnormalities of their feet", prevents the execution of a public statute

by officers of the law for the public benefit, which is prohibited by section 3423, subd. 4, Civil Code, and section 526, subd. 4, Code of Civil Procedure.

The judgment among other things, exempts respondent from the operation of section 2141, Bus. & Prof. Code, by virtue of section 2148 of the same code, hereinbefore quoted, and declares that he has the right to point out such manifest abnormalities in carrying on his business of manufacturing, recommending and selling corrective shoes and appliances for the human feet.

The injunction goes no farther than to preserve respondent's right to carry on his business under section 2148, supra. It does not restrain appellant from enforcing section 2141.

[4–6] As was stated in Knox v. Wolfe, 73 Cal.App.2d 494, 505, 167 P.2d 3, 9: "In an action for declaratory relief an injunction ancillary to the relief sought is appropriate and may issue to preserve the rights of the parties. Code Civ.Proc., sec. 1060; James v. Hall, 88 Cal.App. 528, 535, 264 P. 516. Both declaratory and coercive or executory relief may be granted in the same action. Coyne v. Spellacy, 12 Cal.2d 284, 286, 83 P.2d 715; Cook v. Winklepleck, 16 Cal.App.Supp.2d 759, 764, 59 P.2d 463; Vaughn v. Roberts, 45 Cal.App.2d 246, 256, 113 P.2d 884. Future rights may be determined when a declaration of the present and actual controversy is dependent upon an adjudication of such future rights. Rolapp v. Federal Building & Loan Ass'n, 11 Cal.App.2d 337, 341, 53 P.2d 974. Since the actual controversy in the declaratory relief action was whether respondent was entitled under the terms of the lease to remove the fixtures and equipment from the premises, the court, in addition to declaring the rights of the parties, fittingly proceeded to determine disputed issues of fact, (Tolle v. Struve, 124 Cal.App. 263, 266, 12 P.2d 61); and having assumed jurisdiction of the equitable controversy it rightly administered complete relief and made final disposition of the litigation. Zimmer v. Gorelnik, 42 Cal.App.2d 440, 447, 109 P.2d 34."

Unlike the cited case, injunctive relief was sought in the instant cause and properly granted.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



109 Cal.App.2d 87

PEOPLE v. MASON.

Cr. 4679.

District Court of Appeal, Second District, Division 1, California.

Jan. 31, 1952.

George Walker Mason pleaded guilty to charge of issuing check without sufficient funds. The Superior Court of Los Angeles County, Cunningham, J., entered orders denying motion to reconsider an order denying application for probation and a motion for an order placing defendant in custody of Department of Mental Hygiene rather than the Director of Corrections, and he appealed. The District Court of Appeal, Drapeau, J., held that adjudication that defendant was an intemperate person did not forbid sentencing of defendant on the charge.

Orders affirmed.

1. Criminal Law ⇐1023(12)

An appeal would not lie from order denying defendant's application for probation or from an order denying a motion to reconsider such an order.

2. Convicts ⇐2

Motion to change custody from Director of Corrections to the Department of Mental Hygiene could not be made under statute providing that a person held under illegal custody may by the court be committed to legal custody by a writ of habeas corpus. Pen.Code, § 1493.

3. Criminal Law ⇐977(1)

Pronouncement of judgment in a criminal case was not forbidden because defend-

ant had theretofore been adjudged an intemperate person.

Al Matthews and Robert P. Dockeray, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant was charged by information with the crime of issuing a check without sufficient funds, and with two prior felony convictions. The information was filed July 20, 1950. After defendant was arraigned, there were a number of continuances. The court's minutes recite that one of these continuances was granted for the purpose of instituting civil intemperance proceedings against defendant; and that thereafter there was filed a certified copy of a judgment and order of another department of the Superior Court, committing defendant to the Department of Mental Hygiene; whereupon this cause was ordered off calendar. That order was made August 18, 1950.

Defendant was sent to Patton State Hospital, pursuant to the inebriacy commitment. Then in a few weeks he was released from the Hospital and placed under supervision of the Bureau of Social Work in Los Angeles. While so at large he was apprehended and returned to the Superior Court for further proceedings under the information.

On November 30, 1950 he appeared, with his counsel, and time to plead to the information was set for December 6, 1950. At the time set he pleaded guilty, admitted the prior convictions, and applied for probation. After hearing, his application for probation was denied, and he was sentenced to the state prison for the term prescribed by law. This sentence was made to run concurrently with the sentence from which he was then on parole.

After the judgment, defendant's counsel moved the court for an order reconsidering defendant's application for probation; also for an order placing defendant in the custody of the Department of Mental Hygiene, rather than the Director of Corrections.

Defendant appeals from the orders denying both motions. He states, "The question therefore is this: Did Department 41 have jurisdiction to consider the original charge and sentence appellant under that charge while the order of commitment made by Department 54 was unrevoked and in full force and effect?"

[1, 2] The first ground of appeal may be summarily disposed of. As there can be no appeal from an order denying probation, People v. Bartley, 12 Cal.App. 773, 108 P. 868; People v. Felix, 58 Cal.App.2d 646, 137 P.2d 472; People v. D'Elia, 73 Cal.App. 2d 764, 167 P.2d 253; People v. Woods, 108 Cal.App.2d 50, 238 P.2d 124, neither can there be an appeal from an order denying a motion to reconsider such an order. People v. Erickson, 74 Cal.App.2d 339, 168 P. 2d 417.

Defendant argues that his motion to change custody from the Director of Corrections to the Department of Mental Hygiene was proper under Section 1493 of the Penal Code. This section has to do with proceedings involving the Writ of Habeas Corpus, and is not applicable to this case. In re Wilson, 196 Cal. 515, 238 P. 359.

[3] In any event, there is nothing in the law of California which forbids pronouncement of judgment in a criminal case just because a defendant has theretofore been adjudged an intemperate person. The court had jurisdiction to proceed with this case, and to pronounce judgment. It is pertinent here to add that were the law otherwise all that would be required for a defendant to avoid the consequences of his wrong-doing would be to have an adjudication that he was an intemperate person, made at any time between his arraignment and the pronouncement of judgment in his case.

In People v. Sanchez, 21 Cal.2d 466, 132 P.2d 810, relied on by defendant, our Supreme Court held that the Superior Court could not vacate a prior order of commit-

ment made by the Juvenile Court. That case is distinguishable from the present case. There is no analogy in a conflict as to jurisdiction between a civil and a criminal case in the Superior Court, and a conflict as to jurisdiction between the Juvenile Court and the Superior Court. In certain cases exclusive jurisdiction is given by our law to the Juvenile Court if the facts come within the provisions of the Juvenile Court law conferring such jurisdiction.

Nor does People v. Thompson, 102 Cal. App.2d 183, 227 P.2d 272, cited by defendant, apply under the facts in this case. The Thompson case holds that when there is an issue in a criminal case as to whether a defendant is or is not a sexual psychopath, Section 5517 of the Welfare and Institutions Code must be strictly complied with. There is nothing in that case which holds that when a defendant is committed to a state hospital as a sexual psychopath the Superior Court loses jurisdiction over him.

The orders are affirmed.

WHITE, P. J., and DORAN, J., concur.



109 Cal.App.2d 60

FRANK v. HOWICH.

Civ. 18657.

District Court of Appeal, Second District, Division 1, California.

Jan. 30, 1952.

Rehearing Denied Feb. 18, 1952.

Hearing Denied March 27, 1952.

Action by Harriet Frank against Ruth Howich for overcharge of rental and treble damages, together with $1,000 counsel fees, in the total amount of $11,050. The defendant filed a cross-complaint. The Superior Court, Los Angeles County, Roy A. Herndon, J., entered judgment for plaintiff in the amount of $340, and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that evidence was sufficient to show that the overcharges were not wilful.

Judgment affirmed.

1. Landlord and Tenant ⇐200(1½)
War and National Defense ⇐216

Federal law was applicable to parties in action to recover treble damages for overpayments of rent on premises which had become controlled under the federal Housing and Rent Act. Housing and Rent Act of 1947, as amended in 1948, 50 U.S. C.A.Appendix, § 1881 et seq.

2. Landlord and Tenant ⇐200(1½)
War and National Defense ⇐220

In action for treble damages for rental overcharges, evidence was sufficient to show that overcharges were not wilful. Housing and Rent Act of 1947, as amended in 1948, 50 U.S.C.A.Appendix, § 1881 et seq.

3. Landlord and Tenant ⇐200(1½)
War and National Defense ⇐222

Where duplex apartment was not subject to rent control at time of execution of lease of apartment which thereafter became controlled under federal Housing and Rent Act, payment made over and above the first month's rent by tenants at the time of execution of lease was additional consideration for execution of lease and was not a security deposit subject to recovery under federal Housing and Rent Act. Housing and Rent Act of 1947, as amended in 1948, 50 U.S.C.A.Appendix, § 1881 et seq.

Marvin A. Burnett, Los Angeles, for appellant.

Hanna & Morton and John H. Blake, Los Angeles, for respondent.

DRAPEAU, Justice.

Defendant, Ruth Howich, leased a duplex apartment in her house to plaintiff, Harriet Frank. The lease was for three years, commencing April 20, 1948, and for a rental of $225 a month. The amount of rent was agreed upon at the suggestion of Mrs. Frank in consideration of the three-year term granted to her in the lease. When the lease was executed Mrs. Frank paid the rent for the first month, and the further sum of $675.

After Mrs. Frank had paid Mrs. Howich $3,350 under the lease, she learned that the premises had become "controlled" under the federal Housing and Rent Act of 1947, as amended in 1948, 50 U.S.C.A.Appendix, § 1881 et seq.; and that, effective April 1, 1949, the rent ceiling of her duplex apartment was $80 per month. This "ceiling" was later raised to $90 per month.

Mrs. Howich had no information at the time of making the lease, or thereafter until her tenant sued her, that the rental payments were unlawful.

Mrs. Frank brought this action against Mrs. Howich, and demanded treble damages for overpayments of rent, together with $1,000 counsel fees—a total of $11,050.

Mrs. Howich answered, denying the intent to violate the law which is required under the terms of the statute before treble damages may be adjudged; and, by way of cross-complaint alleged and prayed for damages for waste and damage to the premises.

The trial court found that the housing and renting act did apply during portions of the tenancy, but that defendant's violation of it was neither wilful nor the result of failure to take practicable precautions against the occurrence thereof, and, therefore, that treble damages should not be allowed; that there was a balance due of $1,160 in this respect from the defendant to the tenant, and that $300 was a fair allowance for plaintiff's counsel fees. The court further found that $225 per month was the reasonable value of the use of the premises after the termination of the lease, and that after rent control ended the rental provisions of the lease governed the rights of the parties. The court refused to direct recovery of the $675 paid upon the execution of the lease, and found that it was additional consideration for the lease. The court also found that plaintiff had committed waste and damage to the premises in the amount of $400. Finally, taking into account all of the foregoing items, except the one for $675, the court found that there was a balance due from defendant to plaintiff of $340.

Plaintiff appeals from portions of the judgment which followed. She contends that the $675 paid at the beginning of the lease was a security deposit, subject to recovery under the provisions of the federal law; that the evidence was insufficient to support the finding that the overcharges were not wilful and not a result of defendant's failure to take practicable precautions as provided in the law; that the trial court's failure to "specifically allocate the damage between the various items of waste" was error; and that there was "a fatal variance between the findings of fact and the judgment with regard to an item of repairs * * * in the sum of $41.50."

[1] In the briefs it is conceded, at least tacitly, that the federal law is applicable to the parties to this action. Lovett v. Bell, 30 Cal.2d 8, 180 P.2d 335. But it may not be amiss for this Court to express the hope that this is the last case of this type to come before us. Here we have an example of the fact that injustice may be inflicted upon one citizen by another under a law conceived to be necessary during the stresses of the second world war. Here, years after the last shot was fired in that war, a plaintiff is given an arbitrary and capricious cause of action against a defendant. Here we witness government restraining one of its citizens while another, under sanction of law, takes his money away from him, together with attorney's fees; and, not satisfied with that, demands treble damages besides.

[2] There is ample evidence to sustain all of the findings. No error appears in the allocation of the several items of damages. All that is necessary is to find the ultimate fact. Hudson v. Becker, 12 Cal. App.2d 743, 56 P.2d 249; City of Signal Hill v. Wyse, 9 Cal.App.2d 641, 50 P.2d 1076. Indeed, the trial court was more than fair with plaintiff, for the premises were seriously and wantonly damaged during her tenancy.

[3] There was no fatal variance between the findings and the judgment. And it was proper to find and to adjudge that the $675 payment was not a security deposit subject to recovery under the terms

of the statute. When the lease was made the law did not affect defendant's property. The property became subject to control because of an amendment to the law, effective April 1, 1949. The evidence supports the finding that the $675 was additional consideration for the execution of the lease, and the law supports the holding. Grand Central Public Market v. Kojima, 11 Cal.App.2d 712, 54 P.2d 786.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



109 Cal.App.2d 158

VIGLIONE v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 14807.

District Court of Appeal, First District, Division 2, California.

Feb. 8, 1952.

Hearing Denied April 3, 1952.

Horme Viglione brought action against the City and County of San Francisco and others for writ of mandate to compel the controller to issue a warrant pursuant to an agreement settling plaintiff's claim for injuries received while riding a streetcar. The Superior Court, City and County of San Francisco, Devine, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Jones, J. pro tem., held that since evidence had been presented and the parties had waived findings of fact, defendants could not complain for first time on appeal that petition was insufficient in that it failed to allege that any moneys were on hand in any fund to meet the claim.

Affirmed.

1. Appeal and Error ⇐197(1)

Where cause is tried and evidence introduced on theory that material issues have been raised by pleadings and trial court renders judgments on such theory, a party will not be allowed for first time on appeal to complain that such issues were not raised by pleadings.

2. Appeal and Error ⇐197(1)

Where findings are waived, and trial court renders judgment on theory that material issues have been raised by pleadings, a party will not be allowed for first time on appeal to complain that such issues were not raised by pleadings, even though alleged defect in pleadings is jurisdictional.

3. Mandamus ⇐187(4)

In suit by person who allegedly was injured while riding street car owned and operated by city and county of San Francisco for writ of mandate to compel controller to pay claim in accordance with settlement agreement, where evidence was taken and parties waived findings of fact and judgment was entered for plaintiff, defendant could not complain for first time on appeal that petition was insufficient in that it failed to allege that moneys were on hand in any fund to meet the claim.

Dion R. Holm, City Atty. of City and County of San Francisco, C. Wesley, Davis, Deputy City Atty., San Francisco, for appellants.

Joseph A. Brown, M. A. Leite, San Francisco, for respondent.

JONES, Justice pro tem.

This is an appeal from an order directing the issuance of a writ of mandate.

Respondent, Horme Viglione, claimed that she sustained injuries on the 24th of March, 1949, while she was riding in a street car owned and operated by appellant, City and County of San Francisco. On the 1st day of April, 1949, she filed a verified claim against the said City and County for damages in the sum of $10,000. After negotiations between her attorneys and the claims adjuster for the City and County, a settlement was arrived at on the 14th day of March, 1950, whereby her claim was settled for $2100. On the 23rd of March, 1950, she executed a release in full settlement of her claim and delivered it to the representative of the said City and County. Both prior and subsequent to the delivery of the release respondent's attorneys were advised by the claims ad-

juster that it would not be necessary to file a suit for damages to protect respondent's rights against the running of the statute of limitations as the matter had been settled. Her counsel were further informed that when funds became available, the settlement would be approved and a warrant issued by the controller. In due course the claim was approved by the Claims Department, and was allowed and passed by the Public Utilities Commission. The controller, however, refused to approve the claim or draw his warrant in payment thereof on the grounds that suit had not been filed within one year after the happening of the accident and that the claim was barred by the statute of limitations. Respondent then commenced this action for a writ of mandate to compel the controller to honor her claim.

The alternative writ was issued on August 24, 1950, and on September 6, 1950 appellants, in response to the alternative writ, filed an answer to the petition, and the trial ensued forthwith. Respondent called one witness only, the claims adjuster who had negotiated the settlement. He admitted all of the facts alleged in the petition, which are substantially as herein recited. Appellants declined to cross-examine and rested their case without proof of any kind on their part. Findings of fact were waived by both parties, and the court thereupon gave judgment directing the issuance of the peremptory writ as prayed. It is from this order that the appeal is taken.

The answer filed by the appellants in the trial court pleads the statute of limitations affirmatively in two separate special defenses. As stated, no proof was offered in support of these defenses and findings of fact were waived. There was a complete abandonment in the trial court of the bar of the statute as a defense, and no point is made of it by appellants on this appeal.

[1] The only ground for reversal urged by the appellants is that the petition filed in the court below does not state facts sufficient to justify the issuance of the writ. In support of this contention they point out that the petition fails to allege that any moneys were on hand in any fund to meet the demand of the claim. This point was not raised in the trial court and is presented here for the first time. In Lande v. Southern Cal. Freight Lines, 85 Cal.App.2d 416, 419, 193 P.2d 144, 147, the rule is stated to be "that where a cause is tried and evidence introduced on the theory that material issues have been raised by the pleadings and the trial court renders judgment on such theory, a party will not be allowed for the first time on appeal to complain that such issues were not raised by the pleadings. (Freeeman v. Gray-Cowan, Inc., 219 Cal. 85, 87, 25 P.2d 415; Desert Water, Oil & Irr. Co. v. State, 176 Cal. 745, 746, 171 P. 28, [287]; Smithson v. Atchison, T. & S. F. Ry. Co., 174 Cal. 148, 155, 162 P. 111; Grimes v. Nicholson, 71 Cal.App.2d 538, 543, 162 P.2d 934; Asnon v. Foley, 105 Cal. App. 624, 627, 288 P. 792.)" This rule is based upon the principle of equitable estoppel. It is unfair for a party to withhold an objection to a pleading founded upon a defect, which, if pointed out in time might have been remedied by amendment, thereby inducing his opponent to rely upon his pleading as sufficient, until it is too late to correct the defect, in order that he may have the advantage of the fatal defect upon appeal. Greiss v. State Investment & Ins. Co., 98 Cal. 241, 33 P. 195; Ortega v. Cordero, 88 Cal. 221, 26 P. 80.

[2] Where findings are waived this is so, even though it be claimed that the alleged defect in the pleadings is jurisdictional. It is said in Moreno Mutual Irrigation Co. v. Beaumont Irr. Dist., 94 Cal. App.2d 766, 780, 211 P.2d 928, 937, a case in which the parties waived findings, that "The rule is that every presumption is in favor of the validity of the judgment and any condition of facts consistent with its validity will be presumed to have existed rather than one which will defeat it, City of Salinas v. Luke Kow Lee, 217 Cal. 252, 255, 18 P.2d 335, and where the record is silent as to what was done it will be presumed in favor of the judgment that what ought to have been done was not only done but rightly done. Even though the existence of a jurisdictional fact be not affirmed in the record, it will be presumed."

[3] Respondent's counsel in his opening statement in the trial court apprised appellants that payment was being sought out of the new appropriation in accordance with the allowance of the claim by the Claims Department and the Public Utilities Commission, and that there was money on hand to pay the claim. An opportunity was thus afforded appellants to urge the alleged defect in the pleadings. Having declined to take advantage of the opportunity offered they cannot now be heard to complain for the first time on appeal. Lande v. Southern Cal. Freight Lines, supra.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.



109 Cal.App.2d 113

NANCE v. DIELISSEN.

DIELISSEN v. SCHMIDT.

No. 14858.

District Court of Appeal, First District, Division 1, California.

Feb. 5, 1952.

George W. Nance sued Louis Dielissen and Louis Dielissen sued Max Schmidt to foreclose a mechanic's lien and for other relief. The Superior Court, County of San Mateo, Murray Draper, J., rendered judgments adverse to Dielissen and Dielissen appealed. The District Court of Appeal, Bray, J., held that evidence supported refusal of trial court to permit recovery by Dielissen of an amount based on a claimed profit of $25 per lot for lots in tract of land upon which Schmidt did not allow Dielissen to install lawns.

Judgments affirmed.

1. Contracts ⇐247, 350(1)

Evidence justified conclusion that person who was developing a tract of land in city had not promised gardening contractor that he was to put lawns on all noncorner lots in tract, and that such agreement if made was modified by conduct of parties, and supported refusal of trial court to permit recovery by gardening contractor of amount based on claimed profit of $25 per lot for lots in tract upon which developer of tract did not allow such gardening contractor to install lawns.

2. Contracts ⇐175(3)

Evidence justified finding that gardening contractor who put lawns on some lots in tract of land which was being developed agreed to pay developer of tract the purchase price of a tractor, and that payment was not conditional on doing of all lawns in tract by such gardening contractor, and assignee of developer of tracts was entitled to recover from gardening contractor purchase price of tractor and amounts spent by developer of tract in repairing tractor.

Thomas L. Bocci, Jr., John A. Putkey, Daly City, for appellant.

Francis A. Guido, San Mateo, W. A. Finger, Burlingame, for respondents.

BRAY, Justice.

Two cases consolidated for trial and appeal. The defendant in case No. 47384, Dielissen, appeals from a judgment against him and in favor of plaintiff Nance for $2,546.83. In case No. 47414 plaintiff Dielissen appeals from a judgment denying him a recovery against defendant Schmidt.

Question Presented.

Insufficiency of the evidence. The cases are purely factual, the sole issue being what was the oral agreement between the parties.

Record.

In No. 47384 Nance *as assignee of Schmidt* sued Dielisson for $2,546.83 on three common counts, (1) on a book account, for goods, wares and merchandise, (2) on a balance due for goods, wares and merchandise, and (3) on a stated account. The basis for these counts was the purchase price of a tractor sold to Dielissen and paid for by Schmidt. Dielissen then in No. 47414 sued Schmidt on five causes of action. The first was for alleged loss of

$25 per lot profit on 114 lots, totaling $2850. The second and third were for $1310, based on a claimed withholding by Schmidt of $10 per lot. The fourth cause was to foreclose a mechanic's lien for $695.75 and the fifth for the same amount on a common count, both for work, labor and services. The court found generally in favor of Schmidt's version of the contract and gave judgment in the first action for $2,546.83 against Dielissen and in favor of Nance. In the second action judgment went in favor of Schmidt that Dielissen take nothing under the first three causes of action but that Dielissen recover judgment against Schmidt for $595.75, with interest, and that the mechanic's lien thereon be foreclosed.

Evidence.

The difficulty arises out of an oral agreement which was not too definite in the beginning and which was varied by the action of the parties. Its solution depends, in considerable degree, on which party is believed. The court obviously believed Schmidt's version. In view of the conflict we are bound by the trial court's determination.

Max Schmidt is the developer of a certain tract in the city of Millbrae. This tract contains 350 homes, of which 32 are corner lots. In the spring of 1947, 50 of these homes were under construction, but none were corner lots. This was when Schmidt first met Dielissen, a gardening contractor. Schmidt wanted Dielissen to put lawns in front of the houses, which Dielissen did at the price of $36 each. Dielissen put in 30 of such lawns. After Dielissen put in the first ten lawns, Schmidt complained because the work was going too slowly. Dielissen replied that for more speed a tractor would be needed and that Schmidt should buy it for him and be repaid over a period of time, at the rate of $10 to be deducted from the price of each job. Dielissen claims that it was understood he was to have all the lawns. Yet he admits that at no time did he agree to do all the lawns. Schmidt claims that there was nothing said about Dielissen getting all the lawns. Admittedly no number was discussed. Both agree that corner lawns were not discussed nor the price thereof agreed. At this point, the court could well have determined that it was understood that the arrangement was that Dielissen was to put in all lawns (except corner lawns) at $36 each, that Schmidt was to purchase a tractor for Dielissen and that the sum of $10 per lawn was to be withheld by Schmidt until the tractor was paid for. But, if such was the understanding, the parties did not act under it. Schmidt bought the tractor and turned it over to Dielissen, who used it for all the work he did in the subdivision. At no time was any sum deducted for its payment. Dielissen billed Schmidt each week for the lawns then put in and Schmidt paid the bill in full. Schmidt testified that Dielissen asked him not to make the deductions as he was going to sell his Daly City home and would pay for the tractor then in full, and that it would be too much bookkeeping to deduct from each weekly bill. Dielissen put in 48 lawns at the $36 price. After the tractor was purchased and was being used by Dielissen, he went to Schmidt and said he could not do the lawns for $36 any more, as there was not enough profit. Schmidt then agreed to pay $45 per job. That was the amount paid for all jobs thereafter. Dielissen did altogether about 131 lots. Schmidt testified that Dielissen was so slow that he gave another contractor 70 lawns to put in, which he did in two weeks. Dielissen continued doing lawns while the other contractor was working, and after. Dielissen continued on for almost a year. At the time, Dielissen made no objection to the fact that the other contractor was hired by Schmidt. Schmidt told Dielissen to do the work on the yard of a model home. This was one of the corner lots not mentioned by the parties in the original discussions. When completed Dielissen presented a bill for $574, which was later corrected, because of a mistake, to $475. Schmidt felt it was too high and suggested that another contractor be contacted to determine the reasonable value of the job. They agreed on the California Nursery, which fixed the value at $200 and agreed to do the 32 re-

maining corners at that price per corner. Schmidt offered these corners to Dielissen at that price. Dielissen refused. Dielissen testified that Schmidt offered him only $125 per corner.

Dielissen contends that it was originally understood that he was to get the work in the whole tract. The parties never agreed about the price of the corner lots, if their inclusion was contemplated originally. Dielissen paid for the gas and oil used on the tractor. When the tractor needed repair Schmidt took care of the details by phoning the tractor dealer. Dielissen charged Schmidt for the use of the tractor by Dielissen on jobs for Schmidt other than the lawns.

As to the indefiniteness of the understanding between the parties, it might be pointed out that in his complaint Dielissen alleges that under the agreement he was to be paid $55 per lawn. There is no mention of that sum by either party in the evidence. Admittedly the price originally was $36 and was later raised to $45. Dielissen was paid in full for all work done by him, except the model home corner and some grading across the street. These are the amounts included in the mechanic's lien claim.

[1, 2] While the court could have found differently, the evidence reasonably supports the conclusion that there never was any promise that Dielissen was to have all the noncorner lots in the tract (certainly there was no claim of agreement on Dielissen's part that he would put in all the noncorner lots) and that if originally there was such agreement it was modified by the conduct of the parties. Therefore, the evidence supports the court's refusal to award Dielissen the $2850 sued for, which amount was based on a claimed profit of $25 per lot for those upon which he was not allowed to install lawns, and also the court's finding that there were no sums withheld by Schmidt. It also supports the court's finding that Dielissen agreed to pay Schmidt the purchase price of the tractor and that its payment was not conditional on Dielissen doing all the lawns in the tract, and that Nance as assignee of Schmidt should recover its purchase price and the amounts expended by Schmidt thereon for repairs, totaling $2,546.83. The mechanic's lien claim of $595.75 in favor of Dielissen is for the work done by him on the model house corner and a lot across the street therefrom. Schmidt did not appeal from the judgment, and Dielissen is satisfied with it.

The judgments are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

38 Cal.2d 371

CAFFREY v. TILTON et al.

S. F. 18226.

Supreme Court of California, in Bank.

Feb. 5, 1952.

Action by Richard Caffrey against B. A. Tilton, individually and doing business under name and style of Embe Gear Works, and others, for declaratory relief relating to a contract under which defendant had allegedly employed plaintiff to procure business on commission basis. The Superior Court for City and County of San Francisco, Theresa Meikle, J., denied defendant's motion for change of venue and he appealed. The Supreme Court, Shenk, J., held that an action on a contract to pay commissions which was silent as to place of payment, was not maintainable in county of plaintiff's residence.

Reversed.

Prior opinion, 232 P.2d 496.

1. Venue ⇐7

Where contract does not specify place of performance, statute providing that in absence of express provision, offer of performance may be made, at option of debtor wherever person to whom offer ought to be made can be found, does not have effect of "special contract" in writing within venue statute. Code Civ.Proc. § 395; Civ.Code, § 1489.

2. Venue ⇐7

Under venue statute providing that county in which obligation is incurred shall be deemed to be county in which it is to be performed unless there is a special contract in writing to contrary, a "special contract" is one whose provisions are expressed and not dependent on implication. Code Civ.Proc. § 395.

See publication Words and Phrases, for other judicial constructions and definitions of "Special Contract".

3. Venue ⇐7

Where defendant, resident of Los Angeles County, appointed plaintiff, resident of San Francisco County, as representative in northern California and agreement stated that defendant was to pay plaintiff commissions on business secured in such area, but was silent as to place of payment, an action to recover commissions was not maintainable in San Francisco County. Code Civ.Proc. § 395.

F. T. Leonetti, Glendale, for appellants.

Frank J. Baumgarten, San Francisco, for respondent.

SHENK, Justice.

The plaintiff is a resident of the City and County of San Francisco. The plaintiff sued the defendant in San Francisco for declaratory relief in reference to his rights under a contract which they had entered into in Los Angeles County. The defendant appeals from an order denying his motion for a change of venue to Los Angeles.

At the time this action was commenced the defendant was and for many years prior thereto had been a resident of the County of Los Angeles and engaged in a gear manufacturing business. The contract contemplated the employment of the plaintiff as the defendant's sales representative for northern California on a commission basis. This agreement is contained in a letter from the defendant to the plaintiff which lists certain "companies we have done work for" in northern California. The plaintiff obtained an order from one of these companies but the defendant told him not to negotiate with that company because its financial situation was precarious. The defendant added that if the plaintiff did not wish to continue his work subject to this condition he could consider the agreement as revoked. The plaintiff thereupon filed the complaint in this action alleging that he had performed all terms of the agreement but that the defendant seeks to modify or terminate it, and asking for a declaration that the plaintiff is entitled to a commission on present and future business from this particular company, for a declaratory judgment ordering that the plaintiff receive such compensation, and for a declaration of the rights and duties of the parties.

It is undisputed that under the general provisions of section 395 of the Code of Civil Procedure the defendant is entitled

to have this action tried in Los Angeles which is both his residence and the place where the contract was entered into. It is contended, however, that there is a "special contract in writing" sufficient to justify the denial of the requested change of venue in accordance with the following portion of that section: "When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant * * * resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and *the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary.*" (Italics added.)

[1] No place of performance is specified in the letter setting forth the agreement. The plaintiff relies on the declaration of Civil Code section 1489 that: "In the absence of an express provision to the contrary, an offer of performance may be made, at the option of the debtor: * * * 2. Wherever the person to whom the offer ought to be made can be found". He contends that San Francisco, the place of his residence, is the place of performance by the defendant and that the section has the effect of a "special contract in writing" within the meaning of section 395 of the Code of Civil Procedure. Such an unreasonable, indeed absurd, result cannot be deemed to have been intended by the Legislature. If the plaintiff's contention were to prevail the obligee of a contract could control the venue of an action by the simple expedient of sojourning in whatever county he chose as the place to commence his action since that county would be the county in which he might be found.

[2, 3] While section 1489 of the Civil Code may be assumed to be an implied provision of the agreement, it does not follow that it constitutes the "special contract in writing" referred to in section 395 of the Code of Civil Procedure. In Armstrong v. Smith, 49 Cal.App.2d 528, 122 P.2d 115, the contention that venue may be determined by an implied agreement as to the place of performance of a contract was expressly rejected and an order denying a motion for a change of venue to the county of the defendant's residence was reversed. The court stated 49 Cal.App.2d at page 536, 122 P.2d at page 119, in reference to the portion of section 395 here involved: "If the parties have only impliedly agreed to a place of performance when the statute says that they should have specially agreed before the remedy sought may be obtained, no redress may be had." It was noted that a "special" contract is one whose provisions are express and not dependent on implication. See cases cited in the Armstrong case, supra, 49 Cal.App. 2d at page 535, 122 P.2d 115; see also Hill v. Hanna, 57 N.D. 412, 222 N.W. 459; Oliver Cadillac Co. v. Rosenburg, Mo.App., 179 S.W.2d 476.

It is argued that the Armstrong case is distinguishable on the ground that the obligation sued on was an implied obligation while it is claimed that the obligation here sued on is express. Such a distinction is untenable. The portion of section 395 of the Code of Civil Procedure referred to is concerned with the requirement of a definitely expressed place of performance of an obligation and not with the terms of the obligation itself. Since that section definitely specifies that the county where the obligation is incurred is deemed to be the county in which it is to be performed in the absence of a "special contract in writing to the contrary", and since no such contract has been shown, the trial court was in error in denying the defendant's motion.

The order is reversed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

Ex parte COLLIE.

Cr. 5261.

Supreme Court of California, in Bank.

Feb. 8, 1952.

Rehearing Denied March 6, 1952.

Proceedings in the matter of the application of Gilbert F. Collie for a writ of habeas corpus wherein petitioner attacked the validity of a condition imposed upon the commutation of his death sentence to life imprisonment that he should never be eligible for parole. The Supreme Court, Gibson, C. J., held, inter alia, that the condition was not unreasonable.

Petition denied.

1. Habeas Corpus ⇐23

Writ of habeas corpus was proper remedy to determine validity condition of commutation of death sentence to life sentence that prisoner should never be eligible for parole. Pen.Code, §§ 1473, 3046.

2. Pardon ⇐4

A governor has no power to prohibit his successors from changing a commutation of sentence or modifying its provisions.

3. Statutes ⇐149

One legislative body cannot limit or restrict its own power or that of subsequent legislatures, and therefore the act of one legislature does not bind its successors.

4. Pardon ⇐14.3

Where governor commuted death sentence to life imprisonment upon condition that prisoner should never be eligible for parole, such condition could not restrict power of later governors to grant further executive clemency. Const. art. 7, § 1.

5. Pardon ⇐4

In absence of clear expression of intent to deprive governor of power to withhold parole on commutation of death sentence to life imprisonment statutes relating to parole would not be considered as an attempt by legislature to interfere with governor's power. Pen.Code, § 3040 et seq.; Const. art. 7, § 1; art. 10, §§ 2, 5, 7.

6. Pardon ⇐14.1

A commutation of sentence is in the nature of a favor which may be withheld entirely or granted upon such reasonable conditions, restrictions and limitations as the governor may think proper. Const. art. 7, § 1.

7. Pardon ⇐14.2

Condition of commutation of death sentence to life imprisonment that prisoner should never be eligible for parole was not unreasonable. Const. art. 7, § 1.

Gilbert F. Collie, in pro. per.

Robert K. Barber, San Francisco, under appointment by Supreme Court, for petitioner.

Edmund G. Brown, Atty. Gen. and Clarence A. Linn, Asst. Atty. Gen., for respondent.

GIBSON, Chief Justice.

Following his conviction of first degree murder, petitioner was sentenced to death on January 11, 1932. While he was awaiting execution at San Quentin prison, a jury found that he had become insane, and he was transferred to the Mendocino State Hospital. Some time later the hospital's psychiatric staff reported that petitioner had regained his reason and recommended commutation of sentence to life imprisonment, stating that he would probably become insane again if he were returned to condemned row. In 1934 Governor Rolph commuted the sentence to life imprisonment "upon the condition and with the restriction" that petitioner be confined in San Quentin "for the remainder of his natural life, and that he shall never be eligible for release upon parole, nor shall his release upon parole ever be authorized or granted by any authority of the State of California." By this application for writ of habeas corpus, petitioner, who is still confined in prison, seeks a determination of the validity of the condition thus imposed.

[1] Since the commutation states that petitioner "shall never be eligible for parole," it acts as an immediate restraint on him and prevents him from applying for parole, as may ordinarily be done after seven years' confinement by a prisoner who is serving a life sentence. See Pen. Code, § 3046. The writ of habeas corpus, therefore, is a proper

remedy to determine whether the condition which purports to deprive petitioner of the right to seek parole is valid. Pen. Code, § 1473; see In re Bramble, 31 Cal.2d 43, 53–54, 187 P.2d 411; In re Seeley, 29 Cal.2d 294, 298–299, 303, 176 P.2d 24; In re Stewart, 24 Cal.2d 344, 345–346, 149 P.2d 689.

The governor's power to commute sentences is derived from article VII, section 1, of the Constitution which provides that he "shall have the power to grant reprieves, pardons, and commutations of sentence, after conviction, for all offenses except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons."

[2–4] The terms of the commutation purport to prevent a subsequent governor from granting petitioner permission to apply for parole, but it is clear that one governor has no power to prohibit his successors from changing a commutation of sentence or modifying its provisions. It is the general rule that one legislative body cannot limit or restrict its own power or that of subsequent Legislatures and that the act of one Legislature does not bind its successors. Department of Water, etc., v. Vroman, 218 Cal. 206, 218–219, 22 P.2d 698; Thompson v. Board of Trustees, 144 Cal. 281, 283, 77 P. 951; San Francisco Gas Light Co. v. Dunn, 62 Cal. 580, 584–585; United Milk Producers v. Cecil, 47 Cal.App. 2d 758, 764–765, 118 P.2d 830; see Wills v. Los Angeles, 209 Cal. 448, 451–452, 287 P. 962, 69 A.L.R. 1044. A similar rule should apply to the head of the executive branch of state government. Accordingly, the present commutation cannot be given effect as a restriction on the power of later governors to grant further executive clemency.

[5–7] The remaining question is whether the commutation conditions which deprive petitioner of the privilege of applying for parole are invalid as an interference with the Legislature's power over prisons and paroles. The Legislature is authorized by the Constitution to regulate prisons and has implied power to prescribe the terms and conditions of parole. See Const. art. X, §§ 2, 5, 7. General regulations relating to parole have been enacted in the exercise of this power, Pen.Code, § 3040 et seq., but it does not appear that there was any intent to deprive the governor of the power to withhold parole upon commutation of a death sentence. In the absence of a clear expression of such intent, the statutory provisions should not be considered as an attempt to interfere with the governor's power, and, therefore, we need not determine whether the Legislature could constitutionally do so. A commutation is in the nature of a favor which may be withheld entirely or granted upon such reasonable conditions, restrictions and limitations as the governor may think proper. Ex Parte Kelly, 155 Cal. 39, 41, 99 P. 368, 20 L.R.A.,N.S., 337. In view of the circumstances, we cannot say that the condition imposed here is unreasonable.

The order to show cause is discharged, and the petition is denied.



38 Cal.2d 392

LENAHAN v. POOLE.

Sac. 6224.

Supreme Court of California, in Bank.

Feb. 8, 1952.

Lavona Lenahan brought action against Eula Poole for injuries sustained when part of awning in front of defendant's store broke off and fell onto plaintiff. The Superior Court of Yuba County, Arthur Coats, J., entered judgment for plaintiff, and defendant appealed. The Supreme Court, Gibson, C. J., held that evidence sustained finding that defendant was negligent in failing to make inspection which would have disclosed defective condition of awning.

Judgment affirmed.

Prior opinion, 232 P.2d 20.

1. Municipal Corporations ⇐819(1)

In action by pedestrian against store operator for injuries sustained by pedes-

trian when part of awning broke loose and fell onto pedestrian while awning was being lowered, evidence established that store operator was negligent in not discovering defective condition of awning, so as to render store operator liable for pedestrian's injuries.

2. Municipal Corporations ⇐808(1)

Store operator was required to exercise ordinary care to see that awning was carefully and securely installed and to discover and remedy subsequently arising conditions of disrepair which reasonable inspections would disclose.

3. Damages ⇐132(3)

Award of $8,000 as general damages to 25 year old woman for injuries consisting of fracture of second cervical vertebra, possible compression fracture of sixth cervical vertebra, abnormal depression of skull, and a concussion, was not excessive, where woman still suffered from frequent headaches, severe pains in neck, and extreme nervousness after six years, and there was evidence that symptoms were likely to continue for a long period, and woman on number of occasions suffered from convulsive fits and fainting spells.

Hewitt & McBride and James R. McBride, Yuba City, for appellant.

Ralph W. Rutledge and Richard E. Patton, Colusa, for respondent.

GIBSON, Chief Justice.

This is an action for damages for personal injuries sustained when plaintiff was struck by a board which became detached from the awning in front of defendant's store. The trial court, sitting without a jury, awarded judgment to plaintiff, and defendant appeals, contending that the evidence is insufficient to establish liability and that the damages allowed are excessive.

The awning, which had been installed by defendant, extended across the entire front of her store and over the door of an adjoining barbershop. It consisted of a piece of canvas on a roller, and the outer edge of the canvas was fastened to a wooden board by nails and tacks. Metal pipes or side arms were attached to the board and extended to the side of the building, and the construction was such that the canvas supported the weight of the board and at least part of the weight of the side arms. The awning was raised and lowered by means of a crank inserted in a gear box connected to the roller. Before the awning could be lowered, it was necessary to roll up the canvas slightly in order to release a ratchet pin which held the roller in place.

The awning was being lowered by an employee of the barbershop when the wooden board fell and struck plaintiff, who was on the sidewalk and about to enter defendant's store. The barbershop employee did not have defendant's express permission to lower the awning on this occasion, but he had lowered it many times in the past, and defendant was aware that it had frequently been operated by persons other than herself, including some one in the barbershop. A crank of the type used in lowering the awning was kept in defendant's store, and another was kept in the barbershop.

Persons who saw the awning shortly after the accident testified that the wooden board and the two side arms were on the street, that the canvas was torn, that strips of canvas from three to four feet in length were hanging down from the roller, and that large pieces and strips were still attached to the board. One witness stated that the canvas had "pulled out from the nails" in some places. The awning had been installed by a man in the awning business about two and one-half years before the accident occurred. Defendant testified that she "always would look" at the awning to see if it was torn, but she did not recall any specific occasion when she had done so. She also said that she did not inspect the awning after it was attached to the building but left this to the awning man, and he testified that he did not inspect it until after the accident.

[1, 2] The evidence is clearly sufficient to support the judgment. Defendant was required to exercise ordinary care to see that the awning was carefully and securely

installed and to discover and remedy subsequently arising conditions of disrepair which reasonable inspections would disclose. See Mondine v. Sarlin, 11 Cal.2d 593, 597, 81 P.2d 903 [injury to business visitor]; Potter v. Empress Theatre Co., 91 Cal.App.2d 4, 12, 204 P.2d 120 [injury to passerby on sidewalk]; Rest., Torts, §§ 364, 365. The fact that the canvas tore apart, leaving long strips on the roller and other pieces on the board, warrants an inference that it had deteriorated and was in a dangerous and defective condition which could have been discovered upon a reasonable inspection, and the evidence shows that no such inspection was made.

Defendant contends, in effect, that the *proximate* cause of the accident was the negligence of the barbershop employee, for which she would not be liable. She relies on the testimony of the man who installed the awning, and who examined it after the accident, that the canvas was in good condition and that, in his opinion, it was torn loose from the board because the awning was rolled up too tightly. As we have seen, however, there was evidence from which it could be inferred that the canvas was not in good condition, and the court was not obliged to accept the opinion of the witness.

[3] Plaintiff suffered a fracture of the second cervical vertebra, a possible compression fracture of the sixth cervical vertebra, an abnormal depression of the skull, and a concussion. At the time she was injured she was about 25 years of age, and prior to the accident she had enjoyed good health. Since then, however, and including a period of six years before the case came to trial, she has been subject to frequent headaches, severe pains in her neck, and extreme nervousness. All of these symptoms have persisted and become aggravated with the passage of time, and there was testimony that they were likely to continue for a long period. On a number of occasions plaintiff has suffered from convulsive fits and fainting spells. Because of her condition she has been unable to undertake steady employment and has been forced to give up several jobs. The judgment awarded her the sum of $8,000 as general damages and $465.56 as special damages, and we cannot say that the sums allowed were excessive or unreasonable.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



38 Cal.2d 386

ESTRADA et al. v. ALVAREZ.

L. A. 21515.

Supreme Court of California, in Bank.

Feb. 8, 1952.

Mary Estrada and others, brought action against Ben Alvarez to rescind a conditional sales contract for a truck. The Superior Court, Los Angeles County, William B. McKesson, J., entered judgment for defendant and plaintiffs appealed. The Supreme Court, Schauer, J., held that third amended complaint stated cause of action on ground that contract was void for failure to comply with statute requiring contracts for conditional sale of motor vehicles to recite certain matters therein.

Affirmed in part and reversed in part.

Prior opinion 222 P.2d 671.

1. Sales ⇐481

Where second count of complaint sought recovery of moneys paid under contract of conditional sale of truck to plaintiffs on ground that contract was void for failure to comply with statute requiring that contract for conditional sale of motor vehicle recite certain matters therein and in third count plaintiffs purported to allege a common count for money had and received but also incorporated by reference all allegations of second cause of action, second and third causes of action were identical and third cause of action was not required to be separately discussed.

2. Sales ⇐461

Contract for conditional sale of a truck violated statutory requirements ap-

plicable to such contracts by failing to recite price at which seller would have sold for cash, amount of time price differential, or contract balance and provision that contract recite amount of buyer's down payment, and whether made in cash or represented by net agreed value of described property traded in, or both, together with a statement of respective amounts credited for cash and for such property, by incorrectly reciting that down payment was $3,500 in cash whereas plaintiffs' alleged down payment actually made was an automobile of reasonable value of $3,800. Civ. Code, § 2982.

3. Sales ⇐126(1)

Where plaintiffs alleged that they were induced to enter into conditional sales contract for purchase of truck by defendant's fraudulent representations but third amended complaint was filed at least twenty months after discovery of fraud and 15 months after discovery or right to rescind, and did not contain allegations that plaintiffs had restored to defendant everything of value which they received on condition that defendant do likewise, because of their inexcusable failure to give prompt notice of rescission plaintiffs lost their right to rescind. Civ.Code, § 1691.

4. Contracts ⇐270(1)

The right to rescind a contract is lost by delay because diligence is a condition of the right to rescind.

5. Election of Remedies ⇐7(1)

Where plaintiffs' original complaint attempted to state a cause of action for damages for breach of conditional sales contract and in pursuit of that contract remedy plaintiffs obtained an attachment, they were estopped to pursue tort remedy of damages for fraud.

Larwill & Wolfe and Charles W. Wolfe, all of Los Angeles, for appellant.

C. Paul Du Bois, Los Angeles, for respondent.

SCHAUER, Justice.

Plaintiffs appeal from a judgment for defendant entered after a demurrer to their third amended complaint "(For Rescission and Money Paid Under Void Contract)" had been sustained without leave to amend. The action grew out of a contract of conditional sale of a truck and trailer to plaintiffs, and defendant's repossession of the vehicles. Plaintiffs contend that they have stated three causes of action: (1—"For Rescission"): They were induced to enter into the contract by fraud of defendant, they paid certain sums on account of the contract, defendant has received back everything he delivered under the contract, and plaintiffs are entitled to restitution of the sums paid to and for the benefit of defendant or, in the alternative, to damages for fraud. (2—"For Money Paid Under Void Contract"): The contract does not comply with section 2982 of the Civil Code, which requires that a contract for the conditional sale of a motor vehicle must recite certain matters (whether the down payment was by cash or trade-in, etc.); therefore, under the holding of Carter v. Seaboard Finance Co. (1949), 33 Cal.2d 564, 574, 588, 203 P.2d 758, plaintiffs can recover the sums paid under the contract. (3) Plaintiffs purport to allege a common count for money had and received.

[1] We have concluded that the demurrer to the purported cause of action based on fraud was properly sustained, but that plaintiffs have stated a cause of action under the holding of the Carter case. The purported "third cause of action" uses the language of the common count for money had and received but it also incorporates by reference all the allegations of the "second cause of action." The second and third "causes of action" are, therefore, identical and the "third cause of action" need not be separately discussed. (See Orloff v. Metropolitan Trust Co. (1941), 17 Cal.2d 484, 489, 110 P.2d 396.)

[2] A copy of the contract is attached to the complaint as an exhibit and incorporated therein by reference. The contract is one of conditional sale as defined by section 2981 of the Civil Code (par. (a), subd. 1). Section 2982 sets forth the form and recitals required of such a contract. The contract here violates section 2982 in

the following respects: It does not recite the price at which the seller would have sold for cash (Civ.Code, § 2982, par. (a), subd. 1). It does not recite the amount of the "time price differential" or the "contract balance" (Civ.Code, § 2982, par. (a), subds. 7 and 8). Furthermore, subdivision 2 of paragraph (a) of section 2982 requires that the contract recite "The amount of the buyer's down payment, and whether made in cash or represented by the net agreed value of described property traded in, or both, together with a statement of the respective amounts credited for cash and for such property." The contract here incorrectly recites that the down payment was $3,500 "in cash," whereas, plaintiffs allege, the down payment which they actually made was a Buick automobile of the reasonable value of $3,800.

According to the Carter case, "The obvious purpose of the statute is to protect purchasers of motor vehicles against excessive charges by requiring full disclosure of all items of cost" (page 573 of 33 Cal.2d, page 764 of 203 P.2d); the form and requisites prescribed by the statute are mandatory; a contract which does not substantially conform thereto is unenforceable; and a buyer who has made payments to the seller under such a contract may recover them because "A member of the class for whose protection the statute was enacted is ordinarily not considered *in pari delicto* with those who violate the statute" (page 574 of 33 Cal.2d, page 765 of 203 P.2d).

The third amended complaint, now before us, is plaintiffs' fifth attempt to state a cause of action. (They previously filed a complaint, an amended complaint, an amendment to the amended complaint, and a second amended complaint.) The legal theory of a cause of action under the holding of the Carter case is suggested for the first time by the language of the third amended complaint, but the essential facts constituting that cause of action have been pleaded in each of the complaints filed by plaintiffs. The situation as to the purported fraud cause of action is somewhat different; in their successive complaints plaintiffs have not merely attempted to present different legal theories, but also have changed and added to some of the facts pleaded. As a result of these changes and additions, facts which are fatal to plaintiffs' claimed right to restitution have been brought out.

The third amended complaint contains the following allegations: Plaintiffs were induced to enter into the contract by fraudulent representations that the truck and trailer were in excellent condition and would not need repair for two years, that certain equipment "would be included with the vehicles in the purchase price," that defendant would assign to or obtain for plaintiffs a contract for hauling under which "plaintiffs would receive a net profit of not less than $1,500 per month from the operation and use of said vehicles." The contract was executed and plaintiffs received the vehicles on July 19, 1947. Thereafter the vehicles "had numerous mechanical breakdowns, due to * * * bad mechanical condition at the time of delivery to plaintiffs" and plaintiffs had to have many repairs made; for these repairs plaintiffs paid $4,289.82 (an amount equal to more than one-fourth the contract price). Plaintiffs discovered the fraud on March 1, 1948, more than seven months after receiving possession; on March 10, 1948, defendant took possession of the vehicles.

There is no explanation as to how plaintiffs could use the vehicles from July 19, 1947, until the end of February, 1948, and pay $4,289.82 for repairs, without discovering the falsity of material representations of defendant as to the condition of the vehicles. It should have been immediately obvious to plaintiffs that the promised equipment was not delivered with the vehicles and it should very soon have become apparent, if in truth it was the fact, that the vehicles were not in excellent mechanical condition. Nevertheless plaintiffs used the truck for more than seven months and during this period made payments thereon, although not exactly in the amounts and on the dates required by the contract.

But even if we assume that plaintiffs did not discover facts which should have put

them on notice of the asserted fraud until March 1, 1948, plaintiffs cannot recover upon the theory of rescission because they have not, and it is apparent from the allegations of the successive complaints that they cannot, allege facts showing compliance with section 1691 of the Civil Code. That section provides:

"Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

"1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,

"2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

We may assume that plaintiffs became aware of their right to rescind at least before August 2, 1948, for on that date an attorney filed on their behalf a complaint which alleges the fraud which, plaintiffs now claim, entitled them to recover on the theory of rescission. The first mention of rescission is in the second amended complaint, filed October 1, 1949; the filing of this complaint did not effect a unilateral rescission by plaintiffs; it contained no allegation that plaintiffs had restored, or offered to restore, benefits received under the contract. The third amended complaint was filed November 10, 1949, at least 20 months after discovery of the fraud and at least 15 months after discovery of the right to rescind. It prays "That the court by its decree rescind the conditional sales contract," but contains no averment that plaintiffs had ever rescinded, or given notice that they had rescinded, the contract. It does contain an allegation which appears to be sufficient compliance with paragraph 2 of section 1691 of the Civil Code; it alleges that the possession and use of the vehicles by plaintiffs under the contract "have been without any value whatsoever to these plaintiffs." However, this allegation is basically contradictory to the allegation of the original complaint that plaintiffs were damaged in the sum of $5,000 by defendant's retaking the vehicles and depriving plaintiffs of the use thereof.

[3, 4] Because of their inexcusable failure to give prompt notice of rescission plaintiffs lost their right to rescind. The right to rescind is lost by delay because diligence is "a condition of the right to rescind," and "There have been many cases in which delays for much shorter periods than a year have been held to be fatal to the right to rescind." (Clanton v. Clanton (1942), 52 Cal.App.2d 550, 556, 126 P.2d 639, and King v. Los Angeles County Fair Ass'n (1945), 70 Cal.App.2d 592, 596–597, 161 P.2d 468, which collect some of those cases; see also Campbell v. Title Guarantee, etc. Co. (1932), 121 Cal.App. 374, 377, 9 P.2d 264; Schneider v. Henley (1923), 61 Cal.App. 758, 763, 215 P. 1036; Brown v. Domestic Utilities Mfg. Co. (1916), 172 Cal. 733, 737, 159 P. 163; Ferguson v. Edgar (1918), 178 Cal. 17, 19, 171 P. 1061.)

[5] As previously stated, plaintiffs pray, in the alternative, for damages for fraud. Their original complaint attempted to state a cause of action for damages for breach of contract. (This attempt has been abandoned.) In pursuit of this contract remedy plaintiffs obtained an attachment. They are, therefore, estopped to pursue the tort remedy of damages for fraud. (Steiner v. Rowley (1950), 35 Cal. 2d 713, 720, 221 P.2d 9.)

For the reasons above stated, the judgment is affirmed as to the first cause of action; the judgment is reversed as to the second cause of action and the so-called "third cause of action" with directions to permit defendant to answer.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concur.

EDMONDS, Justice (concurring).

I join in the conclusion that the first count of the complaint fails to state a cause of action based upon a rescission at law, and that Estrada, by pursuing his

contract remedy to the detriment of the defendants, has waived his remedy in tort. In my opinion, the count also fails to state a cause of action in equity for a rescission. I, therefore, concur in the judgment.



38 Cal.2d 330

STATE RUBBISH COLLECTORS ASS'N v. SILIZNOFF.

L. A. 22158.

Supreme Court of California, in Bank.

Jan. 29, 1952.

Action by the State Rubbish Collectors Association, a corporation, against John W. Siliznoff upon notes wherein defendant filed a cross-complaint for cancellation of notes and damages for physical injuries allegedly resulting from emotional distress caused by threats. From a judgment of the Superior Court of Los Angeles County, William S. Baird, J., the plaintiff appeals. The Supreme Court, Traynor, J., held that a cause of action was stated in favor of defendant though threats allegedly related to action that might take place in the future that the award of damages as reduced by the trial court's remittitur with respect to exemplary damages was not excessive.

Judgment affirmed.

Prior opinion, see 235 P.2d 95.

1. Threats ⇦10

A cause of action is established when it is shown that one, in absence of any privilege, intentionally subjects another to mental suffering incident to serious threats to his physical well-being, whether or not the threats made are under such circumstances as to constitute a technical assault.

2. Threats ⇦10

Where member of mutual protective association of rubbish collectors making practice of settling controversies took collection account from another member in violation of association rules and gave it to defendant who made a financial settlement with wronged member after the association inspector threatened physical violence if he failed to settle, cause of action was established against association for defendant's alleged physical injuries resulting from emotional distress though threats made all related to future actions and neither the inspector nor directors of the association threatened immediate physical harm to the defendant.

3. Torts ⇦15

Recovery is allowed where physical injury results from intentionally subjecting plaintiff to serious mental distress.

4. Damages ⇦48

If a cause of action is otherwise established, damages may be given for mental suffering naturally ensuing from the acts complained of.

5. Damages ⇦48

Administrative difficulties do not justify denial of relief for serious invasion of mental and emotional tranquillity.

6. Threats ⇦10

In cross-action against protective association of rubbish collectors for physical injuries allegedly resulting from emotional distress caused by association inspector's threats to force defendant to make a financial settlement with an association member from whom defendant had taken a collection account, admitting evidence of threats made by the inspector and the directors of the association against other non-members to compel them to relinquish accounts they had solicited from customers of members of the association was proper.

7. Bills and Notes ⇦503

In cross action against protective association of rubbish collectors for physical injuries allegedly resulting from emotional distress caused by association inspector's threats to force defendant to make financial settlement with association member from whom defendant had taken a collection account, evidence that rubbish accounts including the account involved, constituted property rights and had definite property values, to prove that there was consideration for note signed by defendant was properly excluded where defendant had secured the account not through the member but by soliciting it from the company involved.

8. Trade-Marks and Trade-Names and Unfair Competition ⇐77

Defendant had the right to compete for the business of collecting rubbish from customers in the open market and was under no obligation to pay a member of a rubbish collecting association for the privilege.

9. Associations ⇐13

By-laws of a rubbish collecting association providing for arbitration between members was not applicable to a dispute between the defendant and the association where defendant did not join the association until after the dispute over a rubbish account was purportedly settled and there was no evidence that he agreed before that time to submit the controversy to the association's board of directors for settlement. Code Civ.Proc. § 1280 et seq.

10. Appeal and Error ⇐216(2)

If plaintiff desired more specific instructions on the law of the case with respect to the elements of defendant's cause of action, it should have requested them and where it did not do so it could not complain on appeal. Code Civ.Proc. § 607a.

11. Appeal and Error ⇐207

Where no objections or assignments of misconduct were made at trial to alleged objectionable argument of counsel for defendant and the court was not asked to instruct the jury to disregard the challenged remarks, no complaint could be made on appeal.

12. Trial ⇐328

A judgment against an association was not required to be set aside because the verdict was silent as to the agent of the association who was allegedly the principal tort feasor, where there was nothing to indicate that the jury's failure to find with respect to the agent was intended as a verdict in his favor and the proceedings indicated that its failure to do so was due to inadvertence.

13. Appeal and Error ⇐1004(3)

Question of excessiveness of damages is addressed primarily to the discretion of the trial court and an award that stands approved by that court will not be disturbed unless it appears that jury was influenced by passion or prejudice.

14. Threats ⇐10

In cross-action for physical injuries allegedly resulting from emotional distress caused by threats, verdict of $1250 compensatory damages and $4000 exemplary damages as reduced from an award of $7500 was not excessive.

John C. Stevenson and Lionel Richman, Los Angeles, for appellant.

Borah & Borah and Peter T. Rice, all of Los Angeles, for respondent.

TRAYNOR, Justice.

On February 1, 1948, Peter Kobzeff signed a contract with the Acme Brewing Company to collect rubbish from the latter's brewery. Kobzeff had been in the rubbish business for several years and was able to secure the contract because Acme was dissatisfied with the service then being provided by another collector, one Abramoff. Although Kobzeff signed the contract, it was understood that the work should be done by John Siliznoff, Kobzeff's son-in-law, whom Kobzeff wished to assist in establishing a rubbish collection business.

Both Kobzeff and Abramoff were members of the plaintiff State Rubbish Collectors Association, but Siliznoff was not. The by-laws of the association provided that one member should not take an account from another member without paying for it. Usual prices ranged from five to ten times the monthly rate paid by the customer, and disputes were referred to the board of directors for settlement. After Abramoff lost the Acme account he complained to the association, and Kobzeff was called upon to settle the matter. Kobzeff and Siliznoff took the position that the Acme account belonged to Siliznoff, and that he was under no obligation to pay for it. After attending several meetings of plaintiff's board of directors Siliznoff finally agreed, however, to pay Abramoff $1,850 for the Acme account and join the association. The agreement provided that he should pay $500 in thirty days and $75 per month thereafter until the whole sum agreed upon was paid. Payments were to be made

through the association, and Siliznoff executed a series of promissory notes totaling $1,850. None of these notes was paid, and in 1949 plaintiff association brought this action to collect the notes then payable. Defendant cross-complained and asked that the notes be cancelled because of duress and want of consideration. In addition he sought general and exemplary damages because of assaults made by plaintiff and its agents to compel him to join the association and pay Abramoff for the Acme account. The jury returned a verdict against plaintiff and for defendant on the complaint and for defendant on his cross-complaint. It awarded him $1,250 general and special damages and $7,500 exemplary damages. The trial court denied a motion for a new trial on the condition that defendant consent to a reduction of the exemplary damages to $4,000. Defendant filed the required consent, and plaintiff has appealed from the judgment.

Plaintiff's primary contention is that the evidence is insufficient to support the judgment. Defendant testified that shortly after he secured the Acme account, the president of the association and its inspector, John Andikian, called on him and Kobzeff. They suggested that either a settlement be made with Abramoff or that the job be dropped, and requested Kobzeff and defendant to attend a meeting of the association. At this meeting defendant was told that the association "ran all the rubbish from that office, all the rubbish hauling," and that if he did not pay for the job they would take it away from him. " 'We would take it away, even if we had to haul for nothing.' * * * [O]ne of them mentioned that I had better pay up, or else." Thereafter, on the day when defendant finally agreed to pay for the account, Andikian visited defendant at the Rainier Brewing Company, where he was collecting rubbish. Andikian told defendant that " 'We will give you up till tonight to get down to the board meeting and make some kind of arrangements or agreements about the Acme Brewery, or otherwise we are going to beat you up.' * * * He says he either would hire somebody or do it himself. And I says, 'Well, what would they do to me?' He says, well, they would physically beat me up first, cut up the truck tires or burn the truck, or otherwise put me out of business completely. He said if I didn't appear at that meeting and make some kind of an agreement that they would do that, but he says up to then they would let me alone, but if I walked out of that meeting that night they would beat me up for sure." Defendant attended the meeting and protested that he owed nothing for the Acme account and in any event could not pay the amount demanded. He was again told by the president of the association that "that table right there [the board of directors] ran all the rubbish collecting in Los Angeles and if there was any routes to be gotten that they would get them and distribute them among their members * * *." After two hours of further discussion defendant agreed to join the association and pay for the Acme account. He promised to return the next day and sign the necessary papers. He testified that the only reason "they let me go home, is that I promised that I would sign the notes the very next morning." The president "made me promise on my honor and everything else, and I was scared, and I knew I had to come back, so I believed he knew I was scared and that I would come back. That's the only reason they let me go home." Defendant also testified that because of the fright he suffered during his dispute with the association he became ill and vomited several times and had to remain away from work for a period of several days.

[1, 2] Plaintiff contends that the evidence does not establish an assault against defendant because the threats made all related to action that might take place in the future; that neither Andikian nor members of the board of directors threatened immediate physical harm to defendant. See, Lowry v. Standard Oil Co., 63 Cal.App. 2d 1, 6–7, 146 P.2d 57; Restatement, Torts, § 29. We have concluded, however, that a cause of action is established when it is shown that one, in the absence of any privilege, intentionally subjects another to the mental suffering incident to serious threats to his physical well-being, whether or not the threats are made under such

circumstances as to constitute a technical assault.

In the past it has frequently been stated that the interest in emotional and mental tranquillity is not one that the law will protect from invasion in its own right. Newman v. Smith, 77 Cal. 22, 27, 18 P. 791; Easton v. United Trade School Contracting Co., 173 Cal. 199, 204, 159 P. 597, L.R.A.1917A, 394; Cook v. Maier, 33 Cal.App. 2d 581, 584, 92 P.2d 434; see, 52 Am.Jur., Torts, § 45, p. 388, and cases cited; Bohlen, Right to Recover for Injury Resulting from Negligence Without Impact, 41 Am.L.Reg., N.S., 141, 142–143. As late as 1934 the Restatement of Torts took the position that "The interest in mental and emotional tranquillity and, therefore, in freedom from mental and emotional disturbance is not, as a thing in itself, regarded as of sufficient importance to require others to refrain from conduct intended or recognizably likely to cause such a disturbance." Restatement, Torts, § 46, comment c. The Restatement explained the rule allowing recovery for the mere apprehension of bodily harm in traditional assault cases as an historical anomaly, § 24, comment c, and the rule allowing recovery for insulting conduct by an employee of a common carrier as justified by the necessity of securing for the public comfortable as well as safe service. § 48, comment c.

The Restatement recognized, however, that in many cases mental distress could be so intense that it could reasonably be foreseen that illness or other bodily harm might result. If the defendant intentionally subjected the plaintiff to such distress and bodily harm resulted, the defendant would be liable for negligently causing the plaintiff bodily harm. Restatement, Torts, §§ 306, 312. Under this theory the cause of action was not founded on a right to be free from intentional interference with mental tranquillity, but on the right to be free from negligent interference with physical well-being. A defendant who intentionally subjected another to mental distress without intending to cause bodily harm would nevertheless be liable for resulting bodily harm if he should have foreseen that the mental distress might cause such harm.

[3] The California cases have been in accord with the Restatement in allowing recovery where physical injury resulted from intentionally subjecting the plaintiff to serious mental distress. Emden v. Vitz, 88 Cal.App.2d 313, 319, 198 P.2d 696; Bowden v. Spiegel, Inc., 96 Cal.App.2d 793, 794–795, 216 P.2d 571; Richardson v. Pridmore, 97 Cal.App.2d 124, 129–130, 217 P.2d 113, 17 A.L.R.2d 929.

The view has been forcefully advocated that the law should protect emotional and mental tranquillity as such against serious and intentional invasions, see, Goodrich, Emotional Disturbance as Legal Damages, 20 Mich.L.Rev. 497, 508–513; Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv.L.Rev. 1033, 1064–1067; Wade, Tort Liability for Abusive and Insulting Language, 4 Vanderbilt L. Rev. 63, 81–82, and there is a growing body of case law supporting this position. See, e. g., Barnett v. Collection Service Co., 214 Iowa 1303, 1312, 242 N.W. 25; Richardson v. Pridmore, 97 Cal.App.2d 124, 129–130, 217 P.2d 113, 17 A.L.R.2d 929; Prosser, Torts, § 11, p. 54 et seq., and cases cited; 15 A.L.R.2d 108. In recognition of this development the American Law Institute amended section 46 of the Restatement of Torts in 1947 to provide: "One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it."

In explanation it stated that "The interest in freedom from severe emotional distress is regarded as of sufficient importance to require others to refrain from conduct intended to invade it. Such conduct is tortious. The injury suffered by the one whose interest is invaded is frequently far more serious to him than certain tortious invasions of the interest in bodily integrity and other legally protected interests. In the absence of a privilege, the actor's conduct has no social utility; indeed it is antisocial. No reason or policy requires such an actor to be protected from the liability which usually attaches to the wilful wrongdoer whose efforts are successful." Re-

statement of the Law, 1948 Supplement, Torts, § 46, comment d.

[4] There are persuasive arguments and analogies that support the recognition of a right to be free from serious, intentional, and unprivileged invasions of mental and emotional tranquillity. If a cause of action is otherwise established, it is settled that damages may be given for mental suffering naturally ensuing from the acts complained of, Deevy v. Tassi, 21 Cal.2d 109, 120, 130 P.2d 389; Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 513, 111 P. 534, 31 L.R.A.,N.S., 559, and in the case of many torts, such as assault, battery, false imprisonment, and defamation, mental suffering will frequently constitute the principal element of damages. See, Deevy v. Tassi, supra; Restatement, Torts, § 905, comment c. In cases where mental suffering constitutes a major element of damages it is anomalous to deny recovery because the defendant's intentional misconduct fell short of producing some physical injury.

It may be contended that to allow recovery in the absence of physical injury will open the door to unfounded claims and a flood of litigation, and that the requirement that there be physical injury is necessary to insure that serious mental suffering actually occurred. The jury is ordinarily in a better position, however, to determine whether outrageous conduct results in mental distress than whether that distress in turn results in physical injury. From their own experience jurors are aware of the extent and character of the disagreeable emotions that may result from the defendant's conduct, but a difficult medical question is presented when it must be determined if emotional distress resulted in physical injury. See, Smith, Relation of Emotions to Injury and Disease, 30 Va. L.Rev. 193, 303–306. Greater proof that mental suffering occurred is found in the defendant's conduct designed to bring it about than in physical injury that may or may not have resulted therefrom.

[5] That administrative difficulties do not justify the denial of relief for serious invasions of mental and emotional tranquillity is demonstrated by the cases recognizing the right of privacy. Recognition of that right protects mental tranquillity from invasion by unwarranted and undesired publicity. Melvin v. Reid, 112 Cal.App. 285, 289, 297 P. 91; Restatement, Torts, § 867, comments c and d. As in the case of the protection of mental tranquillity from other forms of invasion, difficult problems in determining the kind and extent of invasions that are sufficiently serious to be actionable are presented. Also the public interest in the free dissemination of news must be considered. Nevertheless courts have concluded that the problems presented are not so insuperable that they warrant the denial of relief altogether.

In the present case plaintiff caused defendant to suffer extreme fright. By intentionally producing such fright it endeavored to compel him either to give up the Acme account or pay for it, and it had no right or privilege to adopt such coercive methods in competing for business. In these circumstances liability is clear.

[6] Plaintiff contends that the trial court erred in admitting evidence of threats made by Andikian and members of the board of directors in 1950 against other non-members of the association to compel them to relinquish accounts they had solicited from customers of members of the association. This evidence was admitted to show the methods adopted by the association to protect its members from competition by non-members. It was relevant and admissible for that purpose. Evans v. Gibson, 220 Cal. 476, 482, 31 P.2d 389; see, People v. Coefield, 37 Cal.2d 865, 869, 236 P.2d 570; 2 Wigmore on Evidence [3rd ed.] §§ 304, 371 pp. 202, 300.

[7, 8] Plaintiff contends that the trial court erred in excluding evidence that rubbish accounts, including the Acme account, constitute property rights and have definite property values in the rubbish collecting business. It contends that because it was not allowed to prove the value of rubbish accounts it could not prove that there was consideration for the notes signed by defendant. There would be merit in plaintiff's contention if defendant had given the notes in exchange for an assignment of

the Acme contract or in connection with the purchase of a going business. He secured the account, however, not through Abramoff, but by soliciting it from Acme. He had a right to compete for this business in the open market and was under no obligation to pay Abramoff for it. Continental Car-Na-Var Corp. v. Moseley, 24 Cal.2d 104, 110, 148 P.2d 9. Accordingly, the trial court correctly concluded that evidence of its value was immaterial.

[9] Plaintiff contends that the trial court erred in instructing the jury that no legal arbitration had taken place between the parties. It points out that the by-laws provide for arbitration between the members and contends that its dispute with defendant was arbitrated under these provisions. Defendant did not join the association, however, until after the dispute over the Acme account was purportedly settled, and there is no evidence that he agreed before that time to submit the controversy to the association's board of directors for settlement. See, Code Civ.Proc. § 1280 et seq.

[10] The trial court instructed the jury that "an unlawful intent by one to inflict injury upon the person of another is that intent to act which wilfully disregards the right of a person to live without being placed in fear of personal safety." Because specific instructions were not given covering all the elements of defendant's cause of action, plaintiff contends that this specific instruction on intent allowed the jury to return a verdict for defendant based on a finding of an unlawful intent alone. The instruction does not, however, so inform the jury, and had plaintiff desired more specific instructions on the law of the case, it should have requested them. Code Civ.Proc. § 607a; Hardy v. Schirmer, 163 Cal. 272, 275, 124 P. 993; Perry v. City of San Diego, 80 Cal.App.2d 166, 171–172, 181 P. 2d 98.

[11] Plaintiff contends that counsel for defendant was guilty of prejudicial misconduct by making an inflammatory closing argument to the jury. No objections or assignments of misconduct were made at the trial, and the court was not asked to instruct the jury to disregard the challenged remarks. It is therefore too late to raise the point on appeal. Cope v. Davison, 30 Cal.2d 193, 202, 180 P.2d 873, 171 A.L.R. 667; Aydlott v. Key System Transit Co., 104 Cal.App 621, 628, 286 P. 456.

[12] Plaintiff contends that the judgment against it cannot stand because the jury exonerated its agent Andikian, who was the principal tort feasor. The jury did not exonerate Andikian, however; the verdict was merely silent as to him. There is nothing in the pleadings or the instructions that indicates that the failure to find with respect to Andikian was intended as a verdict in his favor, and the transcript of the proceedings on the motion for new trial indicates that it was an inadvertence on the part of the jury caused by the failure to provide it with a form for a verdict against him. Under these circumstances plaintiff cannot attack the judgment against it because of the failure of the jury to return a verdict against its agent. Brokaw v. Black-Foxe Military Institute, 37 Cal.2d 274, 279–280, 231 P.2d 816, and cases cited.

[13, 14] Plaintiff contends finally that the damages were excessive. The question of excessiveness is addressed primarily to the discretion of the trial court, and an award that stands approved by that court will not be disturbed on appeal unless it appears that the jury was influenced by passion or prejudice. Deevy v. Tassi, 21 Cal.2d 109, 120–121, 130 P.2d 389. With respect to the general damages the trial court concluded that the jury was not so influenced, and on the record before us we cannot say that it was. The excessiveness, if any, of the award of exemplary damages was cured by the trial court's reduction of those damages to $4,000. See, Deevy v. Tassi, supra, 21 Cal.2d 109, 121, 130 P.2d 389; Finney v. Lockhart, 35 Cal. 2d 161, 164, 217 P.2d 19; Parrott v. Bank of America Nat. Trust & Savings Ass'n, 97 Cal.App.2d 14, 25, 217 P.2d 89.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

LEIPERT et al. v. HONOLD et al. *

L. A. 21850.

Supreme Court of California, in Bank.

Jan. 29, 1952.

Hearing Granted Feb. 28, 1952.

Denny Leipert, a minor, by and through Charles J. Leipert, his guardian ad litem, and Charles J. Leipert brought action against Bernard M. Honold and George B. Honold, doing business as Honold Bros. Mortuary, and Woodrow John Honold to recover for injuries sustained by the minor in automobile collision and for medical expenses. A judgment for Charles J. Leipert and an order granting the minor a new trial on issue of damages only were entered by the Superior Court of Orange County, Franklin G. West, J., and defendants appealed. The Supreme Court, Traynor, J., held that Superior Court abused its discretion in granting limited new trial.

Order reversed, and judgment affirmed.

Carter, J., dissented.

Prior opinion 224 P.2d 381.

1. Appeal and Error ⇐1178(6)
New Trial ⇐9

A trial court or an appellate court has power to order a new trial on fewer than all issues. Code Civ.Proc. §§ 657, 662.

2. New Trial ⇐9

The purpose of limited retrials is to expedite the administration of justice by avoiding costly repetition. Code Civ.Proc. §§ 657, 662.

3. New Trial ⇐9

Limited retrials should be granted only if it is clear that no injustice will result. Code Civ.Proc. §§ 657, 662.

4. New Trial ⇐9

The decision on the question of a limited new trial rests in the discretion of the trial judge. Code Civ.Proc. §§ 657, 662.

5. Appeal and Error ⇐933(1)

It is presumed that trial judge, in passing on motion for limited new trial, has weighed the evidence and the possibility of prejudice. Code Civ.Proc. §§ 657, 662.

6. Appeal and Error ⇐977(1)

The decision of the trial judge in passing on question of granting a limited new trial will not be reversed on appeal unless an abuse of discretion is shown. Code Civ.Proc. §§ 657, 662.

7. New Trial ⇐9

There is an abuse of discretion in granting a limited new trial on question of damages, where record discloses that issue of liability is close, and other circumstances indicate that verdict was probably the result of prejudice, sympathy, or compromise, or that for some other reason the liability issue was not actually determined. Code Civ.Proc. §§ 657, 662.

8. New Trial ⇐9

Where there was no doubt that damages awarded plaintiff were inadequate, and issue of liability was very close, and record showed that jury had great difficulty with question of liability and indicated that verdict was probably result of compromise, it was an abuse of discretion to grant plaintiff a new trial on question only of damages. Code Civ.Proc. §§ 657, 662.

9. Appeal and Error ⇐1075

Where defendants, though appealing from judgment for plaintiff, limited arguments to appeal from order granting one of the plaintiffs a limited new trial on question of damages, and defendants sought reversal of order granting limited new trial, and reversal of the judgment only if that was necessary to preclude a limited new trial, and they expressly stated that if order was reversed, they wished judgment to stand, and plaintiffs expressly stated that they wished judgment to stand if limited new trial might not be had, and they did not appeal from judgment and did not move for complete new trial in event limited new trial should be denied, all parties would be deemed to have waived deliberately any right to reversal of judgment and judgment would be affirmed by Supreme Court. Code Civ.Proc. §§ 657, 662.

Forgy, Reinhaus & Forgy, Arthur M. Bradley and S. M. Reinhaus all of Santa Ana, for appellants.

Harvey, Rimel & Johnston and F. D. Johnston, all of Santa Ana, for respondents.

* Subsequent opinion 247 P.2d 324.

TRAYNOR, Justice.

On March 13, 1948, at about 11 p. m. two automobiles loaded with teen-age children were traveling west along U. S. Highway 101 near Newport Beach. The one in front was driven by Clifton Edwards. The other one, in which plaintiff Denny Leipert, 15, was riding, was driven by Phillip Duff, 18, whose parents owned it. It was a dark night, and it had sprinkled about an hour and a half before the accident. A defect in the steering apparatus caused Duff to lose control of the car, so that it swerved to the left across the highway. It was struck by a car driven in the opposite direction by defendant Woodrow John Honold. Plaintiff Denny Leipert and one other occupant of the Duff car were injured; the other five children, including the driver, were killed. Honold and his only passenger, Eleanor Brady, who is now his wife, were injured.

Denny brought this action through Charles J. Leipert, his father and guardian ad litem, alleging negligence on the part of Woodrow John Honold. Denny's father also sued on his own behalf for reimbursement of medical expenses. Bernard M. Honold and George B. Honold, doing business as Honold Brothers Mortuary, were joined as defendants; they owned the car driven by Woodrow John Honold and had consented to his using it on this occasion. The case was consolidated for trial with four wrongful death actions brought against the same defendants by the parents of the children who were killed.

The evidence was sharply conflicting. Denny testified that the Duff car was travelling about 40 miles per hour, that the driver said there was something wrong with the steering apparatus; that shortly thereafter "the wheels started acting funny, they started shimmying;" that "the car jerked across the road, and we came to a stop;" that "Our front wheels were away off the road and we were just about off the road;" that the driver "put on the brakes quick;" that the driver "opened his door and put one foot out and looked over the top of the hood of the car;" that the driver "got out and then got back in again, and then he said, 'Some of you kids get out of the car,' so he was going to try and back it up on the side of the road and see what was wrong, and he told me to 'get out' and I got the door open about six inches and I guess that's when it happened;" and that he was knocked unconscious. He testified that he estimated that the Duff car had stopped about 13 seconds before it was struck. In answer to the question how he arrived at this figure he replied: "Well, I went down to the scene of the accident and I had somebody get behind me with a watch, and I went through the actions that the car did when it stopped, and what we did, and then I told the person in back of me, 'That was about when the car hit,' and it was about thirteen seconds." He testified that just before the Duff car got out of control, the Edwards car was from 20 to 35 yards ahead, that the brakes were not applied when the car started shimmying; that as it went across the highway "it didn't skid, it just tipped and was making a squealing sound" that "it sounded like when you go around a corner too fast with a car, it will sort of squeal." He testified that he did not see the Honold car before the collision.

Defendant Woodrow John Honold testified that he first saw the Edwards and Duff cars when they were about 200 to 250 yards away; that he passed the first car and at the same moment the other car swung over; that it first came across at an angle and then sharply turned across the road; that he was 100 to 125 feet away from it when it started across; that its lights flashed in his eyes; that it was moving rapidly; that he was traveling from 40 to 50 miles an hour; that as the Duff car turned in front of him he tightened his grip on the wheel and turned to the right; that he did not put on his brakes; and that the other car was moving when the two cars collided.

The only other eye-witness to the accident was Jim Oakes, a boy who was riding in the rear seat of the Edwards car. He testified that he looked back and saw the Honold car hit the Duff car; that "the Duff car was at right angles with the road, as I looked back, I just got a glimpse of the lights of the Honold car on it, and then they hit and it kind of lifted the car up"; and that when he looked back the Edwards car was about 900

feet from the point of collision. No one in the Edwards car heard the collision.

A sergeant of the Newport Beach Police Department and an officer of the California Highway Patrol testified that at no point in the vicinity of either car were there any skid marks.

Lieutenant Smith, a traffic officer, was called as an expert by plaintiffs. On direct examination he was asked if he had formed an opinion as to whether or not the Duff car "was moving at the moment of impact." He replied that he had, but defendants' objection to his giving his opinion was sustained. He gave his opinion that the Honold car was traveling in excess of 45 miles an hour, but defendants' objection to his giving his opinion as to the "minimum or maximum" speed of the Duff car was sustained. He gave his opinion on cross-examination that a car traveling 40 to 45 miles an hour under road conditions like those in the present case, could not be stopped within a hundred feet without the application of brakes.

The jury returned verdicts in favor of the plaintiffs in all five actions. In the Leipert case, Denny was awarded damages of $500 against all three defendants jointly and, in addition, $700 against Woodrow John Honold alone; Denny's father was awarded $1,000 against all three defendants jointly.

Defendants' motion for a new trial was denied. The Leiperts' motion for a new trial on the issue of damages only was granted as to Denny and denied as to his father. The trial court's order stated that "the said motion for a new trial is granted upon the ground of insufficiency of the evidence to justify the verdict in that the amount awarded by the jury is not in conformity with the evidence adduced at the trial and is inadequate though not so far inadequate as to indicate passion or prejudice." Defendants have appealed from the judgment and from the order granting Denny a partial new trial. No appeals were taken in the other four actions.

[1] The power of a trial or appellate court to order a new trial on fewer than all the issues is generally recognized, see 66 C.J.S., New Trial, § 11, p. 87; 39 Am. Jur., New Trial, § 21, p. 44; 98 A.L.R. 941, and is authorized by statute in this state. Code Civ.Proc. §§ 657, 662.

[2, 3] The purpose of limited retrials is to expedite the administration of justice by avoiding costly repetition. Such retrials should be granted, however, only if it is clear that no injustice will result. Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 499, 51 S.Ct. 513, 75 L.Ed. 1188; see 66 C.J.S., New Trial, § 11, p. 88. Some courts have expressed reluctance to limit new trials in negligence cases, suggesting that only rarely is such a step proper. Simmons v. Fish, 210 Mass. 563, 570, 97 N.E. 102; Murray v. Krenz, 94 Conn. 503, 508, 109 A. 859. Even in California, where new trials limited to the issue of damages have frequently been approved in personal injury and wrongful death actions, it has been held that a request for such a trial should be considered with the utmost caution, Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 11, 175 P. 26, 177 P. 845; Bencich v. Market Street Ry., 20 Cal.App. 2d 518, 528, 67 P.2d 398, and that any doubts should be resolved in favor of granting a complete new trial. Keogh v. Maulding, 52 Cal.App.2d 17, 21, 125 P.2d 858.

[4–6] The decision on limiting the new trial appropriately rests in the discretion of the trial judge. It is presumed that in passing upon the motion he has weighed the evidence and the possibility of prejudice to the defendant. His decision will not be reversed on appeal unless an abuse of discretion is shown. Tumelty v. Peerless Stages, 96 Cal.App. 530, 532, 274 P. 430; Amore v. Di Resta, 125 Cal.App. 410, 413, 13 P.2d 986; Sanford v. Wilcox, 13 Cal. App.2d 193, 194, 56 P.2d 548; Tripcevich v. Compton, 25 Cal.App.2d 188, 191, 77 P.2d 285; Hoffart v. Southern Pacific Co., 33 Cal.App.2d 591, 602, 92 P.2d 436; Cox v. Tyrone Power Enterprises Inc., 49 Cal.App. 2d 383, 390, 121 P.2d 829; Adams v. Hildebrand, 51 Cal.App.2d 117, 118, 124 P.2d 80; Hughes v. Schwartz, 51 Cal.App.2d 362, 364–365, 124 P.2d 886; Tornell v. Munson, 80 Cal.App.2d 123, 124, 181 P.2d 112.

[7] Such an abuse is shown when the damages are inadequate, the record discloses that the issue of liability is close, and other circumstances indicate that the verdict was probably the result of prejudice, sympathy, or compromise or that for some other reason the liability issue has not actually been determined.

There can be no doubt that the damages awarded plaintiff Denny Leipert were inadequate. Forty or fifty stiches were required to close the lacerations of his scalp and forehead, which will remain partially scarred. His pelvis was broken in two places; one fracture was complete. There was a definite shock of the brain and nervous system controlling the eyes. He also suffered a rupture of the bladder, which necessitated an abdominal operation that left a considerable amount of scar tissue in and around the bladder. He was confined in the hospital for about three weeks and was then removed to his home, where he remained in bed another six or seven weeks. Several weeks after he returned home he suffered a low-grade bladder infection, which was probably a result of his injuries. Approximately five months elapsed from the date of the accident before he was able to go about his usual activities.

It is also readily apparent from the record that the issue of liability was very close. The Duff car and the Honold car were approaching each other on a curved-four-lane highway on a dark night. When the Duff car got out of control and crossed to the wrong side, the driver of the other car was confronted with a situation demanding rapid reactions. Whether the Duff car was moving into the path of the other car when it was struck or whether it had stopped long enough before it was struck to enable a reasonably careful operator of the other car to avoid a collision was the crucial question in the case. The testimony that the Duff car was stopped for 13 seconds before it was struck was that of a 15-year-old boy who was knocked unconscious at the time and who was later timed in going "through the actions that the car did when it stopped and what we did." The testimony of Jim Oakes, the boy in the Edwards car, also presented the jury with a close question of fact. Plaintiff contends "If the Edwards automobile was traveling at 40 miles per hour it was covering 58.7 feet per second and if immediately before the steering mechanism of the Duff automobile broke, the two vehicles were only a few car lengths apart, approximately 15 seconds would have elapsed between the time when the Edwards automobile passed the point where the collision subsequently occurred and arrived at the point from which Jim Oakes saw the collision occur." Defendants argue that this contention does not take into consideration the speed of the Duff car, the fact that the plaintiff testified that "there were no brakes on in the Duff car" or the fact that there were no skid marks in the vicinity of either car. They conclude that if plaintiffs' "version of the collision were true the Duff car coasted without the application of brakes and came to a stop by the loss of momentum. This would mean that the Duff car starting at the speed of at least forty miles per hour gradually lost momentum and came to a stop. The difficulty with the calculations is that they consider only the Edwards car. It is impossible to accept the conclusion that, without the application of brakes or skidmarks on the highway, the Duff car, which had been travelling at least 40 miles per hour, suddenly stopped and remained stopped for at least thirteen seconds, while the Edwards car travelled nine hundred feet west."

The record shows that the jury had great difficulty with these questions and indicates that its verdict was probably the result of a compromise.

The jury went out at 11:30 a. m. At 4 p. m. it returned and asked to hear that part of the testimony of Lieutenant Smith relating to the crucial question whether the Duff car was moving or stopped when the collision occurred. His testimony on direct examination was read to the jury, but his testimony on cross-examination was not. Counsel stipulated that it was an accurate statement of his testimony. Thereafter two jurors insisted that Lieutenant Smith had given other testimony bearing on the question whether the Duff car was moving or stopped at the time of impact. The court

said, "The testimony on that point has been read to you" and sent the jury out. It is apparent that the testimony of the witness that was not read to the jury supports the inference that the Duff car was moving at the instant of impact, whereas his testimony that was read supports a contrary inference. Defense counsel did not request the reading of the additional testimony or make any objection or comment. See, Duncan v. J. H. Corder & Son, 18 Cal.App.2d 77, 84, 62 P.2d 1387. The important consideration, however, is not whether the court committed error in not having the testimony on cross-examination read to the jury, but the fact that the interest of the two jurors in having that testimony read indicates that the jury was having great difficulty in finding any negligence on the part of Woodrow John Honold.

At 9:17 p. m. the jury returned and announced that it had reached its verdicts. In each of the wrongful death cases the verdicts awarded $5,000 against all three defendants jointly and an additional $300 against Woodrow John Honold. In the Leipert case the verdict awarded Denny Leipert $4,000 against all three defendants jointly and an additional $300 against Woodrow John Honold, and awarded Charles J. Leipert $1,000 against all three defendants. The award against the owners of the Honold car exceeded the maximum permitted by Vehicle Code, section 402. The jury was polled on the verdicts, more than three answering that they were not their verdicts. In the Leipert case five jurors answered "No" and one juror answered "half yes, and half no." The court announced that the verdicts were incomplete and then read section 402 of the Vehicle Code and the rest of an instruction explaining how the section was to be applied. The jury returned to the jury room and was again brought in at 11:30 p. m., when the foreman announced that they could not reach a verdict. Upon inquiry by the court each juror expressed the opinion that they would be unable to agree. After considerable discussion the jury was again sent out. At 12:33 a. m. the jury returned with a verdict in this action awarding Denny Leipert $500 against all three defendants jointly, and an additional $700 against Woodrow John Honold. The jury was again polled and it stood nine to three in favor of the verdict.

The jury was out 13 hours, including the time out for lunch and dinner. After it was out four and a half hours it asked to have material evidence on the issue of liability re-read. Five hours later it returned a verdict that was repudiated by six of the jurors. Three and one half hours later it brought in a nine-to-three verdict awarding $1200 instead of the $4300 provided in the earlier proposed verdict.

The long deliberation could not have been caused by any dispute in regard to the nature and extent of Denny's injuries. After his parents testified with regard to expenses incurred in his treatment, no questions were asked on cross-examination. No evidence was introduced by defendants to contradict any of the testimony of Denny or his father in regard to the nature or treatment of Denny's injuries. Any difficulty must have arisen from a cause other than the nature and extent of his injuries. It is true that the jury was confused on the apportionment of damages under Vehicle Code section 402, but it is also true that it had great difficulty in determining whether or not defendant Woodrow John Honold was negligent and that only after prolonged disagreement was a 9–3 verdict returned awarding grossly inadequate damages.

[8] We have concluded that the record in this case so strongly indicates that the inadequate verdict for Denny Leipert was the result of compromise that it would be unjust to defendants to have a new trial limited to the issue of damages.

[9] Although defendants have appealed from the judgment, they have limited their arguments to the appeal from the order granting Denny Leipert a limited new trial. They seek a reversal of the order granting a limited new trial, and a reversal of the judgment only if that is necessary to preclude a limited new trial. Moreover, they have expressly stated that if the order is reversed they wish the judgment to stand. Plaintiffs also have expressly stated that they wish the judgment to stand if a limited

new trial may not be had. They did not appeal from the judgment and did not move for a complete new trial in the event a limited new trial should be denied; they have vigorously urged that they intended that "the action of the trial court be restricted to either granting or denying the motion as made" and that neither the trial court nor the appellate courts have jurisdiction to order a complete new trial on the basis of that motion. It is clear, therefore, that all parties have deliberately waived any rights to a reversal of the judgment. Under these circumstances, the judgment should be affirmed. In re Estate of Hinde, 200 Cal. 710, 715–716, 254 P. 561; Hatch v. Galvin, 50 Cal. 441, 443; Hartman v. San Pedro Commercial Co., 66 Cal.App.2d 938, 153 P.2d 214.

The order granting a new trial is reversed. The judgment is affirmed. Each party is to bear his own costs on appeal.

SHENK, EDMONDS, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

The holding of the majority of this court in this and three companion cases,[1] in effect, nullifies the statutory provision, Code Civ.Proc. § 657, which expressly authorizes the trial court to grant a motion for a new trial on "part of the issues", when such new trial is limited to the issue of damages only in cases where the damages awarded are deemed inadequate by the trial court. While there is no code section which expressly specifies inadequacy of damages as a ground for granting a motion for a new trial, it has been held that it comes within the purview of insufficiency of the evidence to support the verdict or judgment. Code Civ.Proc. § 657(6); 20 Cal.Jur. 104. Such being the case, the same rule should be applied to the granting of a motion on the limited issue of damages, as to all issues. The rule in the latter type of cases being that if there is a conflict in the evidence, even though the evidence is overwhelmingly in favor of the party against whom the motion is granted, the order of the trial court granting a new trial on insufficiency of the evidence will not be disturbed on appeal. Brignoli v. Seaboard Transportation Co., 29 Cal.2d 782, 791, 178 P.2d 445; Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 358, 170 P.2d 465; Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689. The same rule is applicable where a new trial is granted on the ground of erroneous instructions to the jury and it is claimed by the party against whom the new trial was granted that the error was not prejudicial Mathers v. County of Riverside, 22 Cal.2d 781, 786, 141 P.2d 419; Finney v. Wierman, 52 Cal.App.2d 282, 126 P.2d 143; Thompson v. Cal. Construction Co., 148 Cal. 35, 82 P. 367; Pettigrew v. O'Donnell, 32 Cal.App.2d 502, 90 P.2d 93; Fennessey v. Pacific Gas & Elec. Co., 10 Cal.2d 538, 76 P.2d 104; Simmons v. Lamb, 35 Cal.App.2d 109, 94 P.2d 814. From the foregoing it necessarily follows that the same reasons exist for sustaining the trial court in granting a new trial limited to the issue of damages only as to the granting of a new trial on all issues on the ground of insufficiency of the evidence, or that prejudice resulted from an erroneous instruction.

The majority concede there is wisdom and merit in the legislation which authorizes a trial court to grant a new trial on limited issues. This should be obvious. Then the majority proceed by these four decisions to deprive the trial court of the power conferred upon it by statute to grant a new trial on the issue of damages only where the damages awarded are obviously inadequate.

These decisions take a step backward in our judicial procedure. They are the products of that same reactionary philosophy which has been invoked by a majority of this court to curtail the power of trial judges in their effort to accord to the less fortunate a greater degree of equal justice under law. See Sanguinetti v. Moore Dry

1. See Toshio Hamasaki v. Flotho, Cal.Sup., 240 P.2d 298; Rose v. Melody Lane, Cal. Sup., 240 P.2d 307, and Cary v. Wentzel, Cal.Sup., 240 P.2d 304, ante.

Dock Co., 36 Cal.2d 812, 228 P.2d 557. There can be no doubt that the sole and only basis for these decisions is the fear by the majority that the plaintiffs in these cases might receive greater awards of damages than if the issue of liability was retried. To prevent this result the majority is willing to destroy the effectiveness of this remedial legislation. What is the court made rule which the majority apply to accomplish this result? It seems to be that if it appears to the majority that there is a conflict in the evidence as to liability, and the damages awarded are inadequate, it is an abuse of discretion for the trial court to grant a motion for a new trial on the issue of damages only. Where does this leave the trial court? Or, a question of greater moment is, what should a plaintiff do under such circumstances? Obviously, in the face of these four decisions, a trial judge or trial lawyer would be stupid to consider retrying anything other than all issues in any personal injury action under such circumstances, even though they had positive information that the jury had no difficulty in determining the issue of liability and that the issue of damages was the only problem which concerned it. And I cannot refrain from expressing my utter amazement at the ineptness of the majority in attempting to rationalize the deliberations and reactions of the juries in these cases. Obviously, such rationalization is not the function of this court. If it must be done, it is exclusively a function of the trial court. Those who have had experience in the trial of jury cases know that many factors influence the ultimate decision reached, and the trial court is in a much better position than this court to know what factors prevailed. Some jurors have fixed views with respect to economics, while others have racial or religious prejudices, which may influence them adversely to the cause of justice. While the record might not disclose such leanings, they would be apparent to an astute trial judge. Yet the majority of this court say, that in cases such as we have here, a trial judge is guilty of an abuse of discretion if he grants a new trial on the issue of damages only, even though he is satisfied that the inadequacy of an award of damages was due to one or more of the factors above mentioned, or some other factor which had no bearing whatever on the issue of liability. For this court to invade the province of the trial court in this field is as unwise as it is unfortunate.

For example, a man with an earning capacity of $300 per month, a life expectancy of 20 years, who loses a leg in an automobile accident and is thereby incapacitated from pursuing his occupation, is awarded $10,000 by a jury. At the present value of money this would appear to be inadequate. But, would the majority of this court so hold if a trial judge denied a motion for a new trial made by plaintiff on the ground that the award was inadequate? It certainly would not. But, if the trial court would grant such a motion on the issue of damages only, the majority would obviously reverse if there was a conflict in the evidence on the issue of liability. In other words, the majority would hold the award inadequate as a matter of law in the latter instance, but not so if the motion for a new trial were denied or granted on all issues. The foregoing results are inescapable under the specious reasoning in the majority opinions in these four cases. The only thing that is made clear by these decisions is that the majority does not approve of a trial court granting a motion for a new trial on the issue of damages only in a case where the damages awarded are inadequate and there is a conflict in the evidence on the issue of liability. In such a case, the majority says, there must be a new trial of all the issues or none at all.

Of course, if a new trial were granted on the issue of damages only in a case where the trial court was of the opinion that the damages awarded were excessive, the majority would not disturb such an order. They would not do so for the reason that they would fear that proof of the facts establishing liability might result in a larger award of damages to the detriment of the defendant. Fuentes v. Tucker, 31 Cal.2d 1, 187 P.2d 752.

The effect of the majority decision in these cases is to hold the damages awarded

inadequate as a matter of law. But would the majority reverse if the trial court had denied a new trial and plaintiff was appealing? Obviously not. It would hold in such a case that the trial court had properly exercised its discretion. The majority only resort to the art of clairvoyance in cases like the present to determine what factors influenced the minds of the jurors in arriving at their verdicts, and all that the crystal ball reveals is that the jurors compromised the issue of liability with the understanding among them that a small award of damages would be made. The majority resort to that procedure in utter disregard of considerations of justice, as the effect of its decisions is to deny plaintiffs the opportunity to have a new trial on all the issues if they should be disposed to proceed accordingly. It would seem that since the rule announced by the majority in these cases is new and contrary to what the bench and bar heretofore believed the law to be, considerations of justice would dictate that complete new trials should be ordered in each case, and the new rule applied to future cases only. Hildebrand v. State Bar, 36 Cal.2d 504, 514, 225 P.2d 508; Phelan v. Superior Court, 35 Cal.2d 363, 371, 217 P.2d 951; Robinson v. Superior Court, 35 Cal.2d 379, 383, 218 P.2d 10.

It is claimed by the majority that this is a close case on liability and the jury seemed to have some difficulty in arriving at its verdict. There are factors present which preclude that result. The question of liability was determined by the trial court to be clear rather than close and the other judgments in the case are res judicata on that issue; the only confusion on the part of the jury was with reference to the limited liability of an owner of a car under section 402 of the Vehicle Code.

There are five actions here involved which were consolidated for trial, the instant one for personal injuries and four for the deaths of five persons. The injuries and deaths were all caused by the same negligence of defendants and the verdicts are against the same defendants. Except for damages, identical issues were presented in each case. *Defendants' motion for a new trial on the ground of insufficiency of the evidence was denied.* Plaintiff, Denny Leipert's, motion for a new trial on inadequacy of the damages was granted on that issue only. In denying *defendants'* motion for a new trial on the ground of insufficiency of the evidence it must be presumed that the trial court *weighed* the evidence *on liability* and, like the jury, concluded it was ample. It is said: "The trial court may, and indeed should, grant a motion for new trial where one of the grounds of the motion therefor is insufficiency of the evidence, if it is satisfied that the verdict or decision is not supported by, or is contrary to, the weight of the evidence, although the evidence is conflicting on the point or points at issue, since, in passing upon a motion for new trial, the trial court must weigh and consider the evidence of both parties, and determine for itself the just conclusion to be drawn. * * * The same rules apply to an order denying a new trial, which will be affirmed where the evidence was substantially conflicting and there was sufficient evidence to sustain the verdict." (20 Cal.Jur. 117.) The court said in Mosekian v. Ginsberg, 122 Cal.App. 774, 777, 10 P.2d 525, 527; "When the question of the insufficiency of the evidence to justify the verdict is presented on a motion for a new trial, it becomes the duty of the trial judge to inquire into the question of sufficiency and to grant a new trial if in his judgment the evidence is insufficient to justify the verdict, or *to deny* the motion for a new trial if in his opinion the evidence is sufficient to sustain the verdict. * * * There is a clear distinction between the duties and powers of a trial court in passing upon a motion for a new trial upon the grounds heretofore mentioned and those of an appellate court in reviewing the matter on appeal from the judgment. The appellate court is not concerned with questions of preponderance of the testimony or weight of the evidence; the only matter for its determination is whether or not there is evidence which, if given its fullest effect, is legally sufficient to support the decision. * * * On the other hand, the trial court may weigh and consider the evidence on behalf of both parties and determine for

itself the just conclusion to be drawn from it. The question of the insufficiency of the evidence to justify the verdict is addressed to the sound legal discretion of the trial court. * * * The courts of last resort of this state have repeatedly held that insufficiency of the evidence to justify a verdict is a ground for a new trial which is peculiarly within the discretion of the trial court, and its order either granting or *denying* a new trial will not be disturbed on appeal, unless it appears that there was a manifest abuse of discretion." (Emphasis added.)

As the trial court's denial of the motion for a new trial, made on the ground of insufficiency of the evidence, included a weighing of the evidence, this court cannot on appeal ignore its determination. It cannot, as does the majority opinion in effect say, that the question of liability is close. By so doing, it is, in effect, weighing the evidence. It is more than a matter of discretion with the trial court. It has weighed the evidence on liability and found it adequate. Where the evidence is conflicting, this court *cannot* set aside that determination, but that is the effect of the majority decision reversing the order granting a limited new trial to plaintiff and requiring a new trial on all the issues. That result is not reached here because neither plaintiff nor defendants want a new trial on all the issues but the case stands as authority for that proposition.

It is stated in the majority opinion that a large discretion rests with the trial court in determining whether a limited new trial should be granted, but that here there was an abuse of discretion. It is difficult to understand how this court can say there is an abuse of discretion when it cannot view the case from the same standpoint as the trial court. As seen, the latter court weighed the evidence and decided that liability had been established. This court may not weigh the evidence. Therefore, it may not say that the trial court abused its discretion —that it read the dial on the scales wrongly.

It will be recalled that no appeal was taken from the judgments in the death actions. They are, therefore, final determinations as to defendants' liability in each and all of these actions. It would be idle to send the case back for a new trial on all of the issues, including liability, because the rule of res judicata would be applied, and there would be nothing left to try except damages—the very issue embraced in the limited new trial which the trial court granted. That res judicata is pertinent to the case is clear from the principles enunciated in Bernhard v. Bank of America, 19 Cal.2d 807, 812, 122 P.2d 892, 894, where this court said: "There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.

"No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend. See 7 Bentham's Works, Bowring's Ed., 171. Many courts have abandoned the requirement of mutuality and confined the requirement of privity to the party against whom the plea of res judicata is asserted. * * *

"In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" All three questions are answered in the affirmative in the instant case. The identical issue is whether defendant driver was negligent and was his negligence the proximate cause of the collision. The answer is yes in the four death actions. There are four final judgments on the merits of that issue. The party against whom the prior adjudications are asserted is the same.

It is said that the verdict was the result of a compromise because the jury wanted additional instructions on liability and had

difficulty in arriving at a verdict. An examination of the record reveals that in arriving at a verdict the difficulty was apparently the amount allowable against an owner under section 402 of the Vehicle Code. It is true that after the jury had been deliberating for a time they requested the reading of the testimony of a witness on liability, but *thereafter* their sole concern was the *amount* of damages and how they should be apportioned among the various plaintiffs within the $10,000 limit. They were first asked by the court how they stood numerically and they replied 9 to 3 and then told to finish their verdict by determining the "balance of the matters presented to you." Verdicts were then returned but they were too large as against the owner, they being for $5,000 in each of three of the death actions and $10,000 in the fourth, or a total of $25,000. That for Denny Leipert was for $4,000, and for his father $1,000, thus increasing the total to $30,000. They were told that the verdicts were incomplete because they did not limit the owners' liability. When they were polled the indication was that the *amounts* awarded, and not liability, was the reason for diverse answers. For example, one juror said: "We wanted to have some instruction there, but you said it wouldn't do any good, so we were *confused on the money question.*" (Emphasis added.) The court explained the $10,000 limitation and there was a discussion between the court and jurors on the subject. Later they were asked if they thought they could reach a verdict, to which negative replies were given, and then as the record discloses:

"The Court: The jury has been out for twelve hours, with some slight rest, and they feel they are getting farther apart rather than closer together.

"Mr. Johnston: If the court please, I wonder if inquiry might properly be made towards determining whether there is some question of law and its application to the law?

"The Court (To Jury): Well, is it some particular problem of law that bothers you?

"Juror Sheik: Well, I believe the most confusion arises by not asking for some more instructions about the *money matter. We had agreed upon the negligence* and we came to the point about the $10,000.00 which has confused us, and suggestions were made for more instructions, and they didn't want to ask for any more instructions because we didn't think they would give the instructions we wanted." (Emphasis added.) After further discussion about the *amounts* the jury again retired. They then returned verdicts which apportioned the $10,000 as follows: $1,700 each in three of the death actions and $3,400 in the fourth; $500 to Denny and $1,000 to his father, showing that they had finally grasped the method of procedure. Thus, I believe it is clear that the record points away from a compromise verdict much stronger than toward it. The issue of liability was settled, and *after* that, the confusion arose with respect to amounts and apportionment. In any event it is beyond this court's authority to declare that the trial court abused its discretion in accepting one of two possibilities, that is, that the verdict was not the result of a compromise on the issue of liability, for the only disagreement on the verdict related to the apportionment of the amount of damages, rather than on liability.

I would, therefore, affirm the order granting a new trial on the issue of damages only.

TOSHIO HAMASAKI et al. v. FLOTHO et al. *

L. A. 22006.

Supreme Court of California, in Bank.

Jan. 29, 1952.

Rehearing Granted Feb. 28, 1952.

Toshio Hamasaki, a minor, by Tokuye Hamasaki, guardian ad litem, and Tokuye Hamasaki brought action against Fred W. Flotho, Jr., and others to recover for injuries and medical expenses. The Superior Court of Los Angeles County, Harold B. Jeffery, J., entered order granting motion of plaintiffs for new trial on issue of damages only, and defendants appealed. The Supreme Court, Traynor, J., held that damages awarded were so inadequate as to show that verdict was result of compromise, making it an abuse of discretion to grant new trial on issue of damages only.

Order reversed.

Carter, J., dissented.

Prior opinion, 229 P.2d 801.

1. New Trial ⇐9

Though granting of a new trial limited to issue of damages rests primarily in discretion of trial court, it is abuse of discretion to grant such a new trial if question of liability is close, if damages awarded are grossly inadequate, and if there are other circumstances that indicate that verdict was result of prejudice or improper compromise.

2. Automobiles ⇐245(8)

In action for injuries sustained by minor 20 days before his sixth birthday when struck by automobile while minor was crossing street in middle of block, and for medical expenses, whether driver of automobile was negligent was for jury.

3. Automobiles ⇐245(74)

In action for injuries sustained by minor 20 days before his sixth birthday when struck by automobile while minor was crossing street in middle of block, and for medical expenses, whether minor exercised reasonable care for his safety, judged by his age and intelligence, was for jury.

4. New Trial ⇐9

A new trial limited to damages issue may be ordered by trial court where it can reasonably be said that the liability issue has been determined by jury.

5. New Trial ⇐9

Generally, only when verdict allows a substantial, even though inadequate, amount for general damages can it reasonably be concluded that jury's error related solely to damages issue so as to justify new trial on damages issue only.

6. New Trial ⇐9

Where questions of negligence and contributory negligence in personal injury action were close, and jury allowed only $182.90 for injuries consisting of brain concussion, several skull fractures, fracture of collar bone, puncture wounds in forehead, and bilateral ankle clonus, inadequacy of damages was so great as to indicate that there had been a compromise by jury, and therefore it was error to grant a new trial on damages issue only.

7. Appeal and Error ⇐110

No appeal lay from denial by trial court of motion for new trial, and denial could be reviewed only through an appeal from the judgment.

8. Appeal and Error ⇐874(5)

Where defendants did not appeal from judgment for plaintiffs but only from order granting motion of plaintiffs for new trial on issue of damages only, Supreme Court was without jurisdiction to review the judgment or denial of defendants' motion for new trial.

9. Appeal and Error ⇐1178(4)

In disposing of appeal from order granting motion of plaintiffs for new trial on damages issue only, Supreme Court had jurisdiction to do no more than the trial court itself could have done, and therefore could affirm the order or reverse it, but could not direct a complete new trial, since trial court, on motion for limited new trial, could not go beyond jurisdiction conferred by motion and order new trial on all issues.

10. New Trial ⇐136

A new trial may not be ordered unless a motion therefor has been made by an aggrieved party.

11. New Trial ⇐157

In passing on motion for new trial, trial court is limited to the grounds specified therein.

* Subsequent opinion 248 P.2d 910.

12. New Trial ⇐163(1)

On motion for new trial, the trial court may give relief only to the party by whom the motion has been made.

13. New Trial ⇐136

New trials may be granted only to the extent that they are sought by the parties.

Parker, Stanbury & Reese and Raymond G. Stanbury all of Los Angeles, for appellants.

Culbert L. Olson, John H. Carter, Los Angeles, and Richard C. Olson, Beverly Hills, for respondents.

TRAYNOR, Justice.

Plaintiff Toshio Hamasaki was struck by an automobile driven by defendant Fred Flotho, Jr. The latter was acting in the course of his employment by defendant Leland and was using the car with the consent of its owner, defendant Fred Flotho, Sr. Toshio and his father brought this action to recover for injuries and medical expenses.

The accident occurred in a residential neighborhood while Toshio, who was then not quite six years of age, was crossing the street in the middle of the block. At the trial plaintiffs contended that the defendant driver was traveling at an excessive rate of speed and was not maintaining a reasonable lookout for pedestrians. Defendants contended that the driver was not speeding and that plaintiff suddenly darted from behind a parked truck into the path of the automobile. Although it was conceded that Toshio was severely injured, the extent of his injuries was contested.

The jury returned a verdict in favor of plaintiffs for $1,000. Defendants' motion for a new trial was denied. Plaintiffs' motion for a new trial on the issue of damages only was granted after defendants refused to consent to a judgment of $7,500. Defendants have appealed from the order granting plaintiffs' motion. There is no appeal from the judgment.

Defendants do not claim that the damages awarded by the jury are adequate. It is their position that the jury compromised the liability issue and that liability was therefore never determined. They suggest even that the verdict is "less than a compromise," that is, that the jury concluded defendants were not liable but nevertheless, out of sympathy, allowed plaintiffs approximately the amount of the special damages.

[1] Although the granting of a new trial limited to the issue of damages rests primarily in the discretion of the trial court, it is an abuse of discretion to grant such a new trial if the question of liability is close, if the damages awarded are grossly inadequate, and if there are other circumstances that indicate that the verdict was the result of prejudice or an improper compromise. Leipert v. Honold, Cal.Sup., 240 P.2d 288.

(1) Evidence of liability. The accident took place on Carmelita Street in Los Angeles. The pavement is 30 feet wide and has no center line. There are houses on most of the adjoining lots, but no sidewalks. Between the pavement and the houses on each side of the street there is a dirt shoulder. Immediately before the accident Toshio was walking south on the east shoulder. A truck was parked on the shoulder in the middle of the block, approximately 195 feet south of the nearest intersection. A witness saw Toshio pass the truck on the side away from the pavement and then turn around it into the street. At that moment this witness looked away and did not see the accident. The defendant driver was also proceeding south on Carmelita. He testified that he was driving at 20 to 25 miles per hour. Other witnesses variously estimated his speed at from 35 to 60 miles per hour, but they also testified that he stopped within 50 feet beyond the point of impact. Just before the accident he had moved into the east half of the street to pass around another truck parked partially off the pavement on the west side. Photographs of his skid marks indicate that at the point of impact he had returned to the west side; his left skid mark passed over a manhole cover in the center of the street. He testified that Toshio suddenly ran into his path from behind the truck when only 15 feet in front of the moving car and that it was

then impossible to avoid the accident. Toshio did not testify.

[2, 3] In view of the residential character of the neighborhood, the testimony that the driver was traveling 60 miles per hour would fully justify the conclusion that he was negligent, but the opposing evidence was also ample to uphold a contrary finding. Even if the jury found against defendants on that issue, however, difficulties remained in connection with the defense of contributory negligence. Toshio was crossing in the middle of the block, and until he entered the street he was obscured by the parked truck. The jury could have inferred from the evidence either that he did not look to see whether or not any vehicles were approaching or that, having looked, he nevertheless darted into defendant's path. The accident occurred 20 days before Toshio's sixth birthday; it was for the jury to say whether or not he exercised reasonable care for his safety, judged by his age and intelligence. Smith v. Harger, 84 Cal.App.2d 361, 369, 191 P.2d 25; Carrillo v. Helms Bakeries, 6 Cal.App. 2d 299, 304, 44 P.2d 604; see 107 A.L.R. 4. The testimony indicated that he was of above average intelligence for his age and had been taught to go into the street only at crosswalks or intersections.

It is apparent that the jury faced a difficult task in resolving the questions of negligence and contributory negligence.

(2) Inadequacy of damages. Plaintiffs' special damages were stipulated to be $817.10. Thus, the award of $1,000 allowed only $182.90 for general damages.

When taken to General Hospital immediately following the accident, Toshio was not expected to live. He was unconscious for several days. His injuries included brain concussion, a complete fracture of the collar bone, and several fractures of the skull. Three of the skull fractures were extensive; one of them resulted in a separation of almost half an inch and a depression of almost one-quarter of an inch. There were two puncture wounds in the forehead, the coverings of the left eyeball were swollen, and the pupils were unequal. There was also a bilateral ankle clonus. This much was not contested. In addition there was medical testimony that as a result of the accident Toshio was suffering from permanent psycho-motor epilepsy and that he would require continuous medical care throughout the remainder of his life. This latter evidence, however, was disputed by defendants' medical experts. Toshio's teachers were in disagreement as to whether or not he had made a substantial recovery insofar as his school activities were concerned.

Even if the jurors rejected the evidence of permanent injury, it is inconceivable that they regarded $182.90 as adequate compensation for the brain concussion, the broken clavicle, the various skull fractures, and the other injuries admittedly sustained. The conclusion is inescapable that the verdict was not the result of an effort to assess the pecuniary value of Toshio's suffering. Had the jury truly believed that defendants were liable, the verdict would have been for many times this amount.

[4, 5] Plaintiffs contend, however, that whenever the jury allows full compensation for special damages and any amount, no matter how small, for general damages, the trial court's decision to allow a limited new trial will not be reversed on appeal. Such a view offers the convenience of a mechanical formula, but it ignores the principles that govern the granting of partial new trials. A new trial limited to the damages issue may be ordered by the trial court when it can reasonably be said that the liability issue has been determined by the jury. A refusal to allow for undisputed special damages is usually convincing evidence that the jury failed to make a decision of the liability issue, and that circumstance has therefore been stressed in a number of appellate opinions. See Wallace v. Miller, 26 Cal.App.2d 55, 56, 78 P.2d 745; Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 11, 175 P. 26; Id. 177 P. 845. In a particular case, however, gross inadequacy of unliquidated general damages may be just as convincing. Thus, in Simmons v. Fish, 210 Mass. 563, 571, 97 N.E. 102, it was held that a verdict of $200 for the loss of an eye was a conclusive indication that the jury had com-

promised the issues of liability and damages. See, also, Schuerholz v. Roach, 4 Cir., 58 F.2d 32, 34 [$625 for loss of eye]; Keogh v. Maulding, 52 Cal.App.2d 17, 21, 125 P.2d 858 [verdict for $291.23 more than undisputed damages]. As a general rule, it is only when the verdict allows a substantial, even though inadequate, amount for general damages that it can reasonably be concluded that the jury's error related solely to the damages issue. Hughes v. Schwartz, 51 Cal.App.2d 362, 368, 124 P.2d 886; McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 16, 146 P.2d 34. In view of Toshio's serious injuries, $182.90 cannot be regarded as substantial.

Taylor v. Pole, 16 Cal.2d 668, 675, 107 P.2d 614, does not conflict with the foregoing authorities. In that case the error necessitating a new trial directly involved the trial court's instructions regarding damages. Moreover, the evidence of defendant's liability was "overwhelming." The new trial was therefore limited to the damages issue even though, as to one of the plaintiffs, the jury had awarded less than the undisputed special damages. See, also, Crandall v. McGrath, 51 Cal.App.2d 438, 440–442, 124 P.2d 858; Loughran v. McKenna, 60 R.I. 453, 457, 199 A. 302; cf. Keogh v. Maulding, 52 Cal.App.2d 17, 21–22, 125 P.2d 858. In the present case the jury was properly instructed concerning damages and the issue of liability was close, so that the grossly inadequate award cannot reasonably be explained as a mere error of the jury in the assessment of damages.

(3) Other circumstances indicating compromise. The order granting plaintiffs' motion for a limited new trial provided that if defendants would consent to a judgment of $7,500, the motion would be deemed denied. This proposal of the trial judge thus allowed $6,682.90 for general damages—more than 36 times the $182.90 allowed in the verdict. The great disparity between the jury's determination and that of the judge provides an additional and striking indication that the jurors could not agree on the liability issue and that those who believed defendants were liable consented to inadequate damages in return for the votes of those who had decided that defendants should pay nothing.

[6] Ordinarily the conclusion that the verdict was the result of an improper compromise would necessitate a reversal of the judgment and a complete new trial. In the present case, however, we have concluded that we have no jurisdiction to do more than reverse the order granting a limited new trial.

[7, 8] No appeal lies from the trial court's denial of defendants' motion for new trial; they may have that ruling reviewed only through an appeal from the judgment. City of Los Angeles v. Glassell, 203 Cal. 44, 46, 262 P. 1084; Litvinuk v. Litvinuk, 27 Cal.2d 38, 42, 162 P.2d 8; Caldwell v. Caldwell, 80 Cal.App.2d 378, 384, 182 P.2d 258. They have not appealed from the judgment, and, since timely notice of appeal is a jurisdictional requirement, Estate of Hanley, 23 Cal.2d 120, 122, 142 P.2d 423, 149 A.L.R. 1250, we are therefore without jurisdiction to review the judgment or the denial of defendants' motion.

[9] The only appeal before us is that from the order granting plaintiffs' motion for a limited new trial. In disposing of this appeal we have jurisdiction to do no more than the trial court itself could have done. See Tomales Bay Oyster Corp. v. Superior Court, 35 Cal.2d 389, 392, 217 P.2d 968; Crescent Feather Co. v. United Upholsterers' Union, 153 Cal. 433, 434, 95 P. 871; Byxbee v. Dewey, 128 Cal. 322, 326, 60 P. 847; Wheeler v. Bolton, 92 Cal. 159, 167, 28 P. 558; Bloxham v. Tehama County Telephone Co., 29 Cal.App. 326, 340, 155 P. 654. We can affirm the order or reverse it, but we cannot direct a complete new trial, for the trial court, on a motion for a limited new trial, could not go beyond the jurisdiction conferred by the motion and order a new trial on all issues. Quevedo v. Superior Court, 131 Cal.App. 698, 702, 21 P.2d 998; Cox v. Tyrone Power Enterprises, Inc., 49 Cal.App.2d 383, 389, 121 P.2d 829, see, also, Mercantile Trust Co. v. Superior Court, 178 Cal. 512, 520, 174 P. 51.

It has been urged that the rule of the Quevedo case is inconsistent with the action of the court in Keogh v. Maulding, 52 Cal. App.2d 17, 22, 125 P.2d 858, and should be disapproved. In the Keogh case the plaintiff's motion for a new trial on the issue of damages only was granted by the trial court, and the defendant appealed; as in the present case, there was no appeal from the judgment. The appellate court ordered a complete new trial, but without discussing whether or not it had jurisdiction to do so. An examination of the briefs filed in that case, and of the petition for a hearing in this court, shows that at no time was the issue of jurisdiction raised, nor was the Quevedo case cited. The court and parties alike appear not to have realized that the court might be without power to order a complete new trial once the limited new trial had been found to be improper. Under these circumstances, and in view of the thorough discussion of jurisdiction in the Quevedo case, Keogh v. Maulding cannot be regarded as controlling.

[10–13] There are additional reasons for adhering to the rule of the Quevedo case. It is well settled in California that no new trial may be ordered unless a motion therefor has been made by an aggrieved party. Tabor v. Superior Court, 28 Cal.2d 505, 507, 170 P.2d 667; Prothero v. Superior Court, 196 Cal. 439, 444, 238 P. 357; Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 398, 205 P. 446; Title Insurance & Trust Co. v. California Development Co., 171 Cal. 173, 194, 152 P. 542; Kohlstedt v. Hauseur, 24 Cal.App.2d 60, 64, 74 P.2d 314. It is also settled that in passing on such a motion the trial court is limited to the grounds specified therein, Polk v. Boggs, 122 Cal. 114, 117, 54 P. 536; Laver v. Hotaling, 115 Cal. 613, 616, 47 P. 593; Sitkei v. Frimel, 85 Cal.App.2d 335, 337, 192 P.2d 820; Cox v. Tyrone Power Enterprises Inc., 49 Cal.App.2d 383, 389, 121 P.2d 829; O'Malley v. Carrick, 60 Cal.App. 48, 51–52, 212 P. 45; see, also, 20 Cal.Jur. 162, and may give relief only to the party by whom the motion has been made. Watkins v. Nutting, 17 Cal.2d 490, 499, 110 P.2d 384; cf. Del Barrio v. Sherman, 16 Cal.App.2d 407, 412–413, 60 P.2d 559. The holding of the Quevedo case is in harmony with the decisions in these analogous situations involving the power of the trial court to grant a new trial on its own motion. Throughout all these cases there appears a well-established principle that new trials may be granted only to the extent that they are sought by the parties.

Moreover, the Quevedo rule possesses practical advantages. Cases will arise in which the additional damages that may be awarded by a second jury will not compensate the plaintiff for the delay, expense, and uncertainty involved in retrying all the issues. In such a situation, he would be benefited by a new trial only if it were limited to the question of damages, and he should be permitted to seek that relief without fear that his motion will be used as the basis for ordering a complete new trial. The defendant likewise may desire to pay the relatively small judgment in preference to undergoing a costly, even if successful, repetition of the litigation. He, rather than the trial judge, should be the one to determine whether or not the setting aside of the compromise verdict will be of ultimate benefit to him. No prejudice results from the rule, inasmuch as either party, by moving for a complete new trial, may confer upon the trial court all the jurisdiction necessary to correct the error.

If the plaintiff prefers a new trial on all issues to none at all, he can move for a complete new trial and in his argument on the motion urge the trial court to limit the new trial to the question of damages; or he can make an alternative motion, asking for a limited new trial and if that cannot be granted for a complete new trial.

The order is reversed.

SHENK, EDMONDS, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

My dissent in Leipert v. Honold, Cal. Sup. 240 P.2d 288, is equally applicable to this case. Here the majority of this court again invade the province of the trial court,

and after weighing the evidence, which was sharply conflicting, finds the trial court guilty of abusing its discretion in granting plaintiff a new trial on the issue of damages only. The majority opinion in this case is a shocking example of the ruthless violation by members of this court of the settled rule that the weight and sufficiency of evidence are matters solely within the province of the trial court. If there ever was a case where the discretion of the trial judge in granting a motion for a new trial should be upheld, this is it. Yet the majority, while admitting that the evidence is sharply conflicting on all the issues, undertakes to resolve those conflicts contrary to the conclusion reached by the trial court. The majority of this court even goes so far as to hold that the issue of liability in this case was not determined by the jury. It states: "A new trial limited to the damages issue may be ordered by the trial court when it can reasonably be said that the liability issue has been determined by the jury. A refusal to allow for undisputed special damages is usually convincing evidence that the jury failed to make a decision of the liability issue, and that circumstance has therefore been stressed in a number of appellate opinions."

In holding, as it does in this case, that the issue of liability was not determined by the jury, the majority flatly contradict the record and its decision is therefore based upon a false premise. It must be remembered that the verdict of the jury was in favor of the plaintiff for $1,000. How could this be if it did not determine the issue of liability? It must also be remembered that the plaintiff was a 5 year old child of Japanese parentage who was crossing a street when struck by defendant's automobile. The medical testimony as to the extent of the injuries also was in sharp conflict. In such a case anything could happen during the deliberations of the jury. In holding that the damages awarded plaintiff were inadequate as a matter of law the majority must accept as true the medical evidence produced on behalf of plaintiff, which is narrated in the majority opinion as follows: "When taken to General Hospital immediately following the accident, Toshio was not expected to live. He was unconscious for several days. His injuries included brain concussion, a complete fracture of the collar bone, and several fractures of the skull. Three of the skull fractures were extensive; one of them resulted in a separation of almost half an inch and a depression of almost one-quarter of an inch. There were two puncture wounds in the forehead, the coverings of the left eyeball were swollen, and the pupils were unequal. There was also a bilateral ankle clonus. This much was not contested. In addition there was medical testimony that as a result of the accident Toshio was suffering from permanent psycho-motor epilepsy and that he would require continuous medical care throughout the remainder of his life."

In view of the foregoing, for this court to find the trial court guilty of an abuse of discretion in granting a new trial on the issue of damages only, and reverse the order, thus entitling the defendant to recover his costs on appeal, with no opportunity for the plaintiff to ever retry the case or obtain further redress, is, to my mind, not only unsound from the standpoint of legal reasoning, but is so cruel and inhuman as to shock the sense of justice of all who may read the majority opinion.

I would, therefore, affirm the order granting the limited motion for a new trial.

CARY et ux. v. WENTZEL.*

L. A. 22028.

Supreme Court of California, in Bank.

Jan. 29, 1952.

Hearing Granted Feb. 28, 1952.

George E. Cary and Mabel Cary, husband and wife, brought action against Lawrence Wentzel to recover for injuries sustained in automobile accident. The Superior Court of San Luis Obispo County, Ray B. Lyon, J., entered judgment for plaintiffs and order granting plaintiffs a new trial on damages issue only, and defendant appealed. The Supreme Court, Traynor, J., held that inadequacy of damages showed that verdict was result of a compromise, and that therefor granting of limited new trial was abuse of discretion.

Judgment and order reversed.

Carter, J., dissented.

Prior opinion 230 P.2d 656.

1. Appeal and Error ⇐979(5)

An order granting a new trial on damages issue only will be reversed on appeal when it is shown that damages awarded by jury are inadequate, issue of liability is close, any other circumstances indicate that verdict was probably the result of prejudice, sympathy or an improper compromise.

2. Damages ⇐135

Where three teeth of plaintiff had been broken and had to be extracted and others had been cracked and loosened, dentist's estimate that needed bridge work would cost $320 was not excessive.

3. New Trial ⇐9

Where task of jury in personal injury action with respect to liability was exceptionally difficult, and award for injuries was grossly inadequate, verdict was result of a compromise, and trial court abused its discretion in granting new trial on damages issue only.

A. H. Brazil, San Luis Obispo, for appellant.

Kenneth J. Thayer and Dorsett M. Phillips, Bakersfield, for respondents.

TRAYNOR, Justice.

At about four o'clock on the afternoon of December 26, 1948, plaintiffs George and Mabel Cary, husband and wife, were proceeding west on Highway 41 approximately ten miles east of Paso Robles. Mr. Cary was driving. The pavement at that point was fourteen feet wide and had a center line that separated the highway into two lanes, for traffic in each direction. The sky was overcast and it was drizzling. For several miles they had been following, at a distance of about 100 feet, an automobile owned and being driven by defendant, Lawrence Wentzel. Defendant's wife and child were riding with him. Both cars were traveling approximately 35 miles per hour. A third automobile was being driven in the opposite direction by Robert Seelinger, with whom Mrs. Dora Grove was riding as a guest. Defendant's and Seelinger's cars collided, and Seelinger's car swerved in front of and collided with plaintiffs' car. Mrs. Grove died several days later as a result of injuries received in the accident. Plaintiffs and Seelinger were injured and, their cars were damaged.

It is conceded that plaintiffs were not guilty of contributory negligence. The principal issue at the trial was whether defendant or Seelinger was responsible for the first collision. Three witnesses (plaintiffs and Seelinger) testified that defendant's car was being driven partly on the wrong side of the center line; two witnesses (defendant and his wife) testified that Seelinger suddenly crossed the center line into their path.

Defendant was sued by Seelinger, by the heirs of Mrs. Grove, and by the Carys, and the three suits were consolidated for trial. The jury found for defendant in the Seelinger and Grove actions and returned a verdict for plaintiffs in the amount of $1,000 in the Cary action. Seelinger did not move for a new trial and did not appeal; the judgment against him is now final. Mrs. Grove's heirs were granted a new trial, but they later voluntarily dismissed their action. In the Cary case, defendant's motion for a new trial was denied, and plaintiffs' motion for a new trial on the issue of damages only was granted. Defendant has appealed from the order granting a limited new trial and from the judgment. He contends that the jury did not

* Subsequent opinion 247 P.2d 341.

actually determine that he was negligent and that the verdict against him was the result of sympathy or an improper compromise. He therefore seeks a new trial on all issues.

[1] The principles that govern the granting of new trials limited to the damages issue were reviewed in Leipert v. Honold, Cal.Sup., 240 P.2d 288. We there pointed out that the question is addressed in the first instance to the sound discretion of the trial court. An order granting such a limited new trial will be reversed, however, when it is shown on appeal that the damages awarded by the jury are inadequate, the issue of liability is close, and other circumstances indicate that the verdict was probably the result of prejudice, sympathy, or an improper compromise.

[2] (1) *Inadequacy of damages.* Defendant contends that the $1,000 verdict was less than the undisputed special damages and therefore could not have resulted from a decision by the jury that defendant was negligent. See Wallace v. Miller, 26 Cal.App.2d 55, 56, 78 P.2d 745; McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 16, 146 P.2d 34. The amount of plaintiffs' special damages, however, is disputed. Defendant contends that the special damages shown totaled $1199.[1] Plaintiffs contend that only $704 special damages were proved, so that the verdict allowed $296 for general damages. The difference between these two versions of the special damages results from defendant's inclusion of $175 for hospital bills and $320 for future dental work. Plaintiffs suggest that the jury may have disallowed the hospital expenses because they related to services that were rendered to Mrs. Cary by Army hospitals and for which Mr. Cary, as a soldier, would not be liable. There was no evidence, however, that would justify such action. The Carys testified that bills from the Army had been received. They agreed on the length of time she had been hospitalized (three and a half months) and on the amount they were charged ($1.75 per day). At no time during the trial was this expense disputed. We cannot assume that the jurors, without evidence to support them, speculated concerning the nature and extent of free hospital service given by the Government to wives of servicemen. If they had concluded that defendant was negligent, they would certainly have awarded plaintiffs the cost of this hospitalization. The expense of future dental work could not, of course, be definitely determined at the time of trial. There can be no doubt, however, that such work had been made necessary by the accident, for three of Mrs. Cary's teeth had been broken and had had to be extracted and others had been cracked and loosened. The only evidence concerning the reasonable value of the needed bridgework was the testimony of Mrs. Cary that her dentist had estimated the expense at $320. In view of the undisputed injuries to her teeth, this estimate was not excessive. Cf. Keogh v. Maulding, 52 Cal.App.2d 17, 18, 21, 125 P.2d 858.

It must be concluded that there was no legitimate reason that would have prompted the jury to exclude the cost of hospitalization and future bridgework from the special damages necessarily to be allowed in the event defendant were found liable. It follows that defendant is correct in his claim that the verdict for special damages should have been $1199. The failure to award this minimum amount is a convincing indication that the jury had not reached the conclusion that defendant was negligent.

Moreover, the jury should have allowed general damages for plaintiffs' suffering, inconvenience, and loss of time. Mrs. Cary was seriously injured. She was thrown into the windshield, radio, and heater of their car and sustained lacerations on her forehead, chin, tongue, the inside of her mouth, and her left knee. In addition there were the broken and loosened teeth already mentioned, and bruises on her chest, shoulders, back, and legs. The cut on her chin left a scar. At the time

1. The figure claimed by defendant is actually $1219, but it is apparent that an inadvertent error of $20 has been made.

of the trial, almost a year and a half after the accident, she was still bedridden and continued to suffer pain in her back and knee. A number of abscesses on her back developed and persisted to the time of trial; it is possible, however, that the jury concluded that these were related to an earlier disease ("valley fever") from which she had been suffering. Whatever may have been the cause of her continued general disability, it is clear that the injuries received in the accident were painful, extensive, and, in part at least, permanent. Mr. Cary was also injured, but had substantially recovered at the time of the trial. He was thrown against the steering wheel, bending it six inches, and he sustained bruises and cuts on his head, chest, and knee.

The failure of the jury to allow substantial general damages for these injuries, as well as for several weeks loss of use of the automobile during repairs, also indicates that the liability issue had not been decided. See Toshio Hamasaki v. Flotho, Cal.Sup., 240 P.2d 298.

(2) *Evidence of liability.* The jury had only the testimony of the parties themselves from which to determine whether defendant or Seelinger was driving on the wrong side of the road. Seelinger and plaintiffs testified that defendant was at fault; defendant and his wife testified that Seelinger was at fault. It is apparent that the jury's task with respect to this issue was exceptionally difficult.

It is also significant that the testimony of Seelinger and plaintiffs was to a certain extent inconsistent. Seelinger testified that as his car approached defendant's car, he saw defendant's left wheels a foot or two over the center line for a distance of 100 to 200 feet before the accident. Plaintiffs testified, however, that defendant crossed over the line only a short time before the accident and that at the time of the collision defendant's car was still traveling at an angle from the center line of about 25 degrees. Mr. Cary admitted in his testimony, moreover, that he did not state to the officers investigating the accident that defendant had driven on the wrong side of the highway.

(3) *Other circumstances indicating compromise.* The verdict against Seelinger is not inconsistent with the verdict in favor of plaintiffs, for the jury could have concluded that defendant was negligent and that Seelinger was guilty of contributory negligence. The court's instructions, however, limited the issue of contributory negligence to the Seelinger suit; Mrs. Grove was a guest in Seelinger's car and his negligence would not be imputed to her. Reynolds v. Filomeo, 38 Cal.2d 5, 236 P.2d 801. The verdict against Mrs. Grove's heirs is therefore at variance with the verdict against defendant in the Cary action —the latter necessarily implies that defendant was negligent whereas the former implies that he was not. One of these verdicts is erroneous, and the gross inadequacy of the award in the Cary case suggests at once where the error lies.

It is contended that the court's failure to give a damages instruction in the Grove case was responsible for the verdict against Mrs. Grove's heirs. This explanation is not persuasive. Special damages covering hospital and funeral expenses were proved by the executor of Mrs. Grove's estate and were at no time disputed by defendant; that much at least would have been allowed by the jury. Moreover, during their deliberations the jurors returned to the courtroom for instructions on questions that were causing difficulty. They would probably have sought similar aid from the court with regard to the measure of damages had they reached that issue and had difficulty in determining it.

[4] We have concluded that the verdict against defendant in the Cary action was the result of a compromise between jurors who believed that defendant should pay substantial damages and jurors who believed that he should pay none. There has not been, therefore, an acceptable determination of defendant's liability, and defendant is entitled to a new trial on that issue.

The judgment and order appealed from are reversed.

SHENK, EDMONDS, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

The views which I have expressed in my dissenting opinions in Leipert v. Honold, Cal.Sup., 240 P.2d 288, and Hamasaki v. Flotho, Cal.Sup., 240 P.2d 298, are equally applicable to this case.

I would, therefore, affirm the order granting a new trial on the issue of damages only.



ROSE v. MELODY LANE OF WILSHIRE et al. *

L. A. 21984.

Supreme Court of California, in Bank.

Jan. 29, 1952.

Hearing Granted Feb. 28, 1952.

Jacob B. Rose brought action against Melody Lane of Wilshire, and others, and the Pig'n Whistle Corporation to recover for injuries sustained. The Superior Court of Los Angeles County, Albert F. Ross, J., entered judgment for plaintiff and order granting plaintiff a new trial on damages issue only, and the Pig'n Whistle Corporation appealed. The Supreme Court, Traynor, J., held that damages were so inadequate as to show that verdict was result of a compromise, and that therefore it was error to grant limited new trial.

Judgment and order reversed.

Carter, J., dissented.

Prior opinion 228 P.2d 854.

1. Negligence ⇐32(1), 44

Operator of cocktail room was not an insurer of the safety of its premises but was liable only for negligence in constructing, maintaining, or inspecting the premises.

2. Negligence ⇐136(22)

In action against operator of cocktail room for injuries sustained by patron when chair separated from its supporting base and patron fell to the floor, whether operator of cocktail room was negligent was for jury.

* Subsequent opinion 247 P.2d 335.

3. Negligence ⇐121(3)

In action against operator of cocktail room for injuries sustained by patron when chair separated from its supporting base and patron fell to the floor, patron was entitled to rely on doctrine of res ipsa loquitur.

4. Negligence ⇐121(2)

Doctrine of res ipsa loquitur applies if accident would not ordinarily have happened in absence of negligence and if defendant had exclusive control over instrumentality causing the injury.

5. Negligence ⇐121(2)

Once it has been established that accident was more probably than not the result of negligence, it need only be determined, in order to render the res ipsa loquitur doctrine applicable, that defendant was the sole person who could have been guilty of that negligence.

6. Negligence ⇐121(2)

Inference of negligence under the res ipsa loquitur doctrine is sufficient to sustain a verdict against defendant, unless it is overcome by plaintiff's own evidence, or unless it is conclusively rebutted by evidence that is clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved.

7. Evidence ⇐571(1)

In action against operator of cocktail room for injuries sustained by patron when chair separated from its supporting base and patron fell to the floor, credibility of expert witness of operator of cocktail room and probative value of his testimony were questions for triers of fact.

8. Negligence ⇐138(2)

In action against operator of cocktail room for injuries sustained by patron when chair separated from its supporting base and patron fell to the floor, patron could rely on res ipsa loquitur doctrine, though no instruction on res ipsa loquitur was requested by patron.

9. Negligence ⇐138(2)

Jury may draw inference of negligence under the res ipsa loquitur doctrine without a specific instruction authorizing jury to do so.

10. New Trial ⇐9

The granting of a new trial limited to issue of damages appropriately rests in the discretion of the trial court.

11. New Trial ⇐9

An abuse of discretion on part of trial court in granting a limited new trial is shown when record discloses that issue of liability is close, damages are inadequate, and there are other circumstances that indicate that verdict was probably result of a compromise of liability issue.

12. New Trial ⇐9

Where jury fails to compensate plaintiff for special damages indicated by the evidence, and, despite the fact that his injuries had been painful, makes no award or allows only a trifling sum for his general damages, the only reasonable conclusion is that jurors compromised issue of liability and a new trial limited to damages issue is improper.

13. New Trial ⇐9

Where issue of liability for injuries was sharply contested, and plaintiff incurred a bill of $300 for medical treatments plus $52 for X-rays, and jury returned a verdict for only $1 for general damages and $250 special damages, the verdict was so inadequate as to show that there had been a compromise, making it an abuse of discretion to grant defendant a new trial on damages issue only.

Sidney A. Moss and Henry F. Walker, Los Angeles, for appellants.

David Schwartz, Beverly Hills, for respondent.

TRAYNOR, Justice.

This action was brought to recover for personal injuries sustained in defendant's cocktail lounge when the stool on which plaintiff was sitting collapsed. Defendant's motion for a directed verdict was denied. The jury returned a verdict for plaintiff for $1 general damages and $250 special damages. Plaintiff's motion for a new trial on the single issue of damages was granted. Defendant has appealed from the judgment and from the order granting a limited new trial.

Sufficiency of the Evidence

At about 11:00 p. m., plaintiff and a friend entered defendant's cocktail room for a drink on their way home from a lodge meeting. There is no question of intoxication; the injuries were sustained before any liquor was consumed. Almost immediately upon their sitting down at the bar, and while his companion was giving their order to the attendant, plaintiff's chair separated from its supporting base and he fell backward to the floor, sustaining injury.

The upper part of the stool consisted of a leather seat and back and was held in place on its pedestal by a metal pin. Defendant's expert testified that the pin broke as the result of a progressive fatigue fracture, which is a weakening of the metal owing to continued local stress. He stated that this defect could not be detected before the break, even with the aid of a microscope, and that such a pin might last indefinitely or only a short time. Defendant's maintenance mechanic testified that this type of seat made a partial turn to right or left on a ball bearing swivel and that he removed all the seats every 30 to 60 days to lubricate the bearings. He had greased the seat in question about two weeks before the accident and had found nothing wrong with the pin. Defendant's assistant manager testified that he checked the seats almost every day, that he must have inspected this seat not more than two or three days before the accident, and that he discovered no defect.

[1] Defendant contends that this evidence conclusively shows that the accident resulted from a latent defect in the pin, that defendant did not know of the defect, and that reasonable inspection to ascertain the condition of the stools had been made. Since defendant is not an insurer of the safety of its premises but is liable only for negligence in constructing, maintaining, or inspecting them, Blumberg v. M. & T. Inc., 34 Cal.2d 226, 229, 209 P.2d 1; Johnston v. De La Guerra Properties, Inc., 28 Cal.2d 394, 399–400, 170 P.2d 5; Perbost v. San Marino Hall-School, 88 Cal.App.2d 796,

802, 803, 199 P.2d 701; McKellar v. Pendergast, 68 Cal.App.2d 485, 489, 156 P.2d 950, it argues that the evidence is insufficient to sustain the verdict.

[2] The jury, however, was not required to accept defendant's theory of the accident. There are at least two other theories consistent with the evidence that would support the verdict.

(1) The very fact that it is virtually impossible to detect this type of defect made it all the more important that defendant install stools so designed that the possibility of a break is reduced to a minimum. The expert testimony indicated that a progressive fatigue fracture develops gradually as a result of continued localized stress and that "any metal is likely to start fatigue." Such stress was to be anticipated in view of the swivel action of the seat; defendant's maintenance mechanic testified, as his opinion of the accident, that "when they twisted the seat and forced it, it broke." The jury may reasonably have concluded that the pin was not large enough, or of a suitable design, to withstand the strain that would be placed upon it. This view was substantially that of the trial judge. In denying defendant's motion for a directed verdict, he said, "I believe there is sufficient evidence for the jury to decide whether or not there was a latent defect, or whether the rod was perhaps too small to support the weight * *." It may even have been the conclusion of the jury that an additional pin or other safety device was reasonably necessary to guard against injury.

[3, 4] (2) Plaintiff was entitled to rely upon the doctrine of res ipsa loquitur. That doctrine applies if the accident in question would not ordinarily have happened in the absence of negligence and if defendant had exclusive control over the instrumentality causing the injury. Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 457, 150 P.2d 436; Lejeune v. General Petroleum Corp., 128 Cal.App. 404, 412, 18 P.2d 429; Judson v. Giant Powder Co., 107 Cal. 549, 556, 40 P. 1020, 29 L.R.A. 718; Scott v. London & St. Katherine Docks Co., 3 H. & C. 596, 601, 159 Eng.Rep. 665, 667. Seats designed for use by patrons of commercial establishments do not ordinarily collapse without negligence in their construction, maintenance, or use. Gross v. Fox Ritz Theatre Corp., 12 Cal.App.2d 255, 256, 55 P.2d 227; Micek v. Weaver-Jackson Co., 12 Cal.App.2d 19, 21–22, 54 P.2d 768; Gow v. Multnomah Hotel, Ore., 224 P.2d 552, 560; Billroy's Comedians v. Sweeny, 238 Ky. 277, 278, 37 S.W.2d 43; Sasso v. Randforce Amusement Corp., 243 App.Div. 552, 275 N.Y.S. 891; Fox v. Bronx Amusement Co., 9 Ohio App. 426, 430; cf. Durning v. Hyman, 286 Pa. 376, 379–382, 133 A. 568, 53 A.L.R. 851. See also Gates v. Crane Co., 107 Conn. 201, 203, 139 A. 782; Bence v. Denbo, 98 Ind.App. 52, 56–57, 183 N.E. 326.

[5] Defendant and its agents were in exclusive control of the stool up to the time plaintiff sat upon it. It is true that in one sense plaintiff was in control of the stool while he was using it; at least one court has held that this circumstance is sufficient to prevent the application of res ipsa loquitur. Kilgore v. Shepard Co., 52 R.I. 151, 154, 158 A. 720; contra, Gow v. Multnomah Hotel, supra, Ore., 224 P.2d 552, 556–560; see also, Prosser on Torts, p. 298. Such a view is artificial and ignores the purpose of the requirement that defendant have exclusive control. Once it has been established that the accident was more probably than not the result of negligence, it need only be determined that defendant is the sole person who could have been guilty of that negligence. Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 458, 150 P.2d 436; Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 517–518, 203 P.2d 522; Breidenbach v. M. McCormick Co., 20 Cal.App. 184, 190, 128 P. 423. Here it was the condition of the stool, not the use made of it, that was responsible for the fall. Plaintiff had done no more than sit upon it when it gave way, and there is no suggestion that his conduct was in any way improper. So far as construction, inspection, or maintenance of the stool were concerned, defendant had exclusive control. Plaintiff's actions had no more legal significance as a cause of the accident than those of the innocent bystander in the typical res ipsa loquitur case.

[6, 7] When res ipsa loquitur is applicable, as it is here, an inference of defendant's negligence arises. That inference is sufficient to sustain a verdict against defendant unless it is overcome by plaintiff's own evidence, see Binns v. Standen, 118 Cal.App. 625, 627–628, 5 P.2d 637; Gritsch v. Pickwick Stages System, 131 Cal.App. 774, 785, 22 P.2d 554; Prosser, Res Ipsa Loquitur in California, 37 Cal.L.Rev. 183, 212–214; cf. Leet v. Union Pacific R. R., 25 Cal.2d 605, 621–622, 155 P.2d 42, 158 A.L.R. 1008, or unless it is conclusively rebutted by evidence that is "clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved". Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868, 870; Leet v. Union Pacific R. R., 25 Cal. 2d 605, 622, 155 P.2d 42, 158 A.L.R. 1008. The inference in this case was not dispelled by plaintiff's own evidence. Nor did defendant's countershowing conclusively establish absence of negligence on its part. The jury may have rejected defendant's evidence that the accident resulted from a latent defect in the pin. The credibility of defendant's expert witness and the probative value of his testimony were questions for the triers of fact. Huth v. Katz, 30 Cal. 2d 605, 609, 184 P.2d 521; Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 461, 150 P.2d 436; Blank v. Coffin, 20 Cal.2d 457, 461–462, 126 P.2d 868; Meyer v. Tobin, 214 Cal. 135, 137, 4 P.2d 542; Michener v. Hutton, 203 Cal. 604, 609–612, 265 P. 238, 59 A.L.R. 480. Lejeune v. General Petroleum Corp., 128 Cal.App. 404, 416–417, 18 P.2d 429; Reinzi v. Tilyou, 252 N.Y. 97, 99–100, 169 N.E. 101. Johnston v. Black Co., 33 Cal.App.2d 363, 368–369, 91 P.2d 921, is inconsistent with the foregoing cases and is disapproved. Moreover, there was evidence that after the accident the back of the chair was found broken; it is possible that a defect in the back of the chair was the cause of plaintiff's fall and that the weakened pin broke later as a result of the strain suddenly placed upon it. The fact that plaintiff fell immediately upon sitting down suggests that the chair was defective before he used it. In this connection the jury may have concluded that the inspections made by defendant's employees were insufficient to discharge defendant's duty of care. Particularly in view of the subdued lighting in the cocktail room, it cannot be said as a matter of law that an examination of the stool two or three days before the accident was all that was reasonably required. The jury may even have believed that no such examination was made.

[8, 9] Defendant contends that, since no instruction on res ipsa loquitur was requested by plaintiff or given by the trial court, it is now too late to rely upon that theory. The doctrine of res ipsa loquitur concerns a type of circumstantial evidence upon which plaintiff may rely to discharge his burden of proving defendant's negligence. Such evidence was given to the jury in this case. The nature of the accident and the fact that defendant and its agents were the only persons whose negligence could have been involved give rise to the inference that defendant was negligent. There is no reason why the jury may not draw that inference without, as well as with, a specific instruction authorizing them to do so. Fedler v. Hygelund, 106 Cal.App.2d 480, 235 P.2d 247.

Limited New Trial

[10, 11] The granting of a new trial limited to the issue of damages appropriately rests in the discretion of the trial court, but an abuse of that discretion is shown when the record discloses that the issue of liability is close, the damages are inadequate, and there are other circumstances that indicate that the verdict was probably the result of a compromise of the liability issue. Leipert v. Honold, Cal.Sup., 240 P.2d 288. An examination of the present case in the light of this rule indicates that the order granting a limited new trial should be reversed.

(1) *Evidence of liability.* The issue of liability was sharply contested, for defendant made a strong showing that the accident resulted from a latent defect of which it had no knowledge and for which it could not reasonably be held responsible. Plaintiff contends that the cases in which it has been held that a conflict on the liability issue is a circumstance to be considered in determining the propriety of a limited new

trial have all involved questions of contributory negligence. See, for example, Wallace v. Miller, 26 Cal.App.2d 55, 56, 78 P.2d 745; Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 9, 177 P. 845. That distinction, however, is not material. Uncertainty concerning defendant's liability is the controlling consideration, and it makes no difference whether that uncertainty arises in connection with defendant's negligence or plaintiff's contributory negligence.

(2) *Inadequacy of damages.* The evidence shows that plaintiff was shaken and excited at the time of his fall but did not feel significant discomfort until he was awakened during the night by pain in the lower part of his back. The next day he consulted a physician, and he was given treatment for several months, which continued to the time of the trial. When he testified, plaintiff was still unable to sit for extended periods without pain, particularly on hard surfaces. For some time after the accident, he found it necessary to assign to an employee a number of the duties he had regularly performed at his candy store. Plaintiff's physician testified that plaintiff had sustained an injury to his coccyx, that in his opinion it was a permanent injury, and that such an injury is painful. The bill for his medical services, covering about 75 treatments, was $300. In addition plaintiff incurred an expense of $52 for X-rays. The verdict was for $1 general damages and $250 special damages; it was thus more than $100 less than the medical and X-ray charges.

[12, 13] When the jury fails to compensate plaintiff for the special damages indicated by the evidence and despite the fact that his injuries have been painful, makes no award or allows only a trifling sum for his general damages, the only reasonable conclusion is that the jurors compromised the issue of liability and a new trial limited to the damages issue is improper. See Hughes v. Schwartz, 51 Cal.App.2d 362, 367–368, 124 P.2d 886; McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 16, 146 P.2d 34; Adams v. Hildebrand, 51 Cal.App.2d 117, 118–119, 124 P.2d 80. A contrary conclusion is justified only when the evidence of defendant's negligence is "overwhelming." See Taylor v. Pole, 16 Cal.2d 668, 675, 107 P.2d 614; Crandall v. McGrath, 51 Cal.App.2d 438, 440–442, 124 P.2d 858.

It is claimed that the inadequacy of the award is attributable to the fact that the damages issue was not argued by counsel. It is not likely, however, that, even without the aid of counsel, the jurors would have allowed less than the special damages shown and only $1 for pain and suffering.

(3) *Other circumstances indicating compromise.* More than three hours after the case was submitted to them, the jurors returned for a re-reading of the testimony of defendant's maintenance mechanic. This witness was not present at the accident and had no knowledge concerning plaintiff's injuries; his testimony related exclusively to the construction and maintenance of the stool. The trial was a short one, and the fact that the jurors were at that time still debating defendant's liability demonstrates the difficulty they were having in determining whether or not defendant was negligent. In the light of the gross inadequacy of the award, this circumstance also supports the conclusion that the verdict was the result of a compromise.

Defendant has appealed not only from the order granting a limited new trial but also from the judgment. Since its liability has never been properly determined the judgment must be reversed.

The judgment and order are reversed.

SHENK, EDMONDS, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

The views which I have expressed in my dissenting opinions in Leipert v. Honold, Cal.Sup., 240 P.2d 288, and Hamasaki v. Flotho, Cal.Sup., 240 P.2d 298, this day filed, are equally applicable to this case.

I would, therefore, affirm the order granting a new trial on the issue of damages only.

109 Cal.App.2d 7

GUIPRE v. KURT HITKE & CO., Inc. et al.

Civ. 4405.

District Court of Appeal, Fourth District, California.

Jan. 29, 1952.

Rehearing Denied Feb. 26, 1952.

Lyle Duane Guipre, by his guardian ad litem, N. H. Smedegaard, sued Kurt Hitke & Co., Inc., and others, and Republic Indemnity Company of America, a corporation, for the amount of a judgment which had been entered against plaintiff in a suit arising out of an automobile collision. The Superior Court, Orange County, Franklin G. West, J., entered judgment for plaintiff, and defendant indemnity company appealed. The District Court of Appeal, Griffin, J., held, inter alia, that the evidence presented question for the jury as to whether defendant's agent had authority to enter into the substandard automobile liability policy upon which the suit was based.

Affirmed.

1. Insurance ⇐131(1)

Oral contracts of insurance are enforceable.

2. Insurance ⇐175

In absence of evidence to the contrary, the effective date of insurance is the date when acceptance is made.

3. Customs and Usages ⇐10

When there is a known usage of trade, persons carrying on that trade are deemed to have contracted in reference to the usage, unless the contrary appears, and the usage forms a part of the contract. Insurance Code, § 335(b).

4. Customs and Usages ⇐15(1)

Evidence of usage is always admissible to supply deficiency or as means of interpretation of a contract where such evidence does not alter or vary the terms of the contract. Insurance Code, § 335(b).

5. Evidence ⇐20(1)

It is a matter of common knowledge and experience that insurance agencies represent several companies in automobile insurance field and that oral application to such agency is ordinarily considered accepted when approved by such agent, and responsibility of selecting company to cover risk is with such agent. Insurance Code, § 335(b).

6. Insurance ⇐129

If an application for insurance is accepted by a clerk who undertakes to speak for insurance agent, an enforceable insurance contract results. Insurance Code, § 1671.2.

7. Insurance ⇐668(2)

In action by insured against automobile liability insurer for amount of judgment which had been entered against insured in suit arising out of automobile accident, evidence presented question for jury as to whether clerk of insurance agent had ostensible authority to accept insurance contract. Insurance Code, §§ 335(b), 1671.-2.

8. Insurance ⇐668(2)

In action by minor insured against insurance company under automobile liability policy for amount of judgment which had been entered against insured in suit arising out of automobile accident, evidence presented question for jury as to whether insurance agent had actual or ostensible authority to write substandard policies for the company. Insurance Code, § 1671.2.

9. Insurance ⇐129
Principal and Agent ⇐116(1)

Secret limitations of agent's power do not prevent party from dealing with agent to full extent of his apparent authority, and parties dealing with insurance agent having apparent authority to enter into insurance contract cannot be affected by special instructions to contrary. Insurance Code, §§ 335(b), 1671.2.

10. Insurance ⇐668(3)

In action by minor insured against insurance company under automobile liability policy for amount of judgment which had been entered against insured in suit arising out of automobile accident, evidence presented question for jury as to whether company had entered into the insurance contract. Code Civ.Proc. § 2055.

11. Appeal and Error ⇐930(1)

On appeal, evidence would be viewed in most favorable light in support of judgment.

12. Insurance ⇐136(1)

Where automobile owner applied orally for regular automobile liability policy and was told that his automobile was covered, policy was effective and insurer was liable for loss sustained thereafter, though policy was not delivered. Insurance Code, §§ 335(b), 1671.2.

Flaum & Hecker, Beverly Hills, Stanley Sevilla, Los Angeles, of counsel, for appellant.

N. H. Smedegaard and Winthrop O. Gordon, Santa Ana, for respondent.

GRIFFIN, Justice.

Plaintiff, by his guardian, brought this action against appellant Republic Indemity Company of America, and defendants Kurt Hitke & Co., Inc., D. E. Morris, Wilma Oliphant, United Insurers and Inter-Insurance Exchange, to recover upon plaintiff's claim that defendants, as agents of appellant corporation, orally insured or agreed to insure to plaintiff, effective as of the date of the oral acceptance of such risk, a standard form of Insurance for P. L. & P. D., and that defendant United Insurers likewise agreed to issue a collision insurance policy on plaintiff's automobile; that thereafter an accident happened and defendants and appellant, contrary to the terms of the policies, refused to assist in the defense of an action and to pay a judgment rendered against plaintiff.

Plaintiff, at the close of his affirmative case, by the order of the court, elected to proceed against appellant Republic Indemnity Company and defendant United Insurers, and, over their objections, the action was dismissed as to the remaining defendants. A jury returned a verdict resulting in a judgment against appellant for $6,248.02 and against defendant United Insurers for $563. Apparently the latter judgment was satisfied. Republic Indemnity Company appealed.

Plaintiff, then aged 19 years, and a corporal in the United States Marines, arranged to borrow a sum of money from a bank in Balboa to purchase a used car. The bank advised plaintiff of the type of insurance required as a condition to granting the loan. Guipre told his friend Kliewer of this requirement, and Kliewer called defendant Gilmore in Santa Ana, who was a member of the insurance agency firm of Stricklin, Gilmore & Rabun, and who particularly dealt in various kinds of automobile insurance. His company would not handle "substandard risk", such as this one. Gilmore, on February 6, 1948, then phoned defendant Morris in Anaheim, who was an insurance broker and who, since 1947, had been selling P. L. & P. D., as well as other kinds of insurance for different companies, as broker, or through the office of Kurt Hitke & Co., Inc. in Los Angeles, which company was conducting a general insurance business, and was general agent for Republic Indemnity Company as well as the United Insurers. A major portion of Morris's business was with Kurt Hitke & Co., Inc. in connection with substandard business, and his business was being conducted with them over the phone.

At the trial Gilmore testified generally that due to the fact that his company did not write substandard policies, he called the office of defendant Morris, as he had done on previous occasions, about placing such a policy and gave one of the assistants the required information; that the next day he called Morris and asked him if he had obtained the necessary coverage and Morris stated that he had; that he gave him such additional information as was suggested, such as the car number, amount Guipre borrowed and to whom the loss, if any, was payable; that he specifically asked Morris if the "risk could be bound" (immediately); that he answered "Yes", it would be effective immediately; that Morris said he had called (Kurt Hitke & Co., Inc.) and that they had said they would "take it"; that Kurt Hitke & Co., Inc. asked him to send the additional information to it on a written application form. (This form was placed in evidence and was addressed to "Kurt Hitke Co.") He

then testified that on other occasions he had called Morris when he wanted to place a risk of this type and followed this same procedure, and after presenting the question as to whether such a policy would issue, Morris would quote the rates and say: "It is bound" or "You have it", or words to that effect and the policy would be effective as of the date of such phone call ratification, and that subsequently a policy would be forwarded to him, issued as of the date of the call; that these policies were written by the appellant Republic Indemity Company because "it was the only type of insurance that we could place with Republic, substandard insurance"; that it was the policy of that company to write the insurance and if, after further investigation it desired to do so, it would cancel it and return the premium. He then stated that after this conversation with Morris on February 7th he gave the premium rate figures, amounting to $121, (which was about double the ordinary rate) to Guipre, and told him Morris had advised him the "coverage was in effect". He then stated that on February 14th, he received a call about an accident. He testified that he then called Morris and told him the particulars and asked him to contact the necessary adjusting service; that Morris said he would, and made no mention of the fact that the applicant was not covered. He stated that several days later, Morris called him and said that he had been advised that there was no coverage.

Guipre testified he contacted Gilmore about the policy the bank required before the loan would be made; that while in his office Gilmore phoned to Morris; that after the conversation Gilmore gave him the figures and the cost of the insurance; that he gave these figures to the bank and the loan was made after deducting $121 for insurance premiums; that he bought the car and returned to the bank with the pink slip; that the accident happened on the 14th; that a report of it was made and demand was made upon Gilmore to have the insurance company furnish attorneys to defend the suit; that he was told the company refused his request; that similar demand was made on Kurt Hitke & Co., Inc., as well as Morris and that he employed his own attorneys and judgment went against him in the case.

Defendant Morris, called under section 2055 of the Code of Civil Procedure, testified that he placed the name Kurt Hitke & Co., Inc. on the top line of the application blank (Exhibit A) and mailed it to the company, which application showed the coverage and amount of premium on each item, as given to him by that company through defendant Miss Oliphant; that the sum total was $121. He then stated in his deposition that on these substandard risks, prior to this occasion, John D. Lynch, vice president of Kurt Hitke & Co., Inc., had told him that he (Lynch) would write him such a risk "over the phone" and that "we bound" lots of them over the phone; and that usually a written application would follow; that he would call the Kurt Hitke office and either Mr. Lynch or Miss Oliphant would take the particulars of the risk and give a rating. He then testified that this was what was done in the instant case; that Miss Oliphant told him "she would write it"; to "send it in on a written application"; (the policy period mentioned in the written application was from February 7, 1948, to February 7, 1949); that he then got in touch with Mr. Gilmore. Subsequently, however, he stated in his deposition that Kurt Hitke & Co., Inc. gave him a rate without saying it would write it "because all the minors had to go in to the company in person for approval"; that this was the absolute direction to him; that he never knew what company, if any, was going to write it; that in the instant case no company was mentioned; and that he knew Kurt Hitke & Co., Inc. represented several companies. However, in a recorded telephone conversation with Gilmore, it shows that in this particular instance Morris did tell Gilmore that Miss Oliphant "told him that they would take it", and "for us to submit it on a written application". He also told Gilmore that he could not "bind" the risk, but in order to do so he first had to call Kurt Hitke & Co., Inc.; that that was why he called him, to "let him bind it"; that he could not understand their attitude because "they are bound to be

stuck for it". In this conversation Morris's testimony was impeached in many ways. Morris, at that time, was a licensed broker and had an appointment as agent for the United Insurers. He never wrote any business for them except through Kurt Hitke & Co., Inc. On cross-examination Morris stated that Lynch admitted that Miss Oliphant had told Lynch about the call and that she told Morris "They would write it", but Lynch told him that "they were unable to place it at that time". Morris's books show, in his account, "that a number of the policies he had obtained through Kurt Hitke & Co., Inc. had been canceled and others rejected after the policies had been written"; that among them was one issued by the Republic Indemnity Company. He testified that nearly all of his business with Kurt Hitke & Co., Inc. was substandard business, and that the policies, when issued, were delivered through Kurt Hitke & Co., Inc.

Miss Oliphant testified she received applications for insurance on various forms from Mr. Morris; that if Mr. Lynch instructed her that the United Insurers would accept the collision risk, the practice was to then send that company a copy of the application, and the same rule was true as to the Republic Indemnity Company in reference to P. L. & P. D. insurance. She denied telling Morris "we could write it", or anything of that nature. She stated she kept books and acted in a secretarial capacity for Mr. Lynch, took such applications as here involved over the phone, and gave "estimates" of rates, but that she had no authority to bind the risk without taking it up with Mr. Lynch; that many policies were canceled after their issuance upon a flat rate, i. e., "returning the full amount of premium if it had been received" (because the particular company did not want to stay on the risk); that this was often done after the company read an inspection report as to the risk. She stated she knew Mr. Lynch surcharged minors and service men, at 100 per cent; that after the accident she remembered that there was a discussion in the office whether the Guipre policy had been written. She then remarked that her company could not place any surcharge business with Republic Indemnity Company or United Insurers, but on cross-examination she testified she believed they did later write such business.

An insurance agent and broker of many years experience testified in respect to the custom of insurance agents "binding" risks of automobile insurance and as to the meaning of the words "We will write it", that these words mean that the coverage is effective immediately; that it is not ordinarily disclosed what company is to carry it; that that is usually determined by the agent where he is general agent for more than one company, and it is usually written by the company designated by the agent; that if a loss occurs before the policy is issued he charges the loss to the company he selected; that if he is only a broker for a company he cannot bind it, but if he is an agent for it he has binding authority; that if clerks in an office of an authorized agent accept applications for insurance and give rates, they are generally considered as representing the agent in so doing; and that on occasions, in his absence, they have "bound" the risk for the general agent, as to general automobile insurance, even on substandard risks; that it is the custom to accept the word of the agent as making a binding contract when he says "we will write it".

At this point plaintiff offered in evidence a substandard policy issued by the appellant company for another service man in August, 1947, for P. L. & P. D., which was obtained by Morris on a commission-splitting basis, for the purpose of showing that the company did issue such a policy as indicated, at that time. Thereafter, plaintiff rested his case. Motions for nonsuit were denied. Plaintiff elected to proceed only as against the United Insurers and Republic Indemnity Company.

Defendant produced a witness from the bank who testified that, in reference to plaintiff's statement as to the car being covered, a check for $121, the amount of the premiums indicated, was forwarded to Stricklin, Gilmore & Rabun Company,

which firm later returned it to the bank. The bank turned these proceeds back to the plaintiff to pay his attorney's fees.

Thereafter, Lynch testified that he had complete charge of his office; that his secretary had no authority to bind him as agent for any company; that the Republic Indemnity Company had its own underwriting department in charge of a Mr. Mapes in Los Angeles; that he had been instructed by Mapes to issue only P. L. & P. D., and after January, 1948, only manual rates were to be employed and no coverage was to be issued to minors; and that he so informed Morris. He testified generally as to the custom of receiving applications; that upon receipt they would call the various companies to see if they would carry the risk and that all companies for which he accepted business required a signed application before issuing a policy, except one of the companies not here involved. A considerable number of exhibits were received in evidence in an endeavor to substantiate this policy. He then testified that Morris told him that he knew that neither he nor Kurt Hitke & Co., Inc. could "bind" the risk by telephone and that he told Gilmore it could not be "bound" because minors' applications had to be sent to the company for approval; that he received no money on account of the claimed Guipre risk; that he never did "bind" a risk in his office; that he was the designated agent for the United Insurers and for the Republic Indemnity Company and that he was only a broker as to the other agencies.

Mr. Mapes, the underwriter, was called and testified that Lynch approached him sometime before March 1st, in regard to writing substandard business; that he told him that the idea had a lot of merit; that if and when they accepted that class of business they were going to publish rate books, etc., and that until that time they would not accept any of that business from him; that in the meantime he was not to "bind" them on any risk that was not standard; that after March 1st they did accept that type of risk and sent out a notice of higher premium rate.

On rebuttal, plaintiff produced Mr. Stricklin and Mr. Rabun, who testified that they went to Mr. Mape's office about the time of this Guipre controversy to see if they could act as agent for his company in issuing substandard business; that he told them that Kurt Hitke & Co., Inc. had a contract for all substandard business with them and that he preferred any sub-agent's appointments be made with that company for such business; that he then said about the Guipre policy, "There was a policy issued and torn up". Mapes denied this latter part of the conversation.

[1, 2] Appellant concedes that oral contracts of insurance are enforceable. Smith v. Massachusetts Bonding, etc., Company, 71 Cal.App. 661, 236 P. 176; K. C. Working Chemical Co. v. Eureka-Security Insurance Co., 82 Cal.App.2d 120, 185 P.2d 832. The cases hold that in the absence of evidence to the contrary, the effective date of insurance is the date when acceptance is made. Marderosian v. National Casualty Co., 96 Cal.App. 295, 273 P. 1093; Ferrar v. Western Assurance Co., 30 Cal.App. 489, 159 P. 609.

It is argued that the evidence here is insufficient to support the implied finding of the jury that appellant company did, by its own acts or the acts of its authorized agent, enter into such a contract; that Morris was not an agent of appellant and could not bind the appellant company to an oral contract of insurance with Guipre; that although Kurt Hitke & Co., Inc. was an agent of appellant company, it did not have actual or ostensible authority to bind it to such a contract; and even though it may be assumed that it did have such authority, the elements of an oral binding contract of insurance were not present.

[3, 4] We have here a lay person making a regular application for insurance coverage on his automobile to an insurance agent who, in accordance with the adopted custom, informed him that his automobile was covered, according to the requirements of the loaning agency. He was informed that such coverage was immediate, as of the date of the oral ratification by such agent. Under Section 335, subdivision (b) of the Insurance Code each party to a contract of insurance is bound

to know "All the general usages of trade". When there is a known usage of trade, persons carrying on that trade are deemed to have contracted in reference to the usage, unless the contrary appears; and the usage forms a part of the contract. Evidence of usage is always admissible to supply a deficiency or as a means of interpretation where it does not alter or vary the terms of the contract. Watson Land Co. v. Rio Grande Oil Co., 61 Cal.App.2d 269, 272, 142 P.2d 950.

[5] If automobile liability insurance companies and agencies are going to deviate from or alter the general practice of accepting oral applications for such insurance by authorized agents and require written applications for such policies and a previous approval by the company itself before the issuance of such policies and before liability shall attach, the burden to examine into the changed policy or limited authorization of such agent should not be cast upon the applicant. It is a matter of common knowledge and experience that insurance agencies do represent several companies in the automobile insurance field and that an oral application to such an agency is ordinarily considered accepted when approved by such agent, and the responsibility of selecting the company to cover the risk is with such agent. Under these conditions, in case of a loss, the applicant should not be made to suffer by reason of some undisclosed agreement or change of policy between the agent and the company as to the method of procedure pertaining to such coverage, particularly where the company allows its authorized agent to transact such business in accordance with the custom mentioned.

In Wheaton v. North British & M. Insurance Co., 76 Cal. 415, 18 P. 758, it was held that an insurance company doing business through the medium of agents is responsible for their acts within the general scope of the business entrusted to their care. And in Marderosian v. National Casualty Company, supra, 96 Cal.App. at page 303, 273 P. at page 1097, it is said: "Where the assured has no notice of any limitation on the powers of the general agent, any act within the scope of the insurance business is binding on the insurance company, although it is in fact in violation of the agent's authority." See, also, Cronin v. Coyle, 6 Cal.App.2d 205, 212, 44 P.2d 385.

[6] The evidence is sufficient to show that Miss Oliphant did, in fact, inform Morris that Kurt Hitke & Co., Inc. would cover the risk described, as of the date of such oral application, and did quote the exact rate of premium required for such coverage in some company; that she had pursued this method of procedure on other occasions and a policy of insurance followed. Notwithstanding Lynch's testimony to the contrary, the surrounding circumstances indicate an authorization by him for her to act as his agent in this respect. As pointed out by respondent, in modern practice much of the business of the agency insurance company is conducted over the telephone. New insurance in various forms, as well as increased coverage on existing insurance is commonly ordered by telephone and if an application is accepted by a clerk who undertakes to speak for the agent, an enforceable insurance contract results. Harris v. Sachse, 160 Pa.Super. 607, 52 A.2d 375, 379. See, also, Barone v. Aetna Life Ins. Co., 260 N.Y. 410, 183 N.E. 900; Allen v. St. Louis Ins. Co., 85 N.Y. 473; Bodine v. Exchange Fire Ins. Co., 51 N.Y. 117; Security Insurance Co. v. Van Norman, 195 Ark. 200, 111 S.W.2d 561; International Trust Co. v. Norwich Union Fire Ins. Soc., 8 Cir., 71 F. 81.

[7] Although section 1671.2 of the Insurance Code provides that certain employees are not deemed agents, Goldstone v. Columbia Life, etc., Co., 33 Cal.App. 119, 164 P. 416, holds that such statutory provision as to agents does not change the rule of law as to principal and agent between the company and the policy holder. The question of Miss Oliphant's ostensible agency was a jury question and was apparently submitted to the jury under proper instructions. Stanley v. Columbia Casualty Co., 63 Cal.App.2d 724, 732, 147 P.2d 627.

[8] As pointed out, Kurt Hitke & Co., Inc. was general agent for the Republic Indemnity Company and the United Insurers, and broker for several other com-

panies. It had, at all times, ostensible authority to contract for automobile liability insurance for the appellant company. The jury had the right, under the evidence here presented, to believe or disbelieve appellant's evidence that Kurt Hitke & Co., Inc. was not authorized to write substandard policies for it, or bind it in respect to such insurance. Morris did state that he did principally substandard business with Kurt Hitke & Co., Inc. He produced his book account with the company which clearly showed a considerable amount of business transacted with it and the appellant had issued many of the policies indicated. It also showed that several of these policies were canceled by that company after the policy was issued and the entire premium returned. This fairly well indicates that the jury was justified in disbelieving appellant's testimony in respect to the claimed limited authority given by the appellant company to Kurt Hitke & Co., Inc. The jury had all of the evidence on this subject before it, and the question whether that company had authority, either actual or ostensible, was for the jury to determine. Ames v. Auto Owners' Insurance Co., 225 Mich. 44, 195 N.W. 686; Farnum v. Phoenix Insurance Co., 83 Cal. 246, 261, 23 P. 869.

[9] The law has been stated to be that the secret limitations of an agent's power do not prevent a party from dealing with the agent to the full extent of his apparent authority and the parties dealing with an insurance agent having apparent authority to enter into a contract of insurance cannot be affected by special instructions to the contrary. See, Wheaton v. North British & M. Insurance Co., 76 Cal. 415, 420, 18 P. 758; Browning v. McNear, 145 Cal. 272, 281, 78 P. 722; Farnum v. Phoenix Ins. Co., supra; Oderkirk v. Fargo, 61 Hun. 418, 16 N.Y.S. 220.

[10, 11] Appellant relies principally upon K. C. Working Chemical Co. v. Eureka-Sec. Insurance Co., 82 Cal.App.2d 120, 185 P.2d 832, where the general agent represented several companies writing the same type of *fire* insurance. There it was held that before any particular company could be bound, the minds of the parties must have met on the identity of the person with whom they were dealing; and that there was no enforceable contract of insurance with the insured. There, the agent, who represented several companies, failed to designate one of the companies before the loss occurred. There is a factual difference between that case and the instant case. There is evidence here which shows that Kurt Hitke & Co., Inc. was general agent for only one automobile insurance company writing P. L. & P. D. insurance; that appellant Republic Indemnity Company did in fact write the policy, and after the accident happened it was torn up by that company. The jury had the right to believe this evidence. The custom of covering automobile liability insurance was shown to be somewhat different from that involved in the cited case. There, no premium amount was indicated to the insured and no payment was made for the policy. Viewing the evidence in its most favorable light in support of the judgment, as we must do, it shows that every necessary detail had been covered by the parties except the matter of delivering the policy.

[12] In Marderosian v. National Casualty Company, supra, it was held that under such circumstances the contract of insurance is deemed effective from the date of the oral acceptance of the risk, although a loss occurs before the policy is actually delivered.

Many of the authorities cited by appellant, such as Toth v. Metropolitan Life Insurance Co., 123 Cal.App. 185, 11 P.2d 94; and O'Brien v. New Zealand Insurance Co., 108 Cal. 227, 41 P. 298, involve life or fire insurance contracts based on a written application and in which it was provided that there was no coverage until the written application was accepted by the company.

We conclude that the evidence is sufficient to support the judgment.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

109 Cal.App.2d 280

VASQUEZ v. VASQUEZ.

Civ. 18449.

District Court of Appeal, Second District, Division 3, California.

Feb. 15, 1952.

Marie Vasquez, also known as Maria De Jesus Ledesma De Vasquez, brought quiet title action against Bartolo Vasquez. The Superior Court of Ventura County, Atwell Westwick, J., quieted plaintiff's title to undivided half interest in certain property, and the defendant appealed. The District Court of Appeal, Vallée, J., held that judgment in prior divorce action awarding defendant entire community property though divorce was granted solely on ground of desertion was void and could be collaterally attacked.

Affirmed.

1. Divorce ⇐255

Adjudication in prior action for divorce that property of parties was community was final and conclusive and could not be impeached in action to quiet title.

2. Divorce ⇐252

Statute providing that in case of dissolution of marriage, community property shall be equally divided between parties if decree is rendered on any other ground than that of adultery, incurable insanity or extreme cruelty, is limitation on power of court in disposing of community property. Civ.Code, § 146.

3. Courts ⇐1

Generally, jurisdictional requirements are legal organization of tribunal, jurisdiction over person, jurisdiction over subject-matter, and power to grant judgment.

4. Judgment ⇐486(1)

In rendition of a judgment, court must remain within its jurisdiction and power, and where it grants some relief which it has no power to grant, judgment is void and may be reached by collateral attack.

5. Judgment ⇐505

A wrong decision made within limits of court's power is mere error correctable on appeal or other direct review.

6. Divorce ⇐252, 255

Where court in divorce action awarded husband entire community property though divorce was granted him solely on ground of desertion, court exceeded jurisdiction in making such award and judgment was void and could be collaterally attacked. Civ. Code, § 146.

7. Quieting Title ⇐7(4)

Where judgment in divorce action awarding husband entire community property though divorce was granted solely on ground of desertion was in excess of court's jurisdiction and hence void, wife's title to undivided one-half interest in the community property was properly quieted in her action to quiet title. Civ.Code, § 146.

Levy, Bernard & Jaffe, and Saul J. Bernard, all of Los Angeles, for appellant.

William A. Reppy, Oxnard, for respondent.

VALLÉE, Justice.

Appeal by defendant from a judgment quieting title to an undivided half interest in two parcels of realty in plaintiff.

The parties were formerly husband and wife. On April 14, 1948, defendant in the present suit, as plaintiff, obtained an interlocutory decree of divorce from plaintiff in the present suit on the ground of desertion after she had defaulted in the action. The wife resided in Mexico at the time and jurisdiction was obtained by substituted service. In his complaint in the action for divorce, the husband alleged that the only property of the parties was the two parcels of realty involved here and that they were community property. The interlocutory decree found that the allegations of the complaint were true, that the two parcels of realty were community property, and assigned them to plaintiff in that action, defendant here. No property was assigned to the defendant in that action, plaintiff here. On April 22, 1949, on an affidavit of the husband, a final decree of divorce was entered which provided that wherein the interlocutory decree related to property of the parties, such property was assigned "in

accordance with the terms thereof to the parties therein declared to be entitled thereto."

Plaintiff-wife brought this suit on the theory that the court in the action for divorce exceeded its jurisdiction in awarding all of the community property to the husband when it granted him the divorce solely on the ground of desertion. The court found the judgment roll in the action for divorce showed on its face that the interlocutory decree was obtained solely on the ground of desertion, the two parcels of realty were community property of the parties at the time the interlocutory decree was rendered and entered, and that the husband "at no time acquired the interest of the wife in the property."

The question is whether a judgment assigning all of the community property to a litigant securing a divorce on the sole ground of desertion is an act in excess of the jurisdiction of the court. We have concluded it is.

[1] The husband in the divorce action alleged the property was community. The question whether the property was community was directly in issue and was necessarily litigated. The court had jurisdiction of the property and found it was community. Adjudication in the action for divorce that the property was community is final and conclusive and cannot be impeached. Estate of Williams, 36 Cal.2d 289, 292, 223 P.2d 248; Zaragosa v. Craven, 33 Cal.2d 315, 317, 202 P.2d 73, 6 A.L.R.2d 461.

[2] Civil Code, section 146, in pertinent part, provides: "In case of the dissolution of the marriage by decree of court of competent jurisdiction, the community property, and the homestead, shall be assigned as follows: * * * Two. If the decree be rendered on any other ground than that of adultery, incurable insanity or extreme cruelty, the community property shall be equally divided between the parties." The section is manifestly a limitation on the power of the court. The community property was assigned in the divorce action contrary to the express mandate of section 146. Was such assignment in excess of the court's jurisdiction, in which event it was void and subject to collateral attack, or was it merely an error or irregularity in the proceeding, in which event it is not subject to collateral attack?

[3] Generally it may be said the following are the jurisdictional requirements: 1) legal organization of the tribunal; 2) jurisdiction over the person; 3) jurisdiction over the subject matter; 4) power to grant the judgment. 15 Cal.Jur. 49–55, §§ 140–1, and cases there cited; Hunter v. Superior Court, 36 Cal.App.2d 100, 112, 97 P.2d 492. It is conceded the first three requirements were present in the action for divorce.

[4, 5] In the rendition of a judgment a court must remain within its jurisdiction and power. It is the power and authority behind a judgment rather than the mere result reached which determines its validity and immunity from collateral attack. A judgment, though entered in a case over which the court had jurisdiction over the parties and the subject matter, may be void in whole or in part because it granted some relief which the court had no power to grant. A wrong decision made within the limits of the court's power is error correctable on appeal or other direct review, but a decision which oversteps the jurisdiction and power of the court is void and may be set aside directly or collaterally. (1 Freeman on Judgments, 5th Ed., p. 733, § 354; Feillett v. Engler, 8 Cal. 76–77; Crew v. Pratt, 119 Cal. 139, 148–149, 51 P. 38; Grannis v. Superior Court, 146 Cal. 245, 253–256, 79 P. 891; Petition of Furness, 62 Cal.App. 753, 218 P. 61; Corbett v. Corbett, 113 Cal.App. 595, 601, 298 P. 819. See the learned and exhaustive discussion by Mr. Chief Justice Gibson in Abelleira v. District Court of Appeal, 17 Cal.2d 280, 287–291, 109 P.2d 942, 132 A.L.R. 715; In Tabor v. Superior Court, 28 Cal.2d 505, at page 508, 170 P.2d 667, at page 669 the court quoted the following from the Abelleira case: "'Lack of jurisdiction' * * * may be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to

act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites."

The general rule is exemplified in a number of cases. Lack of authority in a court to pronounce a binding judgment in excess of its statutory power invalidates a judgment for an amount greater than the court is authorized to give judgment for in any event. Feillett v. Engler, 8 Cal. 76. The entry of a final decree of divorce on the trial of the action without an interlocutory decree and the lapse of the statutory period is in excess of jurisdiction, not a mere error in the exercise thereof; it is void and subject to collateral attack. Grannis v. Superior Court, 146 Cal. 245, 79 P. 891. A judgment of foreclosure without giving the right of redemption is, insofar as it bars the right of redemption, void and subject to collateral attack. Tonningsen v. Odd Fellows' Cemetery Ass'n, 60 Cal.App. 568, 213 P. 710. A *nunc pro tunc* final decree of divorce, made in 1931 before the permissive amendment, was to the extent that it was made *nunc pro tunc* void and subject to collateral attack because the court was without statutory power to make such an order. Corbett v. Corbett, 113 Cal.App. 595, 298 P. 819. A judgment in a suit to quiet title, awarding costs against a defendant who had filed a disclaimer, contrary to the statute, is, to the extent it awarded costs, void and subject to collateral atack. Michel v. Williams, 13 Cal. App.2d 198, 56 P.2d 546. A decree granting a husband a divorce on the ground of desertion is void on its face insofar as it awards support money to the guilty wife. Harwell v. Harwell, 26 Cal.App.2d 143, 78 P.2d 1167. A judgment based on an illegal contract because it was in restraint of trade is void where the illegality appeared on the face of the judgment roll. Hunter v. Superior Court, 36 Cal.App.2d 100, at page 116, 97 P.2d 492, at page 500, the court saying: "If a court grants relief, which under no circumstances it has any authority to grant, its judgment is *to that extent* void." Lack of authority in a court to pronounce a binding judgment in excess of its statutory power invalidated an award of real estate as alimony where no power existed under the statute to make such award. Cizek v. Cizek, 69 Neb. 797, 96 N.W. 657, 99 N.W. 28, 5 Ann.Cas. 464.

In Michel v. Williams, 13 Cal.App.2d 198, 56 P.2d 546, 547, the court quoted from Sache v. Wallace, 101 Minn. 169, at page 200, 112 N.W. 386, 11 L.R.A.,N.S., 803, 118 Am.St.Rep. 612, 11 Ann.Cas. 348, with approval thus: "'Proceedings outside the authority of the court, or in violation or contravention of statutory prohibitions, are, whether the court have jurisdiction of the parties and subject-matter of the action or proceedings, or not, utterly void. In re Simmons, 62 Ala. [416] 417; In re Gibson, 31 Cal. 619 [620] 91 Am.Dec. 546; Barton v. Saunders, 16 Or. 51, 16 P. 921, 8 Am. St.Rep. 261. The mere fact that the court has jurisdiction of the subject-matter of an action before it does not justify an exercise of a power not authorized by law, or a grant of relief to one of the parties the law declares shall not be granted. * * * Although every exercise of power not possessed by a court will not necessarily render its action nullity, it is clear that every final act, in the form of a judgment or decree, granting relief the law declares shall not be granted, is void, even when collaterally called in question. * * * '"

[6, 7] This is not a case in which a court has granted a divorce on the ground of desertion and has awarded a portion of the community property to the party obtaining the divorce and a portion to the other party. Here all of the property was community and the court, contrary to the express mandate of the statute, assigned all of it to the party securing the divorce. We conclude that the court in the action for divorce, insofar as it assigned all of the community property to the plaintiff in that action, defendant here, exceeded its power as defined by express statutory declaration; that such assignment was in excess of the jurisdiction of the court and not a mere error or irregularity in the proceeding. Therefore, the judgment, insofar as it made such assignment, is void, and, as such invalidity appears on the face of the judgment roll, is subject to collateral attack in the present suit. The wife's title

in the two parcels of realty was not divested by the decree in the action for divorce, and the court in the present suit properly quieted her title to an undivided half interest therein.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



109 Cal.App.2d 99

ALTADENA COMMUNITY CHURCH v. STATE BOARD OF EQUALIZATION et al.

Civ. 18457.

District Court of Appeal, Second District, Division 3, California.

Feb. 4, 1952.

Hearing Denied March 31, 1952.

Altadena Community Church, a corporation, and another, filed a petition against the State Board of Equalization of the State of California, and another, for a peremptory writ of mandate ordering defendant Board to deny a certain petition for a general liquor license. The Superior Court of Los Angeles County, W. Turney Fox, J., entered a judgment directing issuance of the peremptory writ of mandate, and the board of equalization appealed. The District Court of Appeal, Vickers, J. pro tem., held that granting of license was not abuse of discretion.

Judgment reversed.

1. Administrative Law and Procedure ⇐761, 788, 795, 796
Intoxicating Liquors ⇐72

A court can review decisions of Board of Equalization only to determine whether there has been action in excess of jurisdiction, errors of law, abuse of discretion or insufficiency of evidence. Gen.Laws, Act 3796, § 13; Const. art. 20, § 22.

2. Intoxicating Liquors ⇐72

Whether Board of Equalization has abused discretion in granting license to sell intoxicating liquors can only be determined by examination of all facts and circumstances. Gen.Laws, Act 3796, § 13; Const. art. 20, § 22.

3. Intoxicating Liquors ⇐69

Single fact that there were churches in the immediate vicinity of well-conducted restaurant which had beer and wine license did not constitute granting of general license for sale of intoxicating liquors an abuse of discretion on part of board of equalization, and hence judgment of superior court directing issuance of peremptory writ of mandate ordering board to deny the license was erroneous. Gen.Laws, Act 3796, § 13; Const. art. 20, § 22.

4. Administrative Law and Procedure ⇐501
Intoxicating Liquors ⇐71

Denial by board of equalization of petition by restaurant owner for general license to sell intoxicating liquors in 1948 was not res judicata and did not compel denial of petition by owner in 1950 for similar license. Gen.Laws, Act 3796, § 13; Const. art. 20, § 22.

5. Judgment ⇐542

Doctrine of res judicata applies only to decisions of a judge or a court of competent jurisdiction. Code Civ.Proc. § 1908.

6. Administrative Law and Procedure ⇐501

While an administrative agency may be bound by its final determination of the facts, and lacks power to rehear or reopen, such determination only applies to time at which and proceeding during which such determination was made.

7. Intoxicating Liquors ⇐70

In proceeding before board of equalization to obtain general license for sale of intoxicating liquor, evidence supported decision granting such license. Gen.Laws, Act 3796, § 13; Const. art. 20, § 22.

Edmund G. Brown, Atty.Gen., Bayard Rhone, Deputy Atty. Gen., for appellant.

Roland Maxwell, Paul H. Marston, Pasadena, for respondents.

VICKERS, Justice pro tem.

This case comes before us by reason of an appeal by the State Board of Equali-

zation, from a judgment of the superior court directing the issuance of a peremptory writ of mandate ordering that board to deny a "petition of the respondent [therein], Venetian Dining Room & Gardens, Inc., a corporation, for an on sale general liquor license filed in 1950 for the premises described as 2556 North Lake Avenue, Altadena * * *." The court declared that the granting of the 1950 application of the corporation by the Board was an abuse of discretion because of the proximity of three churches and a youth center to the premises in question, and also that the decision of the Board in 1948 in denying a similar application was *res judicata*. The matter came before the lower court upon a petition by the respondent churches for a writ of mandate. It was heard upon the records and files of the appellant Board. No other evidence was introduced before the court.

It appears from the record that the premises in question had a general liquor license from 1939 to 1945, a beer and wine license from 1946–1948 and a similar license from 1948–1950. One Charles Ingrao testified that he had owned the premises in question since 1944. Whether or not he operated during all that time as a corporation is not clear although he testified he had a partner in 1946 and 1947 and that the restaurant was closed for a while in 1947 because of litigation between him and that partner. At the close of that litigation a new building was erected and thereafter Mr. Ingrao operated alone.

The premises of the restaurant have at all times been within a recognized business district and located on the east side of Lake Avenue about 100 feet south of Foothill Boulevard. On June 21, 1948, when the 1948 application was denied, the respondent Altadena Community Church was located on the north side of Foothill Boulevard east of Lake Avenue and about 235 feet from the restaurant. At that time the St. Marks Episcopal Church was located on the south side of Foothill Boulevard and about 300 feet east of the restaurant. There was also a youth center operated by one of these churches and located on Foothill Boulevard about 220 feet west of the restaurant. The only substantial change in physical conditions between 1948 and 1950 was the erection by the respondent First Church of Christ, Scientist, of a church building on the south side of Foothill Boulevard. The west side of the lot upon which it is located is separated from the rear of the restaurant lot by a 21 foot alley. The west side of the rear portion of the church building is about 50 feet from the outdoor gardens where the restaurant serves meals during suitable weather. The nearest establishment where spiritous liquors may be served is approximately 2,000 feet from the restaurant.

At the time of denying the 1948 application the appellant Board made the following order: "It is ordered that the application mentioned in the said proposed decision be denied on the grounds that the issuance of an on-sale general license for the premises of the applicant would be contrary to public welfare and morals, it appearing to said Board that said premises are located within the immediate vicinity of churches." Shortly thereafter it issued the applicant a beer and wine license for its premises.

The 1950 application was opposed by the three churches. Over 500 citizens of the area signed petitions of protest. The sheriff of Los Angeles County likewise filed a protest. An extensive hearing was had before the Hearing Officer of the Board. At the conclusion thereof he recommended denial of the application in the following language:

"Premises are in the immediate vicinity of three churches and a Youth Center building. Issuance of license woud be contrary to public welfare and morals. Penalty or Recommendation:

" 'That protests be sustained.' "

At the hearing before the appellant Board the only evidence offered or received was that which had been received by the Hearing Officer. At the conclusion of argument the Board made the following finding and order:

"That applicant's premises are located in a business district and consist of a high-type restaurant with an outdoor dining area in the rear thereof; that at said

premises and since 1948 applicant now holds and has held an on-sale beer and wine license; that heretofore and from 1946 until 1948 an on-sale beer and wine license was issued for said premises to persons other than applicant; that for four years prior to 1946 an on-sale distilled spirits license was issued for said location to persons other than applicant; that the church building of the First Church of Christ which was completed in February, 1950, is about 50 feet from the outdoor dining area of applicant's premises; that the Saint Marks Episcopal Church is on property contiguous on the east to that of the First Church of Christ; that across East Foothill Boulevard from said two churches is located the Altadena Community Church, on the property of which said church conducts a youth center; that said Altadena Community Church is located about 235 feet by air line from applicant's premises; and that applicant's premises are not so located with respect to said churches and youth center as to cause a moral hazard to said churches or said youth center.

"Determination of issues presented: that because of the facts as found aforesaid it would not be contrary to public welfare and morals to issue an on-sale general license to the applicant at the premises aforesaid.

"Wherefore, it is hereby ordered that the application herein be granted effective on notice hereof."

The appellant Board was authorized and empowered to control the licensing of the liquor industry by article XX, section 22, adopted in 1934, of the State Constitution. That section reads in part as follows: "The State Board of Equalization shall have the exclusive power to license the manufacture, importation and sale of intoxicating liquors in this State, * * * and shall have the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals." It is interesting to note that the constitution gives the Board the "exclusive power to license" without any specified limitation while it declares the Board may deny or revoke a license "* * * if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals." In denying the 1948 application the appellant acted under the latter part of the sentence while in granting the 1950 application it acted under the first part. The Legislature indicated the same purpose by the passage of section 13 of the Alcoholic Beverage Control Act, 1935, 2 Deering's California General Laws, Act 3796. Section 13 reads as follows: "The board is specifically authorized to refuse the issuance of on-sale retail licenses for premises located within the immediate vicinity of churches, hospitals, schools and children's public playgrounds." This section while authorizing the denial of a license because the premises involved are within the immediate vicinity of churches, etc. does not forbid the granting of a license if the premises are so located.

[1] It had been definitely established that the power of a court is very limited in reviewing the decisions of the Board. In the case of Covert v. State Board of Equalization, 29 Cal.2d 125 at page 131, 173 P.2d 545, at page 548 the Supreme Court said: "* * * [The Board] has specifically been given quasi judicial, or adjudicating power, that is, the right to make determinations of fact which are not subject to reexamination in a trial de novo in the superior court." At page 132 of 29 Cal.2d, at page 549 of 173 P.2d the Court said: "It would appear, therefore, from the foregoing authorities, that the decisions of the board are final, subject to review for excess of jurisdiction, errors of law, abuse of discretion and insufficiency of the evidence, and that where there is error the matter ordinarily should be remanded to the board for further proceedings." In the case of Hansen v. State Board of Equalization, 43 Cal.App.2d 176 at page 180, 110 P.2d 453, at page 455 the Court said: "The constitutional provisions mentioned above are designed to give the board broad discretionary powers in the matter of granting or refusing to grant

licenses of this character. Whether or not 'good cause' for the denial of the license existed was a matter for determination by the board, and not by the courts."

[2, 3] Respondents concede that the superior court could not substitute its discretion for that of appellant. They contend, however, that that court could, as it did, determine that the appellant had abused its discretion in granting the license in question and that such abuse was shown by the location of the premises within the immediate vicinity of churches. While the matter of abuse of discretion was within the court's power of determination we can not agree that the single fact that churches are in the immediate vicinity of the premises establishes such an abuse of discretion. Neither the Constitution nor the Alcoholic Beverage Control Act nor any reported case called to our attention so declares. As we pointed out section 13 of the above act authorizes a denial of a license on that ground but does not require it. By the adoption of section 22, article XX of the Constitution the people of California declared that the manufacture and sale of liquor was a matter of right, as was its purchase and consumption, and left to the appellant Board the exclusive power to regulate the enjoyment of such rights consistently with the public interest. Whether or not the Board abuses its discretion in exercising this power in a given case can only be determined by an examination of all the facts and circumstances surrounding the exercise thereof. There have been many attempts to define abuse of discretion. In the case of Sharon v. Sharon, 75 Cal. 1, at page 48, 16 P. 345, at page 366 the Court said: "In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason, all the circumstances before it being considered." Bouvier's Law Dict., Rawle's Third Rev., page 94, defines abuse of discretion as "A discretion exercised to an end or purpose not justified by and clearly against reason and evidence." After a consideration of all the facts and circumstances we cannot say that there was an abuse of discretion in the instant case under either of the above or any other definition called to our attention.

Some of the facts and circumstances considered by the appellant Board were stated by Mr. Bonelli, the member from this district, as follows: The premises had been licensed almost continuously for eleven years prior to the hearing, the first six years having had an "on sale" general license; that one if not all of the protesting churches had moved into the area during this eleven years; at all times the premises were properly conducted and for the last five years under the principal direction of Mr. Ingrao, the president of the applicant corporation; shortly before the 1948 hearing Mr. Ingrao had dissolved the former partnership and proposed to operate the establishment alone; that it was Mr. Bonelli's understanding at that time that while a general on sale license would be denied, a beer and wine license would be issued, that the Board would wait and see how well the premises were operated under that license by Mr. Ingrao without his partner, and that he might be entitled to a general license later; that Mr. Ingrao has so conducted the premises during the two years since the 1948 denial as to justify the 1950 application being granted; that none of the churches protesting had shown any interference with their operations by the applicant; that it didn't appear that the right to serve cocktails with meals, in addition to wine and beer, would create any such interference; that this establishment would be the only one within a 2,000 foot radius where the residents of the community could enjoy their constitutional right to have a drink of spiritous liquor with their meals; that they were entitled to be protected in that right. Mr. Bonelli concluded by saying that he recommended the granting of the license on the grounds that public convenience and necessity and welfare and morals required that the people of that area be given the same right to the availability of alcoholic beverages as was enjoyed by people in other areas. The facts so recited were pertinent and substantial and were supported by the evidence re-

ceived. We cannot say as a matter of law that by adopting Mr. Bonelli's recommendation there was an abuse of discretion by the appellant Board.

[4–6] Respondents' contention that the denial of a similar license in 1948 was *res judicata* and compelled a denial of a similar license in 1950 is without support in the law. The doctrine of *res judicata* as such applies only to the decisions of a judge or a court of competent jurisdiction, See Code Civ.Proc., sec. 1908; Panos v. Great Western Packing Co., 21 Cal.2d 636, 637, 134 P.2d 242. While an administrative agency may be bound by its final determination of a fact, and lacks the power to rehear or reopen, such determination only applies to the time at which and the proceeding during which such determination was made. See Empire Star Mines Co. v. California Employment Comm., 28 Cal.2d 33, 48, 168 P.2d 686; Aylward v. State Board etc. Examiners, 31 Cal.2d 833, 192 P.2d 929; Waterbury Sav. Bank v. Danaher, 128 Conn. 78, 20 A.2d 455, 461. In the Waterbury Sav. Bank case the defendant Administrator of the Unemployment Compensation Act, from 1937 to 1939, designated the plaintiff bank as exempt from the payment of taxes under the Act. In 1939 the defendant changed his mind and attempted to collect such taxes for the past two years as well as for the current year. The Supreme Court ruled that he could change his mind as to plaintiff's liability for future taxes but not for past taxes. During the course of its opinion the court said: "The right of the defendant as an administrative official to change his decision for due cause, in so far as concerns a change restricted to the assessment of contributions to fall due for some period in the future, is not involved in the present inquiry, and if it were would not be open to question * * *; and upon the situation shown by this record the attorney general's advice would constitute such cause. The vital inquiry in the present case is whether such a change can be given retroactive effect. The serious practical objection to holding that it can is obvious. To so decide would mean that the defendant by changing his ruling after the lapse of a long period of years, during which the plaintiff had gone upon the assumption that it was exempt, could suddenly impose upon it the necessity of paying the back contributions for these years with the unwarranted hardship which that would involve. This is not a result which commends itself, and it should be avoided if this is possible and in consonance with sound legal principles. The desired outcome cannot be supported, however, upon the theory that the defendant's act, in granting exemption to the plaintiff originally as he did, amounted to a decision which, under the rule of res adjudicata, could not later be reversed. That doctrine is not applicable to the defendant's action as an administrative official in this case, but relates only to decisions rendered by a court of competent jurisdiction. * * * Nevertheless, it is true that a broad ground of public policy underlies this doctrine. * * Recognizing this as also the underlying reason in the case of administrative rulings, although the doctrine of res adjudicata was not applicable, we have not hesitated upon grounds of public policy to curb the right of an administrative board to change its decision. * * * Where it appears that it is against public policy that an administrative officer should change a decision with retroactive effect, it is the court's right and duty to curb his powers so as to serve that policy."

The people in their wisdom have given appellant Board the exclusive power to determine under what circumstances it is or is not contrary to public welfare and morals to issue a liquor license. Such a determination is frequently a difficult one and not subject to hard and fast rules. The presence of churches in the vicinity of the premises in question is not in itself necessarily determinative. Different conclusions may properly be reached at different times or under different circumstances. The Board is wisely left free to act upon each application for a license as it comes before it.

[7] Since it appears that the appellant Board acted within its jurisdiction and did

not abuse its discretion as a matter of law, that there is substantial evidence supporting its decision, and that its 1948 decision was not *res judicata* the court below erred in issuing its writ of mandate.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; SHENK and EDMONDS, JJ., dissenting.



109 Cal.App.2d 184

PEOPLE v. PETREE et al.

Cr. 2320.

District Court of Appeal, Third District, California.

Feb. 8, 1952.

Bruce Petree and Birchie H. Jordan were convicted of murder in the Superior Court of El Dorado County, Thomas Maul, J., and Birchie H. Jordan appealed. The District Court of Appeal, Adams, P. J., held that evidence was insufficient to corroborate testimony of alleged accomplice of appellant.

Judgment reversed and new trial ordered.

1. Criminal Law ⇐511(4)

In murder prosecution, evidence that defendant was wearing a brown hat day of homicide and that defendant's companion was wearing no hat, and that defendant told officers conflicting stories as to when he joined companion and alleged accomplice, who testified for prosecution, was not sufficient to corroborate story of alleged accomplice that the three went to store to commit robbery, that defendant's companion put on defendant's hat, that defendant and companion went to store, and that when they returned defendant's companion stated that he had shot someone. Pen.Code, §§ 31, 1111.

2. Criminal Law ⇐511(1)

A defendant should not be convicted of murder on the testimony of an accomplice if corroboration does no more than raise a suspicion of guilt, even a grave suspicion. Pen.Code, § 1111.

Russell F. Milham, Placerville, for appellant.

Doris H. Maier, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Judge.

Appellant Jordan and one Bruce Petree were charged with and convicted of the murder of Robert M. Davidson. The jury fixed the punishment at life imprisonment. No motion for a new trial was made, and Petree has not appealed. The record shows that though the offense was committed October 12, 1949, and the officers of the law were advised of it immediately, no information was filed until May 18, 1951, some 19 months thereafter, though Petree had been identified by the parties present in the Clarksville store long before.

Jordan's contention is that the verdict of the jury against him was based solely upon the uncorroborated testimony of Alfred F. Peterson, who admitted that he was an accomplice, but who was not charged along with Jordan and Petree, but was used as a witness for the State against them. The sole question before us is whether there was sufficient corroboration of Peterson's testimony to sustain the verdict and judgment.

Davidson was shot by defendant Petree when the latter alone held up the Clarksville store in El Dorado County the evening of October 12, 1949. The evidence shows that as Petree was backing out of the store after robbing the proprietor and warning everyone to stay still for three minutes, Davidson, who was sitting at a counter drinking a glass of beer, made some slight movement, whereupon Petree shot and killed him, then fled in an automobile parked outside the store. There were five other people in the store at the time but no one saw or heard anyone except Petree.

Peterson testified as follows: On the night preceding the murder, he and Petree burglarized Fisher's Hardware Store in Placerville and stole a pump gun, three .22 rifles and a .38 target pistol. These guns were wrapped in an old blanket and hidden near the golf course. On the afternoon of October 12, 1949, the date of the murder, Peterson met Petree about 4:00 o'clock. They drove to Diamond Springs in Petree's

Ford coupe, where they picked up Jordan. All three drove to the golf course and Peterson got out and from the gun cache procured a .22 pump rifle and the .38 pistol. They discussed the proposed holdup which was the reason for getting the guns. Petree stopped his car across the street from the Diamond Hardware Store and Jordan secured a box of .38 shells. On their way back Petree stopped the car and Jordan got out and set a beer can on a fence post and then returned to the car and fired the pistol at the beer can. They then drove to Clarksville, where the car was parked about 100 yards from the Clarksville store. It was dark and the lights in the store were burning. Jordan and Petree left the car and Jordan stated that Petree had better go into the store as the people who owned it knew Jordan. Peterson was told to slide under the steering wheel of the car; the motor was kept running but the lights of the car were turned off. Jordan was wearing a brown hat which he gave to Petree to wear, and Petree put on a brown army jacket with a hole burnt in the sleeve, which was behind the car seat. Petree took the .38 pistol and Jordan the rifle and they both went toward the store. Within a minute or two Peterson heard two or three shots, and Petree and Jordan ran back to the car with the guns in their hands. When they entered the car Petree said he had shot someone. They drove away at about 95 miles an hour down the highway toward Perkins and then turned off on the Jackson road. Jordan talked of getting rid of the rifle and pistol. Between Clarksville and Waite's Station in Amador County, Petree gave Peterson $6 in paper money and gave Jordan the same amount or more. During this time the .22 rifle went off accidentally and shot a hole through the roof of the car. Jordan threw the pistol and shells out of the car just before they came to the Consumnes River bridge; the rifle was thrown out after they crossed the bridge on the Jackson side. The army jacket was thrown from the car while on the bridge. It hung up on the bridge rail and the car was stopped while Jordan got out, went back, and threw the jacket into the river. [None of these discarded articles was ever recovered.] They then drove to Drytown and then to Martell where they stopped for beer. They went on into Jackson where they ate, Jordan did some gambling and they had some drinks. Then they drove to Plymouth and on to El Dorado where Jordan left the car and told them not to say anything about what transpired. Petree and Peterson drove back to Diamond Springs about 11:00 p. m. and Peterson went to Petree's house where he was having some coffee when a deputy sheriff arrived.

Respondent, contending that Peterson's testimony finds corroboration in the record, states in its brief:

"Here the *corpus delicti* of the robbery and murder was testified to by the customers of the Clarksville Store, as well as the proprietor and his daughter. The defendant Petree was likewise positively identified as being on the scene and committing the robbery and the murder. The witnesses described him as wearing a brown hat and an army jacket at that time. Defendant Jordan admitted that on that evening he had been wearing a brown felt hat and that Petree was not wearing one. Petree himself admitted that he had possessed an old jacket, which he had formerly used to cover his car. The customers at the store testified to the effect that the robber had a gun which looked new. Arthur Fisher testified that the previous evening—October 11—his store had been burglarized and several guns were taken, among which were a Colt .38 revolver and a pump gun. The expert witnesses testified that the bullets found in the Clarksville Store as an aftermath of the shooting had been fired from a new .38 Colt revolver, and the remaining guns stolen from Fisher's store were recovered from a shaft some two years later, where Peterson told the officers they could be found.

"Both Petree and Jordan admitted they were together with Peterson on the night of October 12, 1949; however, although they admitted being together from approximately 4:30 to 5 p. m. and from 6:45 to 11 p. m., they denied being in the vicinity of Clarksville, or participating in either the murder or robbery. In previous statements

given to the police officers on October 26, 1949, and November 1, 1949, they had admitted being together from around 6 p. m. on until 11 p. m."

The prosecution then drew the conclusion that there was sufficient corroboration of the testimony of Peterson, saying: "In the case at bar, the defendant and appellant Jordan by his own testimony placed himself with Peterson his *nephew*, [sic] and Petree on the night of October 12, 1949. As to the time when the three were together he told conflicting stories to the officers and only fixed the time at 10 minutes to 7 when he took the witness stand. He admitted that the three men went to Jackson in Petree's car on the night in question; that he was wearing a brown hat at the time and Petree no hat. It is apparent that this testimony was sufficient to corroborate the testimony of Peterson the accomplice, and support the finding that the defendant and appellant was connected with the commission of the offense, and the testimony of his accomplice as to his participation in the offense was true."

Section 1111 of the Penal Code provides that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

While this court held in People v. Griffin, 98 Cal.App.2d 1, 219 P.2d 519, that it is not necessary that the corroborative evidence prove independently that the defendant is guilty or that it extend to all of the elements of the offense; that circumstantial evidence may suffice; and that corroborative evidence may be sufficient, even though slight, if the connection of the defendant with the crime reasonably may be inferred therefrom, we also said that such corroborative evidence must do more than merely raise a suspicion of guilt, even a grave suspicion; it must tend to connect the defendant with the commission of the offense.

[1] We are not satisfied that in the instant case the mere fact that Jordan was wearing a brown hat the day of the homicide and Petree was wearing no hat, or that Jordan told conflicting stories to the officers as to the time he joined Peterson and Petree that evening, is sufficient corroboration of Peterson's story to justify the conviction of Jordan of murder. There is no independent evidence that Jordan was with Petree and Peterson when the crime was committed, nor do such conflicts in his statements to officers as to the time he joined them that evening show that he was with them at any particular time. Though such conflicting statements may have tended to discredit him as a witness, they are not evidence of the fact as to when he did join Peterson and Petree that evening.

In section 31 of the Penal Code principals are defined as all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission. The corroborating evidence relied upon does not tend to show any of these things.

Pertinent cases in which the corroborating evidence was held to be insufficient are: People v. Braun, 31 Cal.App.2d 593, 88 P.2d 728; People v. Reingold, 87 Cal.App.2d 382 et seq., 197 P.2d 175 (hearing by Supreme Court in both cases denied); People v. Shaw, 17 Cal.2d 778, 112 P.2d 241; People v. Lima, 25 Cal.2d 573, 579, 154 P.2d 698; People v. Davis, 210 Cal. 540, 293 P. 32; in all of which judgments of conviction were reversed.

[2] If section 1111 of the Penal Code is to be of any effect it should not be whittled away until the mere shadow remains, nor parties charged with such crimes as murder convicted on the testimony of accomplices without corroboration that, as we said in People v. Griffin, supra, 98 Cal.App. 2d at page 28, 219 P.2d 519, does more than raise a suspicion of guilt, even a grave suspicion. It must tend to connect the defendant with the commission of the crime charged.

The judgment against appellant is reversed and a new trial ordered.

PEEK and VAN DYKE, JJ., concur.

109 Cal.App.2d 193

CLARK et al. v. ANDREWS et al.

Civ. 18253.

District Court of Appeal, Second District, Division 1, California.

Feb. 11, 1952.

Hearing Denied April 3, 1952.

Action by Channing Clark and another against Marion Andrews, doing business as Action Collection Service, and others to recover damages for wrongful attachment. The Superior Court of Los Angeles County, Wm. B. McKesson, J., sustained a demurrer to amended complaint without leave to amend and entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, White, P. J., held that amended complaint stated a cause of action for recovery of damages, including punitive damages for malicious attachment.

Judgment reversed and cause remanded with directions.

1. Attachment ⇐351

Where attachment is regular on its face and the wrongfulness of levy can only be shown by defeating the action on its merits so that a motion to vacate attachment would be futile, attorney's fees paid or incurred and other expenses of defense on the merits are recoverable in action on the undertaking on attachment.

2. Attachment ⇐373

In action for wrongful attachment amended complaint and annexed exhibits showed that though marshal's return did not directly so state, person on whom writ and notice of attachment were served was an occupant of the realty attached so that motion to dissolve attachment would have been futile. Code Civ.Proc. § 542, subd. 1.

3. Attachment ⇐324

A motion to dissolve attachment on ground that marshal's return does not show that person on whom copy of writ and notice of attachment were served was an occupant of the realty attached may be met by amending the return or again serving a copy of the writ and other papers in required manner. Code Civ.Proc. § 542, subd.

4. Attachment ⇐170

Under statute providing for attachment of realty by filing copy of writ with description of property attached and notice of attachment with county recorder and serving an occupant of the property with similar copy of writ, description and notice, service on occupant need not precede the filing of attachment writ with county recorder. Code Civ.Proc. § 542, subd. 1.

5. Attachment ⇐325

Where copy of writ, description of realty attached and notice of attachment were filed with county recorder, record title to described realty would remain clouded until attachment was dissolved or action terminated favorably to defendant, regardless of defective return purporting to show service on occupant of the property. Code Civ.Proc. § 542, subd. 1.

6. Attachment ⇐373

Allegations that vendors were unable to convey clear title to realty in accordance with agreement because of attachment lien, that purchasers consequently rescinded agreement and that value of the realty depreciated in the sum of $2500 during period attachment was in force were sufficient to state a cause of action for damages for depreciation of the realty during period of wrongful attachment.

7. Attachment ⇐373

Charges of malice and lack of probable cause constituted sufficient allegations of ultimate facts to state a cause of action for punitive damages for wrongful attachment.

8. Attachment ⇐365, 377

Fact that collection agency was unconditional owner of claims assigned to it for a valuable consideration did not preclude recovery of damages, including punitive damages, against both agency and its assignor for wrongful and malicious attachment, if claims were assigned to agency for collection with knowledge of both agency and its assignor that claims were fictitious and fraudulent, having no basis in law or fact, and action was commenced and attachment levied maliciously, without probable cause and with intent to coerce payment of unfounded claims.

9. Assignments ⇐89, 119

An assignment for collection, without any consideration being paid by assignee, vests the legal title in assignee, which is sufficient to enable him to recover, though assignor retained an equitable interest in the thing assigned.

10. Evidence ⇐20(1)

It is common knowledge that collection agencies pursue the policy of taking assignments of claims for the purpose of bringing actions and that the only interest assignee has in the subject matter is a percentage thereof as its compensation for doing those things ordinarily performed by an attorney.

11. Principal and Agent ⇐159(1)

A principal who authorizes an agent who is not a servant to institute or conduct such legal proceedings as in his judgment are lawful and desirable for protection of principal's interests is subject to liability to a person against whom proceedings reasonably adapted to accomplish principal's purposes are tortiously brought by agent.

12. Malicious Prosecution ⇐42
Principal and Agent ⇐159(1), 175(1)

Principal may be held liable upon general doctrine of respondeat superior for wrongful attachment by agent and for punitive damages for malicious attachment by agent without probable cause, if principal had knowledge of or participated in the malicious acts or ratified, adopted or approved them.

13. Attachment ⇐373

Complaint sufficiently charged that attachment creditor's assignor had knowledge of and participated in malicious acts of assignee to state a cause of action against assignor for punitive damages for malicious attachment by assignee.

14. Pleadings ⇐214(1)

In ruling upon a demurrer to complaint, the allegations of complaint must be taken as true.

Kenneth D. Holland, Beverly Hills, for appellant.

Morris Lavine, Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiffs have appealed from a judgment that they take nothing entered after a demurrer to their amended complaint was sustained without leave to amend.

By the first cause of action plaintiffs seek damages for wrongful attachment against defendant collection agency, its assignor, Kathleen M. Ritchie, and defendant casualty company as surety on the undertaking on attachment filed by the collection agency. By the second cause of action punitive damages are sought against defendant collection agency and its assignor on the ground that the attachment was levied with malice and without probable cause.

[1] The first question for consideration is whether the amended complaint (in the first cause of action) states a cause of action for recovery of attorney's fees incurred by the plaintiff herein in successfully defending the action in which the attachment was levied. It was settled in this state in the case of Reachi v. National Automobile & Casualty Co., 37 Cal.2d 808, 236 P.2d 151, that attorney's fees paid or incurred and other expenses of a defense on the merits are recoverable in an action on the undertaking on attachment when such attachment is regular on its face and the wrongfulness of the levy can only be shown by defeating the action on its merits, so that a motion to vacate the attachment would be futile. Respondents, however, urge that the amended complaint shows on its face that the lien of the attachment on plaintiffs' real property was invalid, in that a copy of the writ was not properly served upon an occupant of the property, and that therefore plaintiffs' title was not clouded thereby. Also, respondents assert that the attachment could have been vacated on motion because of its invalidity, and therefore counsel fees for the defense of the main action are not recoverable.

The amended complaint contains the allegation that "All of the proceedings, pleadings and documents with respect to the levy of said attachment were valid and regular on their face and for that reason plaintiffs (defendant Clark in said action) made no motion nor brought any proceed-

ing to discharge or dissolve said attachment, as such motion or proceeding would have been unsuccessful and an idle and futile act; and the only manner by which said attachment could be discharged or dissolved was to defend and win said action on its merits." Respondents contend that the levy was invalid and created no cloud on the title because the "Return on Real Estate Levy" filed by the Marshal of the Municipal Court, a copy of which was annexed to the amended complaint as an exhibit, fails to show that a copy of the writ was served upon an occupant of the premises as required by section 542, subdivision 1, of the Code of Civil Procedure. This section requires that real property must be attached by filing with the county recorder a copy of the writ, together with a description of the property attached and a notice that it is attached, and "by serving an occupant of the property, if there is one upon the property at the time service is attempted, with a similar copy of the writ, description and notice, or if there is no occupant then on the property, then, by posting the same in a conspicuous place on the property attached."

The Marshal's return shows that on July 23, 1948, he levied upon the interest of E. H. Cox and Mrs. E. H. Cox, Channing Clark and Mrs. Channing Clark (the latter two the plaintiffs herein) by filing with the county recorder on that date the required documents, and on July 28, 1948, by "serving *to* Mrs. E. H. Cox at 7338 Trask Ave., Playa del Rey, Calif. a true copy of said Writ, together with written notice of said levy and description of the property levied upon attached thereto."

[2, 3] It is true that the return of the Marshal does not directly state that Mrs. Cox was an occupant of the property attached. However, from the allegations of the pleading here in question and the exhibits annexed, two facts must be taken as true, viz: That at the time of the levy "there existed a valid written agreement between the plaintiffs herein and the said E. H. Cox and Mrs. E. H. Cox by which plaintiffs agreed to sell and the Coxes agreed to buy the said real property so levied upon." Also, that the real property at 7338 Trask Avenue, Playa del Rey, where Mrs. Cox was served, is the property sought to be attached. These facts, coupled with the allegation that a motion to dissolve the attachment would have been futile, are, in our view, sufficient. A motion to dissolve the attachment could be readily met by amending the Marshal's return or again serving a copy of the writ and other papers in the required manner.

[4] Respondents' contention that "service on the occupant must precede the filing of the attachment writ with the county recorder" is without merit. The case of Main v. Tappener, 43 Cal. 206, relied upon by respondents, involved the construction of a statute which specified the required acts in that order, service on the occupant followed by filing with the recorder; while section 542 of the Code of Civil Procedure lists the requirement of recording first, followed by service on the occupant or posting on the property.

[5] We cannot agree with respondents that by reason of the allegedly defective return there existed no cloud upon the title to the property. Clearly, with proper documents having been filed with the county recorder, the record title would remain clouded until the attachment was dissolved or the action terminated favorably to the defending party or parties.

It is contended that plaintiffs are not entitled to recover damages for depreciation of their property during the period of the attachment. The case of Gudger v. Manton, 21 Cal.2d 537, 554, 555, 134 P.2d 217, 227, holds contrary to respondents' contention. In the cited case, a suit for slander of title by reason of a wrongful levy of execution, an award of damages based upon loss of sales of the property followed by depreciation in value during the period the levy was in force, was upheld, the court saying: "Where, as here, there have been losses of sales and a decline in the market value of property thereafter during the continuance of the disparagement of title (the execution lien here), defendant has not been injured when the court in fixing the damages selects the difference between the amount offered at the sales and the

value of the property at the time the execution was released. That rule takes into consideration the effect of the defect in the plaintiff's title with relation to the fluctuation in the value during that time. Those principles have been applied in wrongful attachment cases. (Citing cases and authorities.) * * *." The court further distinguished the case of Heath v. Lent, 1 Cal. 410, relied upon herein by respondents.

[6, 7] In their amended complaint herein, plaintiffs alleged that they were unable to convey a clear title to the Coxes in accordance with their agreement because of the attachment lien; that by reason thereof the Coxes rescinded the agreement; and during the period the attachment was in force, from July 23, 1948, to September 27, 1949, the real property depreciated in the sum of $2,500. This, clearly, is a sufficient allegation under the rules stated in Gudger v. Manton, supra. The complaint fails to state the outcome of the attachment action against the Coxes, who were codefendants, but whether they were in fact unable to perform their agreement to purchase, whether there was a bona fide agreement of sale, and whether the property actually depreciated in value, are obviously questions for proof at the trial, and have nothing to do with the question here of the sufficiency of allegations of ultimate facts. Further, with respect to other criticized portions of the amended complaint, such as, for example, the charges of malice and lack of probable cause, we find that they constitute sufficient allegations of ultimate facts.

We come now to the contention that because defendant Kathleen M. Ritchie, the assignor of defendant collection agency, was not a party to the attachment suit, she is not liable under either cause of action. It is stated in the brief of respondents that the court in its decision in the attachment suit found that the collection agency was the unconditional and absolute owner of the claims sued upon and that the assignment from Ritchie to Andrews was for a good and valuable consideration. It is urged that an assignee for collection, even without consideration for the assignment, is the real owner of the claim so far as third parties are concerned.

[8] Assuming that the fact of the finding just mentioned is properly before us, nevertheless such finding does not necessarily preclude recovery against the defendant Kathleen M. Ritchie. It is alleged in the first cause of action of the amended complaint that defendant Ritchie "hired and employed defendant Andrews to institute an action * * * pursuant to said employment, defendant Ritchie assigned to defendant Andrews for the purpose of collection a number of purported claims and demands * * * Both said defendants Andrews and Ritchie well knew at said time that said claims and demands as against plaintiffs herein were without basis in law or in fact, and were wholly fictitious." In the second cause of action it is alleged that "The claims sued upon in said action were fraudulent, unfounded and pretended as to these plaintiffs, all of which both of said defendants (Andrews and Ritchie) well knew. Said action was commenced and said attachment levied by said defendants maliciously, without probable cause and with the intent to injure and harass these plaintiffs, and put them to great annoyance and expense, and to coerce them into paying defendants' illegal and unfounded claims."

[9, 10] The finding that the collection agency was the sole owner of the claim is not inconsistent with an agency situation. As was said in Cohn v. Thompson, 128 Cal. App.Supp. 783, 787, 16 P.2d 364, 365, "It is well settled that an assignment for collection, without any consideration being paid by the assignee, vests the legal title in the assignee, which is sufficient to enable him to recover, although the assignor retains an equitable interest in the thing assigned. (Citing authorities.) * * *." Further, in Cohn v. Thompson the court quotes from Koepple v. Morrison, 84 Cal. App. 137, 140, 257 P. 590, as follows: "It is common knowledge that collection agencies pursue the policy of taking assignments of claims for the purpose of bringing action, and that the only interest the assignee has in the subject-matter is a per-

centage thereof as his compensation for doing those things ordinarily performed by an attorney at law."

[11, 12] "A principal who authorizes an agent who is not a servant to institute or conduct such legal proceedings as in his judgment are lawful and desirable for the protection of the principal's interests is subject to liability to a person against whom proceedings reasonably adapted to accomplish the principal's purpose are tortiously brought by the agent." Rest., Agency, sec. 253; Calif. Annotations in accord: Kinsey v. Wallace, 36 Cal. 462; Blancett v. Burr, 100 Cal.App. 61, 279 P. 668; Diggs v. Arnold Bros., Inc., 132 Cal.App. 518, 23 P.2d 71; see also Redgate v. Southern Pacific Co., 24 Cal.App. 573, 141 P. 1191. So far as a mere wrongful, as distinguished from malicious and without probable cause, attachment is concerned, the principal may be held liable upon the general doctrine of respondeat superior, and may also be held liable for punitive damages for malicious acts of the agent if the principal had knowledge of or participated in the malicious acts, or ratified, adopted or approved them. (5 Am.Jur. 222; 34 Am.Jur. 758.)

[13, 14] One who assigns a claim for collection thereby makes the collection agency his agent for the purposes of collection and is liable for the consequences of a wrongful attachment under the circumstances and to the extent indicated in the authorities immediately above cited. Of course, as stated in the cited authorities, liability of the principal for malicious acts of the agent, as distinguished from mere wrongful attachment, must depend upon knowledge of, participation in, or approval or ratification of, the malicious acts. The allegations of the amended complaint herein sufficiently charge knowledge and participation. It remains for a trial of the cause to determine whether the wrongful attachment was an act within the express or implied authority of the agent, whether there existed malice and lack of probable cause, and whether under the principles above stated the assignor of the collection agency is liable therefor. Further, it is to be understood that the views expressed in this opinion are based entirely upon the assumption—an assumption which must be indulged in when ruling upon a demurrer—of the truth of the allegations of the amended complaint, and that the statements herein made constitute no expression of views, favorable or unfavorable, as to the merits of the cause.

The judgment is reversed and the cause remanded with directions to overrule defendants' demurrer to the amended complaint and to allow defendants a reasonable time to answer, should they be so advised.

DORAN and DRAPEAU, JJ., concur.



109 Cal.App.2d 200

STEBINGER v. WARDEN et al.

Civ. 18575.

District Court of Appeal, Second District, Division 1, California.

Feb. 11, 1952.

Rehearing Denied March 3, 1952.

Hearing Denied April 3, 1952.

Action to quiet title by George L. Stebinger against Grace P. Warden, Catherine A. McKenna, and others. The Superior Court of Los Angeles County, J. O. Moncur, J., entered a judgment adverse to defendant Catherine A. McKenna, and she appealed. The District Court of Appeal, White, P. J., held that objection to variance between pleadings and proof which was not presented in trial court was waived on appeal.

Judgment affirmed.

1. Adverse Possession ⇐57

In action to quiet title against defendant who alleged adverse possession, evidence supported finding that defendant failed to establish continuous occupation for period of five years prior to commencement of action.

2. Taxation ⇐688

Where plaintiff's claim of title was based on 1932 and 1943 tax deeds, and plaintiff had paid taxes on land for years 1943 to 1950, alleged defects in procedural

steps leading up to execution of tax deeds and recitals contained therein, if any, were cured by statute. Revenue and Taxation Code, § 175.

3. Adverse Possession ⇐57

Defendant who failed to prove that she or her predecessors occupied land for period of five years continuously prior to commencement of quiet title action failed to establish necessary elements of adverse possession.

4. Taxation ⇐810(3)

In action to quiet title, record failed to show that chain of title of plaintiff who claimed under tax deeds was invalid.

5. Appeal and Error ⇐197(3)

Objection to variance between pleadings and evidence which was not presented in trial court was waived on appeal.

6. Pleading ⇐398

A variance between pleadings and proof is not fatal unless it has misled adverse party to his prejudice. Code Civ. Proc. § 469.

7. Appeal and Error ⇐882(6)

Where complaint in action to quiet title contained erroneous reference to book and page of county recorder's records, but property in dispute was correctly described in various deeds put in evidence by parties, and case was fully and fairly tried on merits as though variance had not existed, the variance was immaterial and appellant could not on appeal adopt new theory and urge that variance was prejudicial. Code Civ.Proc. § 469.

Catherine A. McKenna, appellant, in pro. per.

Moidel, Moidel, Moidel & Smith, Los Angeles, by Leonard Smith, Los Angeles, for respondent.

WHITE, Presiding Judge.

Defendant Catherine A. McKenna has appealed from a judgment adverse to her in an action to quiet title. In her brief she asserts error by reason of a variance between pleading and proof. Her further contentions on appeal may be best set forth by the following excerpts from her brief:

"It appears from the findings of the Court, that this defendant is the owner in fee simple of these lots * * * and has been in possession of same and claiming to own them, since the 7th day of August, 1928, adverse to the whole world.

"That the deed to the State in each case was void as to this defendant for the reason, and under the authorities hereinbefore cited.

"That the deed to the City of Gardena, by the Tax Collector was void, and conveyed no title to the City of Gardena.

"That the plaintiff's right of action was barred, by the provisions of the statutes of limitations, pleaded in the defendant's answer. That the deed to plaintiff was executed in 1943, and this defendant has been in possession and holding adverse to him 9 years.

"That plaintiff failed to prove any title in himself, and plaintiff did not consider that he had acquired any title in the lands, by reason of the deed from the City of Gardena.

"That he has never been in possession of the land or claimed or asserted any right of possession. * * *

"That Catherine A. McKenna has established beyond question that she is and has been the owner in fee simple, in possession and entitled to possession of the said lands, herein described, continuously since the 7th day of August, 1928, in her own and sole right."

The findings of the trial court, so far as here pertinent, are that plaintiff's claim of title is based upon a deed, dated September 1, 1932, from the Tax Collector of Los Angeles County to the State of California, a deed, dated September 29, 1943, from the State of California to the City of Gardena, and a deed, dated November 29, 1943, from the City of Gardena to plaintiff. That defendant's claim is based on a deed from Grace P. Warden to W. P. Nichols dated September 26, 1929, and a deed from W. P. Nichols to Catherine A. McKenna, dated February 5, 1935. The court further

found: "City and County real property taxes for the fiscal year 1926–1927 became delinquent and remained delinquent for 5 years and no redemption or tender of redemption was ever made prior to the bringing of this action. Plaintiff paid all taxes levied against said lots from the fiscal year 1943–1944 to and including 1949–1950, both inclusive. Defendant paid no taxes levied against said lots for the fiscal year 1926–1927 nor has she paid or attempted to pay the taxes levied against said land for a period of 5 years prior to the commencement of this action or of the filing of defendant McKenna's answer. Defendant McKenna failed to prove that she or her predecessors in interest have occupied said lots for a period of five years continuously prior to the commencement of this action or the filing of defendant McKenna's answer nor have they paid all the taxes, State, County or municipal which have been levied and assessed upon such land."

The trial court found, as conclusions of law, that "defendant McKenna is barred from challenging the validity of plaintiff's tax title by the provisions of Section 175, Rev. & Tax Code. That certain defects asserted by defendant McKenna in the published delinquent tax rolls and lists, recitals in the deeds and the notices required are in fact and in law not defects. That, in any event, any defects alleged by defendant McKenna in the procedural steps leading up to the execution of the tax deeds and the recitals contained therein are cured by the so-called curative acts of 1943 and 1945. That the defendant has failed to establish the necessary elements of adverse possession."

[1–4] Appellant has wholly failed to point out in her brief wherein the findings are not supported by substantial evidence, nor has she cited any authority upon which to predicate error in the conclusions of law reached by the trial court. We have nevertheless carefully examined the record on appeal, including the reporter's transcript, and from such examination it appears, (1) that not only was the evidence sufficient to support the findings above quoted, but that contrary findings would have been wholly lacking in evidentiary support; and (2) that the findings made support the conclusions of law and judgment. Appellant has not pointed out any defect in the tax proceedings which are the basis of respondent's title; and while we are not required to search the record for error, we have nevertheless, as above stated, examined the same in its entirety, and find nothing to invalidate respondent's chain of title. See, in this connection, Sec. 175, Rev. & Tax.Code; Tannhauser v. Adams, 31 Cal.2d 169, 187 P.2d 716, 5 A.L.R.2d 1015.

[5–7] With respect to the alleged variance, it appears from the pleadings that the parties joined issue on the question of title to the property in dispute, although the first amended complaint contained an erroneous reference to the book and page of the county recorder's miscellaneous records. The property was correctly described in the various deeds put in evidence by the parties. No challenge to the variance was raised in the court below by objection to the findings or on motion for new trial. Such objection must be presented in the trial court or it is waived. Martin v. Della, 211 Cal. 74, 293 P. 25. A variance is not fatal unless it has misled the adverse party to his prejudice. Genger v. Albers, 90 Cal.App.2d 52, 202 P. 2d 569; Code Civ.Proc. sec. 469. Here the case was fully and fairly tried on the merits as though the variance had not existed, and thus the variance is immaterial. Chelini v. Nieri, 32 Cal.2d 480, 196 P.2d 915. As above indicated, there was no doubt or uncertainty in the minds of the parties as to what land was in dispute. Appellant may not now, on appeal, adopt a new theory and urge that the variance was prejudicial. Grimes v. Nicholson, 71 Cal.App.2d 538, 543, 162 P.2d 934; Priebe v. Sinclair, 90 Cal.App.2d 79, 87, 202 P.2d 577. Our examination of the record discloses no prejudicial error in this or any other respect.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

108 Cal.App.2d 873

SHORB v. BARKLEY.

Civ. 14751.

District Court of Appeal, First District, Division 2, California.

Jan. 29, 1952.

Rehearing Denied March 1, 1952.

Proceeding by Aleen Shorb against Joseph W. Barkley, County Surveyor, in and for the County of Contra Costa, State of California, for a writ of mandate to compel the surveyor to issue a certificate. The Superior Court, County of Contra Costa, Harold Jacoby, J., rendered a judgment denying a writ, and petitioner appealed. The District Court of Appeal, Jones, J. pro tem., held that petitioner had fully complied with a local ordinance relating to subdivision of lands and hence there was no room for the exercise of any discretion by respondent.

Judgment reversed with directions.

1. Counties ⇐22

Under ordinance providing that at time of action on tentative map of proposed subdivision, county planning commission shall designate improvements required, and providing that all lots and proposed subdivisions should be properly drained, and under statute requiring a certificate by county surveyor that all provisions of statute and local ordinance have been complied with, subdivider was not required to drain lots so as to avoid landslides without designation by planning commission. Business and Professions Code, § 11593(a) (1–4).

2. Municipal Corporations ⇐120

In construing ordinance, meaning is to be arrived at as is meaning of any other enactment, and in all cases problem is to ascertain legislative intent.

3. Municipal Corporations ⇐120

Words used in ordinary sense in one part of enactment are to be construed in same sense in another in absence of express definitions.

4. Municipal Corporations ⇐120

Intent different from that expressed may not be deduced by giving different meaning to same expressions or adding words which are not used.

5. Constitutional Law ⇐70(1)

Court's function is to construe and apply law as enacted, and not to add thereto nor detract therefrom.

6. Counties ⇐22

Mandamus ⇐87

Where property owner desiring to subdivide land had fully complied with local ordinance, and final map was approved by county planning commission without designation of improvements of any kind, and county surveyor refused to issue certificate on ground that land had not been drained to prevent landslides, surveyor could not exercise discretion, and writ of mandate was proper remedy to compel issuance of certificate. Business and Professions Code, § 11593(a) (1–4); Code Civ.Proc. § 1085.

7. Mandamus ⇐72

Mandamus is proper remedy to compel reasonable exercise of discretionary powers.

8. Mandamus ⇐72

Mandamus will issue to correct abuse of discretion in cases otherwise proper.

9. Counties ⇐22

Where county planning commission approved tentative map of subdivision on condition that real estate commission be given notice of tendency of land to slide, and planning commission deemed oral notice given as sufficient and approved final map, county surveyor in refusing to issue certificate could not complain that planning commission intended that original notice be written.

Carlson, Collins, Gordon & Bold, George R. Gordon and Steven H. Welch, Jr., all of Martinez, for appellant.

Francis W. Collins, Dist. Atty. of Contra Costa County, Charles L. Hemmings, Deputy Dist. Atty., Martinez, for respondent.

JONES, Justice pro tem.

This appeal is taken from a judgment denying a writ of mandate against the county surveyor of Contra Costa County. The appellant and petitioner is the owner

of a tract of land in the unincorporated part of that county near Martinez. This property she proposed to subdivide into lots and blocks and to that end filed a tentative map of the proposed subdivision with Contra Costa County Planning Commission. The subdivision as proposed consists of a single tier of lots. These lots all front on Pacheco Road an established highway leading from Martinez to Pacheco. There are nineteen of the lots with a total frontage on the highway of 1851.56 feet. One has a frontage of 60.74 feet; another 88.86 feet; a third 101.96 feet; and the frontage of the other sixteen is 100 feet. The lots vary in depth from 162.82 feet to 349.24 feet, and on the rear abut lands of the United States Government. No streets, ways, alleys or highways are shown on the tentative map. Access to each lot is limited to the frontage on Pacheco Road.

At the time that the tentative map came on for hearing before the Planning Commission, the point was raised that in 1941 a landslide had occurred on the property. Evidence was presented to the effect that this slide originated on the adjoining property of the Federal Government and that the debris had slipped over onto the Shorb property. The contour map and the photograph of the premises show that the natural slope of the ground is from the property of the Federal Government in the rear toward Pacheco Road in front. Further evidence was presented to show that since the slide Mrs. Shorb has graded her property and distributed the debris. In addition to scattering the debris she has constructed a road and ditch across the rear of the lots to afford drainage and to prevent a recurrence of the slide condition. With these facts before it the Planning Commission approved the tentative map of the subdivision upon condition that the Real Estate Commission be given notice of the tendency of the lands to slide. Notice was given orally and the final map was approved. No improvements of any kind were ever designated by the Planning Commission to be made by the subdivider.

When the final map was presented to the county surveyor he refused to approve it on the ground that the provisions of the local ordinance had not been complied with. The appellant then filed her petition in the Superior Court for a writ of mandate in which petition she alleged full compliance with all local ordinances. Respondent denied generally the allegations of the petition and alleged affirmatively in his answer that the lots are not properly drained and are subject to landslides.

Section 11593 of the Business and Professions Code provides that "(a) If a subdivision lies within an unincorporated area, a certificate by the county surveyor * * * is required." This section further provides that the appropriate official (the county surveyor) shall state that:

"(1) He has examined the map.

"(2) The subdivision as shown is substantially the same as it appeared on the tentative map, and any approved alterations thereof.

"(3) All provisions of this chapter and of any local ordinance applicable at the time of approval of the tentative map may have been complied with.

"(4) He is satisfied that the map is technically correct."

It is this section taken in connection with the local ordinance that respondent relies upon as authority for refusing to certify the final map.

The local ordinance governing subdivisions in Contra Costa County is No. 217 of that county as amended. Section 9 of this ordinance provides, first that "All parcels of land shown on any final map and intended for any public use shall be offered for dedication" etc., and secondly that "The subdivider shall improve all streets, highways and ways which are a part of the subdivision."

Then follows this language in the same paragraph: "Such improvements, as designated by the Planning Commission, shall conform to the following requirements:

"(1) All streets shall be paved * * *

"(2) Adequate water supply.

"(3) Such sanitary facilities as may be necessary to protect the public health and to serve the public convenience

"(4) All lots in the proposed subdivision shall be properly drained and in all cases there shall be installed such structures as are necessary to the use and the proper drainage of the streets, highways and ways in the subdivision and to the public safety.

"(5) Prior to construction of any of the proposed improvements in the subdivision, the county surveyor shall review and approve the design, layout and alignment." There is then set forth in requirement (5) provision for access to the work by the county surveyor for purposes of inspection, authorization for the subdivider to proceed, stoppage of work until requirements are met, certification of completion, etc.

The only question which confronts us, however, is whether the ordinance in terms requires the subdivider without designation by the Planning Commission to drain the lots so as to avoid landslides. On account of the frontage of all of the lots upon Pacheco Road no streets or ways are laid out in the proposed subdivision. No question is presented of dedication or improvement of streets or ways, nor does the respondent make any point with respect to an adequate water supply or sanitary facilities, or with respect to surface drainage. He contends only that the lots are not drained so as to prevent the land from sliding. His position is that the ordinance requires the subdivider to drain the lots regardless of any action on the part of the Planning Commission, and that until this improvement is made the ordinance has not been complied with and he is not required to sign the certificate.

The appellant on the other hand takes the position that the ordinance does not require such an improvement to be made by the subdivider unless the Planning Commission *designates* it as an improvement to be so made. In support of her position she points to section 2 of the ordinance, which in part reads: "At the time of its action on the tentative map the Planning Commission *shall also designate* the improvements which will be required under provisions of section 9 of this ordinance." (Italics added.)

The pertinent portion of section 9 reads: "Such improvements, as *designated* by the Planning Commission, shall conform to the following requirements: (Italics added.)

"(4) All lots in the proposed subdivision shall be properly drained."

[1] Appellant argues that section 2 expressly directs the Planning Commission to designate the improvements which will be required in any subdivision, and that under section 9 no one of the improvements enumerated therein is required unless the Planning Commission designates it. With this contention we are constrained to agree.

[2–5] Section 2 clearly and expressly directs the Planning Commission to designate the improvements which will be required under section 9, and section 9, while enumerating the improvements which may be required, makes them all dependent upon designation by the Planning Commission. In construing the ordinance its meaning is to be arrived at as is the meaning of any other enactment. In all such cases the problem of the court is to ascertain the legislative intent. In Caminetti v. Pac. Mutual L. Ins. Co., 22 Cal.2d 344, 353, 139 P.2d 908, 913, it is said: "The intent of the Legislature must be ascertained from the language of the enactment and where, as here, the language is clear, there can be no room for interpretation. First Congregational Church v. County of Los Angeles, 9 Cal.2d 591, 594, 71 P.2d 1106; Riley v. Robbins, 1 Cal.2d 285, 287, 34 P.2d 715; People v. Stanley, 193 Cal. 428, 431, 225 P. 1." Words used in an ordinary sense in one part of an enactment are to be construed in the same sense in another in the absence of express definition. The word "designate" in the phrase "the Planning Commission shall * * * designate" found in section 2 must be deemed to have been used in the same sense as the word "designated" in the phrase "as designated by the Planning Commission" found in section 9, which is to say "to point out" in the one case and "as having been pointed out" in the other. An intent different from that expressed may not be deduced by giving a different meaning to the same expressions or adding words which are not used. In the case of In re Miller, 31 Cal.2d 191, 199, 187 P.2d 722, 727, the court said: "Words may not be inserted in a statute

under the guise of interpretation. Code Civ.Proc. sec. 1858; Seaboard Acceptance Corp. v. Shay, 214 Cal. 361, 365, 366, 5 P.2d 882. Rather 'it is the function of the courts to construe and apply the law as it is enacted and not to add thereto nor detract therefrom.' Pacific Coast Joint Stock Land Bank of San Francisco v. Roberts, 16 Cal.2d 800, 805, 108 P.2d 439."

[6-8] Since the Planning Commission did not designate drainage to avoid possible landslides as a required improvement to be made by the subdivider, she has fully complied with the local ordinance and there is no room for the exercise of any discretion in the premises by the respondent. Under these facts mandate is the proper remedy. Sec. 1085, C.C.P.; Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848; Wood v. Strother, 76 Cal. 545, 18 P. 766. It is held in the case of In re McDonough, 27 Cal.App.2d 155, 165, 80 P.2d 485, 490, that mandamus is a proper remedy to compel a reasonable exercise of discretionary powers, and in the same case it is said that "It is well settled that mandamus will issue to correct an abuse of discretion, if the case is otherwise proper. Wood v. Strother, 76 Cal. 545, 18 P. 766, 9 Am.St.Rep. 249; Ex parte Bradley, 7 Wall. [364] 377, 19 L.Ed. 214; [see, also, Rose's U. S. Notes]; State v. Lafayette Co., 41 Mo. [221], 226; Village of Glencoe v. People, 78 Ill. 382; People v. Superior Court, 10 Wend.N.Y. 285; Hammel v. Neylan, 31 Cal.App. [21] 22, 159 P. 618."

[9] The additional point is made by the respondent that the notice to the Real Estate Commission upon which approval of the final map was conditioned was intended to be in writing, but that the notice given was oral. The evidence is conflicting in this respect, but the Planning Commission deemed the notice actually given as sufficient to meet the condition and approved the final map.

The judgment is reversed with directions to the court below to let the peremptory writ of mandate issue as prayed for.

NOURSE, P. J., and GOODELL, J., concur.

109 Cal.App.2d 119

ALHAMBRA SHUMWAY MINES, Inc. v. ALHAMBRA GOLD MINE CORP.

Civ. 8135.

Sac. 6250.

District Court of Appeal, Third District, California.

Feb. 6, 1952.

Action to cancel mining lease by Alhambra Shumway Mines, Inc., against Alhambra Gold Mine Corporation. The defendant petitioned for a writ of supersedeas to stay proceedings pending defendant's appeal from order denying defendant's motion for change of venue. The District Court of Appeal, Schottky, J. pro tem., held that the question whether the trial court abused discretion in denying motion presented a substantial issue to be determined upon the appeal.

Writ issued.

1. Appeal and Error ⇐477

The granting or denial of writ of supersedeas to stay proceedings pending appeal from order denying motion for change of venue is a matter of discretion depending on the special circumstances, and the writ will issue only when justified by showing that substantial questions will be presented upon appeal from order denying change of venue. Code Civ.Proc. § 949.

2. Appeal and Error ⇐965
Venue ⇐52(1)

The determination of motion for change of venue upon ground of convenience of witnesses rests largely in discretion of trial court, and exercise of such discretion will not be disturbed on appeal in absence of showing of clear abuse of discretion. Code Civ.Proc. § 963.

3. Appeal and Error ⇐478

Writ of supersedeas to stay proceedings pending appeal from order denying motion for change of venue for convenience of witnesses would be granted where order was entered when both parties understood that further affidavits would be filed and that there would be a further hearing. Code Civ.Proc. §§ 949, 963.

Entenza & Gramer, Beverly Hills, for appellant.

Bertrand F. Lurie, San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

Defendant seeks a writ of supersedeas to stay proceedings in this cause pending its appeal from an order of the court below denying its motion for change of venue from El Dorado County to Los Angeles County or Fresno County, which motion was made upon the ground of the convenience of witnesses. Code Civ.Proc., sec. 963. This court issued its order to show cause and its order staying all proceedings in the trial court pending the determination of the application for a writ of supersedeas.

The petition alleges that plaintiff brought an action to cancel a lease under which the petitioning corporation operated certain mining property in El Dorado County; that the trial court denied petitioner's motion for a change of venue September 7, 1951, without a hearing thereon; that petitioner filed an appeal from said order on September 17, 1951; that despite the pendency of the appeal, a motion to set for trial would be heard October 19, 1951; that the principal issue in the action against the petitioning corporation is whether the stockholders of the plaintiff corporation approved the making of the lease to petitioner's assignor, and whether or not the plaintiff corporation's stockholders authorized the bringing of the suit for cancellation of the lease; that there are approximately 600 stockholders of plaintiff corporation; that petitioner is informed and believes that approximately 12 to 15 of said stockholders control a majority of the stock; that none of said controlling stockholders reside in El Dorado County and most all of said group and of the entire group of stockholders reside in and around Fresno County; that most of said stockholders will have to be brought before any court in which said trial is held, by subpoena, and petitioner is informed and believes that Fresno County is the only county of which the majority of said stockholders and holders of controlling stock can be reached or served by subpoena.

The affidavit of O. H. Griggs filed in support of the motion for change of venue (an exhibit in this proceeding) substantiates the above allegations. It was averred that 249 individually named persons were material witnesses, thirteen of whom resided in and around the County of Los Angeles and would testify to the work performed by petitioner, and the remaining 236 resided in Fresno County and would testify that the lease was approved by the majority of plaintiff's stockholders.

The affidavit in opposition to the motion averred that out of the 236 individuals named in the Griggs affidavit, 78 of the persons did not approve the lease in question, but voted to reject it; that 11 of such named persons are dead; that 39 of such persons do not reside in Fresno County as stated in the Griggs affidavit but reside in various localities throughout the whole of California; and in some instances outside California; that 24 of such persons were never stockholders of plaintiff corporation.

It appears that the motion for change of venue came on for hearing on July 20, 1951, and that at said time plaintiff filed a lengthy affidavit in opposition to the motion. The clerk's transcript on appeal shows the following:

"Mr. Lurie: If your Honor please, one thing before you leave, may I ask you in regard to that motion for change of venue: Will we get a further notice from the Clerk's office as to a hearing on the motion?

"The Court: You filed some counter-affidavits, did you?

"Mr. Lurie: Yes sir; I did.

"The Court: And Mrs. Gramer wants an opportunity to answer those.

"Mr. Lurie: Yes, your Honor.

"The Court: Answer them as soon as you can, because when I come back in September, it may be set earlier. If you call my attention to it, I might give you an earlier date.

"Mr. Lurie: Right now it is off calendar until she replies?

"The Court: It is off calendar until it is placed back on the calendar by the Court, or at the request of either party."

It appears further that the trial court, on September 7, 1951, without any notice to either party of any further hearing, and before any answering affidavits were filed by defendant, made its order denying the motion for change of venue. It appears also that on the same date, September 7, 1951, counsel for plaintiff, unaware of the court order, mailed to counsel for defendant a notice that said motion would be heard on September 21, 1951.

[1] As this court said in Yee Kee Chong v. Pacific Freight Lines, 72 Cal. App.2d 219, at page 220, 164 P.2d 43, at page 45: "It is the settled law of this state that the granting or denial of a petition for a writ of supersedeas in such a case is a matter of discretion (Code Civ.Proc., § 949; Bardwell v. Turner, 219 Cal. 228, 229, 25 P.2d 978; Kane v. Universal Film Exchanges, 32 Cal.App.2d 365, 367, 89 P.2d 693, 91 P.2d 577; McKenzie v. Los Angeles Life Ins. Co., 88 Cal.App. 259, 260, 263 P. 338), and that the exercise of such power 'must in a great degree depend upon the special circumstances of each case.' West Coast, etc., Co. v. Contractors, etc., Bd., 68 Cal.App.2d 1 [6], 155 P.2d 863."

As stated in Bardwell v. Turner, 219 Cal. 228, at page 229, 25 P.2d 978, at page 979: "This is a discretionary matter, and the writ [supersedeas] will issue only when justified by a showing that substantial questions will be presented upon the appeal from the order denying change of venue."

[2] It is well settled that the determination of a motion for change of venue upon the ground of convenience of witnesses rests largely in the discretion of the trial court, and the exercise of such discretion will not be disturbed on appeal in the absence of a showing of a clear abuse of discretion. Wrin v. Ohlandt, 213 Cal. 158, 1 P.2d 991; Rice v. Schubert, 101 Cal.App. 2d 638, 226 P.2d 50.

[3] Because of this well settled rule we would be disposed to deny the petition for a writ of supersedeas if the only question presented was the sufficiency of the affidavits and other papers. But it is apparent here that both parties understood that further affidavits would be filed and that there would be a further hearing. It further appears that the statement made by the court on July 20th, as hereinbefore set forth, might well justify such understanding. Without prejudging the merits of the appeal, we feel that the question of whether the trial court abused its discretion in proceeding to make its order of September 7, 1951, denying the motion for change of venue, presents a substantial issue to be determined upon the appeal. Under the circumstances here presented, in view of the authorities hereinbefore cited, we feel that a writ of supersedeas should be granted.

Let the writ issue as prayed for.

PEEK and VAN DYKE, JJ., concur.



109 Cal.App.2d 161

GAMBORD MEAT CO. v. CORBARI.

Civ. 14860.

District Court of Appeal, First District, Division 2, California.

Feb. 8, 1952.

Action by Gambord Meat Company against Archie Corbari on two common counts for goods sold and account stated. The Superior Court, Santa Clara County, M. G. Del Mutolo, J., granted plaintiff's motion for summary judgment and defendant appealed. The District Court of Appeal, Nourse, P. J., held that where defendant, as agent, sent his personal check in payment of debt of his principal and failed to disclose the agency on face of the check, plaintiff, as payee, could disregard his knowledge of the agency and hold the defendant primarily liable.

Affirmed.

1. Judgment ⇐181(2)

A motion for summary judgment is based on showing that no triable issue of fact is disclosed in the pleadings. Code Civ.Proc. § 437c.

2. Principal and Agent ⇐146(1)

Where agent gave his personal check in payment of debt of his principal and failed to disclose the agency on face of check, payee could disregard his knowledge of the agency and hold agent personally liable as on an account stated.

Forrest E. Macomber, Stockton, Cal., for appellant.

Barnett & Goodman, San Jose, Cal., for respondent.

NOURSE, Presiding Justice.

Plaintiff sued on two common counts for goods sold and account stated. After an answer was filed plaintiff moved for summary judgment. This motion was granted. In the first count the plaintiff alleged that it had sold a quantity of meat to the defendant. The admitted truth is that plaintiff sold the meat to the Nicolai Meat Company and that the defendant acted throughout as the disclosed agent of that company. When that company failed and went into bankruptcy the defendant sent his personal check to plaintiff in payment of an indebtedness of the principal for some of the meat sold. The check was returned unpaid. This check is the basis of the second course of action on an account stated.

[1, 2] A motion for summary judgment is based on the showing that no triable issue of fact is disclosed in the pleadings, § 437c, Code of Civil Procedure. Here the motion rests on the rule that where an agent sends his personal check in payment of the debt of his principal the payee may disregard his knowledge of the agency and hold the agent, as on an account stated, as primarily liable where the agent's name alone appears on the written instrument. 1 Cal. Jur. 821 et seq.; Van Haaren v. Whitmore, 2 Cal.App.2d 632, 635, 38 P.2d 829; Patterson v. John P. Mills, etc., Inc., 203 Cal. 419, 421, 264 P. 759.

"When one issues a check upon a bank, there is a dual promise implied: First, that the bank upon which it is drawn will pay the amount thereof; and, second, if such bank should fail to make the payment, the drawer will pay the same to the holder thereof." Bank of Venice v. Clapp, 17 Cal. App. 657, 659, 121 P. 298. See, also, Pacific Ready-Cut Homes, Inc. v. Bracht, 89 Cal. App. 250, 253, 264 P. 519.

"There seems to be no doubt as to the right of the payee of a check, upon its nonpayment, to sue the drawer either upon the check itself or on the original consideration [citation]". Roff v. Crenshaw, 69 Cal. App.2d 536, 540, 159 P.2d 661, 662, citing 8 Am.Jur. 237, 238.

Here the defendant admittedly made a mistake in failing to disclose the agency on the face of the check and he therefore became personally liable. There is no issue of fact left to be tried. The court was bound by the rule of the cases cited and these likewise control our decision.

Judgment affirmed.

GOODELL, J., and JONES, J. pro tem., concur.



109 Cal.App.2d 117

HILLSDALE BUILDERS SUPPLY CO. v. EICHLER et al.

Civ. 14849.

District Court of Appeal, First District, Division 2, California.

Feb. 5, 1952.

Hillsdale Builders Supply Company sued Joseph Eichler, an individual, and others, alleging an oral promise of some defendants to answer for debt of a corporate defendant. The Superior Court, County of San Mateo, A. R. Cotton, J., dismissed the action for want of prosecution and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that trial court did not abuse discretion.

Order affirmed.

1. Dismissal and Nonsuit ⇐60(1)

"Discretion" within statute authorizing dismissal of action for want of prosecution, is discretion of trial court and not discre-

tion of reviewing court. Code Civ.Proc. § 583.

See publication Words and Phrases, for other judicial constructions and definitions of "Discretion".

2. Appeal and Error ⇐973

Action of trial court in dismissing action pursuant to statutory authority for want of prosecution will not be disturbed on appeal except on showing of manifest abuse of discretion by trial court. Code Civ. Proc. § 583.

3. Dismissal and Nonsuit ⇐60(3)

Trial court did not abuse discretion in dismissing for want of prosecution an action in which demurrer to complaint alleging oral promise of some defendants to answer for debt of corporate defendant was sustained more than two years prior to filing of amended complaint in which some corporate defendants were named which allegedly obtained assets of debtor corporation by successive transfers, excuse for delay in filing amended complaint that plaintiff's counsel was engaged in research to determine liability of such other corporations being facetious. Code Civ.Proc. § 583.

Waldier & Truce, San Carlos, Marvin J. Colangelo, San Carlos, of counsel, for appellant.

Cushing, Cullinan, Duniway & Gorrill, San Francisco, for respondents.

NOURSE, Presiding Justice.

On this appeal from an order dismissing the action for want of prosecution the only question presented is whether the trial court abused its discretion in making the order. The action was commenced on May 13, 1948, in a complaint against Eichler and several John Doe defendants alleging an oral promise of the defendants to answer for the debt of the corporate defendant Gamel, Inc. On June 30, 1948, the court sustained defendants' demurrer to this complaint. On July 15, 1950, an amended complaint was filed naming two corporate defendants which were alleged to have obtained the assets of Gamel, Inc., by successive transfers on which theory plaintiff sought to bind them on the antecedent oral promise of Eichler to answer for the debt of Gamel, Inc. To this amended complaint the defendants demurred and moved to strike at the same time the motion to dismiss was made. Action was taken on the motion to dismiss only.

[1, 2] Defendants' motion was based on section 583 of the Code of Civil Procedure which reads in part: "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after action is filed to bring such action to trial * * *". The cases are uniform in holding that when the trial court dismisses an action under this section the "discretion" mentioned therein is the discretion of that court, and not that of a reviewing court. It is equally true that the action of the trial court will not be disturbed except on a showing of a manifest abuse of such discretion. Grass v. Rindge Co., 84 Cal.App. 750, 763, 258 P. 673; Steinbauer v. Bondesen, 125 Cal.App. 419, 426–427, 14 P.2d 106; Burbank v. Continental Life Ins. Co., 2 Cal. App.2d 664, 667, 38 P.2d 451; Simonini v. Jay Dee Leather Products Co., 85 Cal.App. 2d 265, 268, 193 P.2d 53.

[3] The only excuse for the delay of more than two years in filing the amended complaint is that plaintiff's counsel was engaged in research to determine the liability of other corporate defendants. This appears rather facetious. The new parties were joined on the theory that years after the alleged oral promise of defendant Eichler these corporations had obtained some of the corporate assets of the original defendant. If they were proper parties to the main action they could have been substituted at any time for the John Does sued in the original complaint. It did not require two years for counsel to determine that fact. The amended complaint is clearly a sham. It does not cure any of the defects of the original to which the demurrer was sustained. The only allegations well pleaded set up new causes of action which are not germane to the original cause of action.

The applicable rule governing an appeal of this character is found in 9 Cal.Jur. p.

529 which reads: "No fixed or certain rule can be laid down as to the circumstances which will justify a court in exercising its discretion in dismissing an action on the ground of want of prosecution, for the obvious reason that no two cases present precisely the same facts. The exercise of this power must in the very nature of things be left to the discretion of the nisi prius court, subject only to a reversal for a patent abuse of such discretion."

It would be inconsistent with all the authorities if we were to deny the discretion of the trial court under the circumstances shown here.

Order affirmed.

GOODELL, J., and JONES, J. pro tem., concur.



109 Cal.App.2d 149

STRECKER v. BARNARD et al.

Civ. 14792.

District Court of Appeal, First District, Division 2, California.

Feb. 8, 1952.

Effie M. Strecker, lessee, etc., brought action against Barney H. Barnard, and others, lessors, for determination of rights and duties of parties under a lease. The defendants cross-complained asking that cost of alterations and installations of elevator be borne by plaintiff. The Superior Court, City and County of San Francisco, Theresa Meikle, J., entered a judgment for defendants, and the plaintiff appealed. The District Court of Appeal, Jones, J. pro tem., held that under the lease, lessee had duty to make changes and installations required for safe operation of elevator.

Judgment affirmed.

1. Landlord and Tenant ⇐150(1)

In absence for fraud or concealment, no duty is owed by landlord to make repairs or to prepare premises for use of tenants.

2. Landlord and Tenant ⇐125(2)

Tenant takes demised premises in condition in which he finds them, and from that point on lease measures rights of parties.

3. Landlord and Tenant ⇐39

A lease has aspects of both a contract and of a conveyance, and gives rise to two sets of rights and obligations, those based on privity of estate and those based on privity of contract.

4. Landlord and Tenant ⇐48(1)

On breach of contractual obligations of a lease, cause of action accrues to injured party as upon breach of any other contract.

5. Landlord and Tenant ⇐37

Where doubt arises as to what rights, duties and obligations of parties are under terms of a lease, statutory rules for interpretation of contracts apply. Civ.Code, §§ 1635–1662.

6. Landlord and Tenant ⇐152(3)

Under lease of second story space together with exclusive use of elevator, providing that lessee would keep elevators in good order, condition and repair, elevator was part of demised premises.

7. Estoppel ⇐92(2)

Where lessee took over possession and operation of elevator with rest of demised premises, lessee was estopped from questioning sufficiency of description to include elevator in terms of lease by which she took possession.

8. Landlord and Tenant ⇐152(4)

Where lease of second story space together with exclusive use of elevator provided that lessee would comply with all requirements of municipal, state and federal authorities at her sole cost and expense, and would observe same in use of premises, and that lessee would at her own cost and expense keep elevators in good order, condition and repair, lessee was required to make and bear cost of safety installations required by Division of Industrial Safety, after lessee took possession, for safe operation of elevator otherwise in good condition. Civ.Code, §§ 1638, 1644, 1647.

Douglas A. Nye, San Francisco, for appellant.

Jerome L. Schiller, San Francisco, for respondent.

JONES, Justice pro tem.

The respondents in this action are the owners of a two story and basement building at 519 Mission Street in San Francisco. On March 12, 1948 they executed a lease of the entire second floor of the building to the appellant for a term of seven years for the purpose of operating on the premises blue printing, photo copying and kindred lines of business. The term of the lease is fixed as commencing on April 1, 1948, and the leased property is described as "That certain second story space designated as No. 519 Mission Street being the entire upper floor of that certain two story and basement building situated on the Southerly line of Mission Street between First and Second Streets together with the exclusive use of the vestibule and entrance to said floor as well as the exclusive use of the elevator leading from said vestibule and being adjacent to the Mission Street front."

After the appellant took over the property, and on January 19, 1949, the Division of Industrial Safety made an inspection of the elevator and served notice on the appellant that it was defective and that certain safety requirements would have to be met. Neither of the parties had any knowledge that the elevator did not come up to safety requirements until this notice was served although the appellant had made a full inspection of the premises before the lease was executed. Upon the notice being served appellant immediately made demand upon the respondents that they make the changes and installations designated. This the respondents refused to do. Appellant then commenced this action to have the rights and duties of the parties under the lease determined. The respondents cross-complained asking that the cost of making the alterations and installations required by the Division of Industrial Safety be ascertained, and that the appellant be required to make them, or, in the alternative, to pay to respondents the cost of having the required work done. The trial court found it to be the duty of the lessee to make the required installations and fixed the cost thereof at $1490. Judgment was entered accordingly and the plaintiff appealed.

The requirements specified by the Division of Indutrial Safety as necessary to bring the elevator within the safety regulations of the state are: Install a capacity sign on the car enclosure; extend the car enclosure up to car top at counterweights; install standard hoistway gates 66" in height on all floors; install approved contact locks on all hoistway gates; provide a sequence device in connection with gate locks and control circuit; replace the present open type limit switch with approved type; install a light and light switch in penthouse; install an approved type disconnecting switch in penthouse; install an externally operated disconnect switch in the machine room; install standard bumpers in the pit; attach a seal on the governor so that adjustment cannot be made without breaking the seal; install a light switch in machine room located no more than 18 inches from the lockside of machine room door; provide safe access to penthouse.

The following provisions of the lease are pertinent to the issues involved here:

"Fifth: That the lessee will, at his sole cost and expense, comply with all of the requirements of all Municipal, State and Federal authorities now in force, or which may hereafter be in force, pertaining to the said premises, occasioned by or affecting the use to which said premises have been, are being, or are to be put by the lessee, and will faithfully observe in the use of the premises all Municipal ordinances and State and Federal statutes now in force or which may hereafter be in force."

"Sixth: That the lessee will, at his sole cost and expense, keep and maintain the said premises and every part thereof, except the roof and sidewalls, (which the lessor agrees to repair) but including glazing and the interior of the premises, in good and sanitary order, condition and repair, hereby waiving all right to make repairs at the expense of the lessor * *."

"Eighth: That the lessee, during the entire term of this lease, shall, at his own

cost and expense, keep all elevators in or upon the demised premises in good order, condition and repair, and also during said time, at his own cost and expense, keep all elevators insured against injury to persons * * *."

We are presented with no question of a deteriorated or dilapidated elevator needing repair or rebuilding, but are only called upon to decide whether the lessor or the lessee under this particular lease is required to make the safety installations required by the Division of Industrial Safety in an elevator otherwise in good condition.

[1, 2] In the absence of fraud or concealment no duty is owed by a landlord to make repairs or to prepare the premises for the use of the tenant. As is said in Davis v. Stewart, 67 Cal.App.2d 415, 418, 154 P.2d 447, 448: "In the absence of an express covenant or stipulation binding him so to do, the landlord is under no obligation to put the demised premises in any particular condition." 15 Cal.Jur. 690. To the same effect is Farber v. Greenberg, 98 Cal.App. 675, 277 P. 534. The rule in this state is that the tenant takes the demised premises in the condition in which he finds them, and from that point on the lease measures the rights of the parties. Katz v. People's Finance & Thrift Co., 101 Cal. App. 552, 553, 281 P. 1097.

[3, 4] A lease presents the aspects of a contract, and also that of a conveyance. It has two sets of rights and obligations—those arising from the relation of landlord and tenant and which are based on privity of estate, and those growing out of express stipulations and which are based on privity of contract. It is a contract, not only on the part of the lessor, but also on the part of the lessee. And, on a breach of its contractual obligations, a cause of action accrues to the injured party as upon the breach of any other contract. 15 Cal. Jur. p. 614.

[5] Where doubt arises as to what the rights, duties and obligations of the parties are under the terms of a lease, the statutory rules for the interpretation of contracts apply. Knox v. Wolfe, 73 Cal.App.2d 494, 499, 167 P.2d 3. Sections 1635 to 1662 inclusive of the Civil Code give us the statutory rules of interpretation. And we find that it is provided in sec. 1638 that "the language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity", and in 1644 that "The words of a contract are to be understood in their ordinary and popular sense * * * unless used by the parties in a technical sense, or unless a special meaning is given to them by usage". Also, 1647 provides that a contract may be explained by reference to the circumstances under which it was made, and by the matter to which it relates. The dispute here, of course, relates to the elevator and we need apply the stated rules in construing the lease only in so far as it pertains to this device.

In paragraph "Sixth" the appellant agrees to keep every part of the premises, including the interior, excepting the roof and sidewalls, in good condition and repair, and in paragraph "Eighth" she expressly stipulates that she will at her own cost and expense "keep all elevators in or upon the demised premises in good order, and condition." This language is clear and explicit and when considered in its ordinary and popular sense, it binds the appellant to maintain the elevator in a safe and sound condition so that it may be used for the purpose for which it was designed, namely, to transfer persons and property from one floor to another in the building without danger.

This construction is wholly consistent with the provisions of paragraph "Fifth", wherein appellant in clear and explicit language covenants at her "sole cost and expense" to "comply with all of the requirements of all Municipal, State and Federal authorities pertaining to said premises, * * * or affecting the use to which said premises are being put by the lessee, and will faithfully observe in the use of the premises all Municipal ordinances and State and Federal statutes * * *." In other words she covenants to make lawful use of the premises only.

A lease containing provisions similar to those before us was before the court in the case of Baker v. Horan, 227 Mass. 415, 116

N.E. 808, 809. In that case the lessee "had agreed that no use should be made of the premises 'which shall be unlawful * * * or contrary to any law of the commonwealth, or ordinance * * * for the time being in force, of the city.'" The building inspector gave notice to the owner of the premises involved that the elevator was defective and was being operated in violation of the building code in that the grillwork on top of the elevator was broken and should be replaced; that rewinding of the armature should be done to reduce excessive speed; that a renewal of the car shoes should be made; that a light should be installed in the car and another in the machine room; and that the landing doors should be covered with sheet iron to make them fireproof. The owner made the designated changes and installations and sued the lessees of the premises for the cost thereof. In sustaining a judgment against the lessees for the sums so expended the court said: "By using the elevator without making the changes under consideration the defendants were making an unlawful use of the premises. By reason of their failure to abate the nuisance before the lease expired the landlord was compelled to do so; but the express terms of the lease imposed upon them the expense of making those reasonable repairs and improvements which were required for the lawful, tenantable use of the premises."

As in the Massachusetts case, the lessee here covenanted to make only lawful use of the premises. By so stipulating she obligated herself to comply with the reasonable requirements of the Division of Industrial Safety, and she is bound by her obligation.

[6, 7] Appellant's point that the elevator does not come under the terms of the lease is without merit. It is held in Osborn v. Henry Cowell Lime & Cement Co., 37 Cal. App. 67, 173 P. 492, that the term "exclusive right", when applied to a space designated in a lease, brought the area so designated under the terms and provisions of the lease. So, here the term, "exclusive use" as applied to the elevator and vestibule could have been designed for no other purpose than to bring both under the terms and conditions of the lease. That the elevator was intended to be leased with the second floor finds further support in the stipulation that "during the entire term of this lease * * * at (her) own cost and expense" she will "keep all elevators insured against injury to persons * * *." Moreover appellant took over the possession and operation of the elevator with the rest of the premises and is still in possession and operating it. Under such circumstances she is estopped from questioning the sufficiency of the description by which she took possession. Merchants Nat. Bank v. Weston, 34 Cal.App. 693, 168 P. 587. In Beckett v. City of Paris Dry Goods Co., 14 Cal.2d 633, 637, 96 P.2d 122, 124, it is said that "where one goes into possession of premises under a contract containing an ambiguous or uncertain description of property to be occupied and pays the stipulated rent, it will be enforced as a lease if the parties acted upon it as relating to particular premises." So here any ambiguity has been cured by entry and payment of rent.

[8] It is clear that the appellant undertook, at her own expense, to keep the elevator in good order and condition and to use it only in a lawful manner. Having assumed this obligation, the duty rests upon her to make the reasonable changes and installations required by the Division of Industrial Safety for the safe operation of the elevator.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

109 Cal.App.2d 163

RAISIN INVESTMENT CO. v. MAGGINETTI et al.

Civ. 18545.

District Court of Appeal, Second District, Division 1, California.

Feb. 8, 1952.

The Raisin Investment Co., etc., sued John Magginetti and others for partition. The Superior Court, Los Angeles County, Marchetti, J., entered an interlocutory judgment directing partition in kind of the building involved, and after such judgment had become final, entered final judgment in accordance with the referees' recommendation, and plaintiff appealed. The District Court of Appeal, Hanson, J. pro tem., held that even if it appeared from the referees' report that a division in kind could not be achieved without great prejudice to the owners, the court could not amend its interlocutory judgment to require a sale of the building.

Affirmed.

1. Partition ⇐77(3)

Court should not have ordered partition of $5,000 building in kind, but should have ordered sale, if cost of erecting partition wall would have been $3,000 or more.

2. Appeal and Error ⇐69(3)

Appeal would lie from interlocutory judgment directing partition in kind. Code Civ.Proc., § 963, subd. 2.

3. Partition ⇐91

Referees appointed to make partition in kind could not recommend sale of the property, but could recommend only physical line for partition.

4. Partition ⇐95

Even if court erred in entering interlocutory judgment directing partition in kind, after such judgment had become final, court could not amend it and order sale of property involved.

5. Partition ⇐95

Where interlocutory judgment directing partition in kind had become final, such judgment was legally conclusive of fact that property could be partitioned in kind, even though physical fact was otherwise.

6. Partition ⇐94(3)

Alleged fact that court could not have ordered referees, appointed to make partition in kind, to expend cost of partition wall to effect a partition did not preclude court from confirming partition in kind which, in effect, imposed such expenditure on the parties.

Wolfson & Essey, Burnett L. Essey, Beverly Hills, for appellant.

Charles E. Hobart, Los Angeles, for respondents.

HANSON, Justice pro tem.

The principal question presented for determination upon this appeal from a final judgment of partition, no appeal having been taken from the interlocutory judgment, is whether a trial court can amend its interlocutory judgment which ordered a partition in kind to one for a sale thereof if it appears from the facts recited in the referees' report that a division in kind cannot be achieved without great prejudice to the owners.

Not only do the respondent owners contend that there is no such power vested in the court, but they also contend that if the court has such power no sufficient prejudice was shown to warrant any such action. We shall turn to consider this last point first after stating the material facts.

[1–3] The real property here involved consisted of three lots aggregating 83.93 feet in width (east to west) and 120 feet in depth (north and south) improved by an old one-story store building, covering the major portion of the three lots, which had been used as a supermarket, but at the time of the trial was used only as a warehouse. A trussed roof resting on the two outer walls covered the forward part of the building and a flat roof the rear part. The building along with some smaller structures was valued by the referees at $5,000 and the three lots at $14,500 or a total of $19,500. At the trial there was evidence produced by appellant indicating that it would cost in excess of $3,000 to place a wall through the

center of the building for its entire length which was the line later selected by the referees when they came to divide the property in kind. What evidence, if any, was introduced by respondents is not indicated by their brief. What it would cost either party to tear down the portion of the building allotted to him is not disclosed in the briefs. If in fact it would have cost the parties $3,000 or more to erect a partition wall to properly segregate the two halves of the building, it seems to us plain that the trial court in the first instance was not warranted in ordering a partition in kind, but should have ordered a sale. This for the reason that an expenditure of $3,000 was altogether too disproportionate to the value of $5,000 for the building as found by the referees. But appellant with full knowledge of the facts, nevertheless, did not appeal from the interlocutory judgment as it had a right to do, Code Civ.Proc. sec. 963(2); Williams v. Wells Fargo Bank, 17 Cal.2d 104, 109 P.2d 649; Pista v. Resetar, 205 Cal. 197, 270 P. 453, but instead permitted it to become final long before the referees' report was filed—a report which of necessity could not recommend a sale, but only a physical line for partition of the property. Richardson v. Loupe, 80 Cal. 490, 22 P. 227.

[4, 5] Assuming then the court erred as indicated we come to the question whether the court had the power to amend the interlocutory judgment after it became final. We think it clear that the court was possessed of no such power. Time and again it has so been ruled in this state. Thompson v. White, 76 Cal. 381, 18 P. 399; Williams v. Wells Fargo Bank, 17 Cal.2d 104, 109 P.2d 649; Pista v. Reseter, 205 Cal. 197, 270 P. 453; Holt v. Holt, 131 Cal. 610, 63 P. 912; Quirk v. Rooney, 130 Cal. 505, 62 P. 825; Barry v. Barry, 56 Cal. 10; Regan v. McMahon, 43 Cal. 625. To be sure the court could have rejected for good cause the report of the referees, but it could not do so merely because of the court's own error embodied in an interlocutory judgment that had become final. As the court could not undo what it had done it had no alternative other than to confirm the report which was not assailed for any failure to comply with the provisions of the interlocutory judgment, Dunn v. Dunn, 137 Cal. 51, 69 P. 847, and thereupon enter its final judgment which likewise is not assailed for any failure to follow the interlocutory judgment. The interlocutory judgment was and is legally conclusive of the fact that the property could be partitioned in kind, even though the physical fact is otherwise.

[6] Appellant's final argument that the court could not have ordered the referees to expend the cost of a partition wall to effect a partition and, as a consequence, the court could not confirm a partition in kind which, in effect, would impose such an expenditure on the part of the parties is not only a *non sequitur*, but is intrinsically unsound. All the court did was to approve a physical partition of the land which carried with it the improvement to the extent it was located on the land allotted to each. If one of the parties and not the other chose to remove that portion of the building resting on the land allotted to him he was privileged to do so at his own expense; if he chose not to do so he would not incur any expense. If, on the other hand, he chose to erect a party wall to divide his portion of the property from that of the other party he likewise had that privilege. The fact that the latter procedure would involve an expense to him does not differ from the case of any landowner who seeks to erect a party wall to separate his property from that of an adjoining landowner. Whether the court could or could not have ordered the referees to expend the cost of a partition wall in order to effect a partition of the realty is not here involved and not decided as the court made no such order.

The judgment must be and it is affirmed.

WHITE, P. J., and DORAN, J., concur.

108 Cal.App.2d 849

JERMANE et al. v. FORFAR et al.
Civ. 14783.

District Court of Appeal, First District, Division 1, California.

Jan. 29, 1952.

Hearing Denied March 27, 1952.

Richard Jermane, a minor, by his father, Kenneth R. Jermane, as his guardian ad litem, and his parents sued Alexander Joseph Forfar and another for personal injuries sustained by minor plaintiff when hit by an automobile driven by named defendant. From a judgment of the Superior Court, County of Alameda, Thomas J. Ledwich, J., on a verdict for defendants, plaintiffs appealed. The District Court of Appeal, Fred B. Wood, J., held that minor plaintiff was a pedestrian within the statute requiring a vehicle driver to yield the right of way to a pedestrian crossing the roadway within a crosswalk at an intersection when he was struck by the automobile while propelling himself across a street on a four-wheel scooter within a pedestrian crosswalk at an intersection.

Judgment reversed.

1. Automobiles ⇐160(4)

The word "pedestrian" is used in section of Vehicle Code, requiring vehicle driver to yield right of way to pedestrian crossing roadway within crosswalk at intersection, in broader sense than its literal dictionary meaning of a walker, one who journeys on foot, a foot traveler, and specifically a professional walker. Vehicle Code, § 560(a).

See publication Words and Phrases, for other judicial constructions and definitions of "Pedestrian".

2. Automobiles ⇐160(4)

While a "pedestrian" is ordinarily understood to be one who travels on foot, mere circumstance that person propels himself along by means of mechanical device, such as scooter, does not clothe him in broad and general sense, with any other character than that of pedestrian, to whom statute requires motorist to yield right of way in crosswalk at intersection. Vehicle Code, § 560(a).

3. Automobiles ⇐162(5)

A boy, crossing street in unmarked pedestrian crosswalk at intersection on four wheel scooter propelled by him with one foot on pavement, was a "pedestrian" within statute requiring vehicle driver to yield right of way to pedestrian crossing roadway within crosswalk at intersection, as such scooter, being moved by human power, was not a "vehicle". Vehicle Code, §§ 31, 83–85, 88, 449–605.12, 476, 510–512, 516, 525, 527–531, 550–553, 554, 560–565, 560(a).

See publication Words and Phrases, for other judicial constructions and definitions of "Vehicle".

4. Trial ⇐241

In action for injuries to boy struck by defendant's automobile while crossing street on scooter in unmarked pedestrian crosswalk at intersection, plaintiffs' requested instruction to jury in terms of statute requiring vehicle driver to yield right of way to pedestrian crossing roadway within crosswalk at intersection was not inapplicable because neither party knew the other was using or intending to use street. Vehicle Code, § 560(a).

5. Automobiles ⇐246(50)

Instruction of jury as to pedestrian's right of way in crosswalk at street intersection is proper, though driver of vehicle striking pedestrian in crosswalk testifies that he could or did not see pedestrian before collision. Vehicle Code, § 560(a).

6. Automobiles ⇐246(51)

In action for injuries to boy struck by defendant's automobile while crossing street on scooter in pedestrians' crosswalk at intersection, defendant's testimony that he could not see pavement of crosswalk all the way across when he stopped at intersection because front of automobile tilted upward on hill and that he could not see crosswalk and saw no one therein as he started to turn across it was sufficient, with other relevant evidence, to take to jury question whether defendant exercised care in performing his duty toward pedestrians in crosswalk, so as to entitle plaintiff to instruction in terms of statute requiring vehicle driver to yield right of way to pedestrian crossing roadway within crosswalk at intersections. Vehicle Code, § 560(a).

7. Automobiles ⇐246(50)

In action for injuries to boy struck by defendant's automobile while crossing street on scooter in pedestrians' unmarked crosswalk at intersection, plaintiffs' requested instruction that if jury found from evidence that defendant violated statute requiring vehicle driver to yield right of way to pedestrian crossing roadway within crosswalk at intersection, such conduct constituted negligence as matter of law, was properly refused, where evidence did not require reasonable men to draw but one inference that such violation was sole effective cause of injury. Vehicle Code, § 560(a).

8. Trial ⇐241

In action for injuries to boy struck by defendant's automobile while crossing street on scooter in pedestrians' crosswalk at intersection, error in plaintiffs' requested instruction, refused by court, that defendant was negligent as matter of law, if he violated statute requiring vehicle driver to yield right of way to pedestrian crossing roadway within crosswalk at intersection, did not justify refusal of plaintiffs' requested instruction in terms of such statute, nor justify given instruction that plaintiff did not occupy legal position of pedestrian crossing street at time and place of accident. Vehicle Code, § 560(a).

9. Appeal and Error ⇐1170(9)
Trial ⇐241

In action for injuries to boy struck by defendant's automobile while crossing street on scooter in crosswalk at intersection, trial court's refusal of plaintiffs' requested instruction in terms of statute requiring vehicle driver to yield right of way to pedestrian crossing roadway within crosswalk at intersection and giving of instruction that plaintiff did not occupy legal position of pedestrian crossing street at time and place of accident was erroneous and constituted miscarriage of justice, requiring reversal of judgment on jury's verdict for defendant, in view of conflicting evidence. Vehicle Code, § 560(a); Const. art. 6, § 4½.

Franklin C. Stark, Carl E. Simon, Jr. and Stanley E. Sparrowe, all of Oakland, Stark & Champlin, Oakland, of counsel, for appellants.

Brown, Rosson & Berry, Oakland, for respondent.

FRED B. WOOD, Justice.

Plaintiffs Richard Jermane and his parents, Kenneth R. and Claudia Joan Jermane, appeal from the judgment entered upon a verdict for defendant, in an action for damages for personal injuries sustained by Richard when hit by an automobile driven by the defendant. "Appellant" as used herein refers to Richard unless the context otherwise indicates.

Appellant predicates his appeal principally upon asserted errors in the giving and refusing of instructions to the jury.

Consideration of the assertedly erroneous giving and refusing of instructions involves, principally, the question: Was appellant a "pedestrian" at the time of the accident? He was crossing a street on a four-wheel scooter, lying face down and propelling it with one foot upon the pavement. There is evidence that he was crossing in an unmarked pedestrian crosswalk at a street intersection, and that respondent turned into this street and crosswalk from the intersecting street after stopping and observing traffic.

The trial court instructed the jury: "You are instructed that plaintiff herein, Richard Jermane, at the time and place of this accident, did not occupy the legal position of a pedestrian crossing the street." Appellant assigns as error the giving of this instruction, and the refusal of each of the following two instructions requested by appellant: "You are instructed that Section 560 of the Motor Vehicle Code of the State of California in effect on November 26, 1948, reads as follows: '(a) (Yielding the right of way to pedestrian.) The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this chapter,'" and "If you should find from the evi-

dence that the defendant conducted himself in violation of California Vehicle Code Section 560 just read to you, you are instructed that such conduct constituted negligence as a matter of law."

[1] The word "pedestrian" is not defined in the Vehicle Code. It is used therein in a broader sense than its literal dictionary meaning: "A walker; one who journeys on foot; a foot traveler; specif., a professional walker." Webster's New Internat'l Dict., 2d ed., unabridged.

It is already judicially established that a person walking upon or across a highway does not cease to be a pedestrian when pushing a cart, Gallardo v. Luke, 33 Cal. App.2d 230, 91 P.2d 211; Lewis v. Watson, 229 N.C. 20, 47 S.E.2d 484 or a lawn mower, Blodget v. Preston, 118 Cal.App. 297, 5 P.2d 25, or a baby carriage, Tedla v. Ellman, 280 N.Y. 124, 19 N.E.2d 987, or a bicycle, Holmes v. Blue Bird Cab, 227 N.C. 581, 43 S.E.2d 71; Benson v. Anderson, 129 Wash. 19, 223 P. 1063, or when pulling a cart, Flaumer v. Samuels, 4 Wash.2d 609, 104 P.2d 484.

[2] In several jurisdictions the question whether or not a person traveling upon or across a highway upon roller skates is a pedestrian, has been presented for judicial determination. In each case which has come to our attention the court has deemed him a pedestrian. Nordman v. Mechem, 227 Mich. 86, 198 N.W. 586; Eichinger v. Krouse, 105 N.J.L. 402, 144 A. 638; Dunlop v. Public Service Co-Ordinated Transport, 122 N.J.L. 226, 4 A.2d 683; Caronia v. Muller, 250 App.Div. 722, 293 N.Y.S. 363; Leopold v. Williams, 54 Ohio App. 540, 8 N.E.2d 476. Concerning this question, the court in Eichinger v. Krouse, supra, said: "While it is true that a pedestrian is ordinarily understood to be one who travels on foot, nevertheless the mere circumstance that he or she has attached to his or her feet roller skates, or ice skates, or walks on stilts, or uses crutches, or is without feet and propels himself or herself along by means of a chair or by some other mechanical device, does not clothe him or her, in a broad and general sense, with any other character than that of a pedestrian." 144 A. at page 639. In Nordman v. Mechem, supra, interpreting the expression "a person walking in the roadway of a public highway," the court said: "The term 'walking in the highway' should be given a meaning sufficiently liberal to effectuate the apparent purpose of the statute, if this can be done without stretching the language employed beyond its comprehensive limits. The word 'walk,' confined to its sense of locomotion, has many shades of meaning; it springs from the old Anglo Saxon word 'wealcan' meaning 'to roll, toss one's self about, roll about.' Skeat, Etymological Dictionary English Language, subject 'Walk.' In walking one takes movement of the whole body into the operation; in skating one does no more. In a narrow sense, 'walking' is progress made by use of heels and toes. But it is evident the Legislature did not intend any such restricted sense in the effort to safeguard human life. One proceeding on foot is walking. The boy was proceeding on foot, aided by roller skates. It used to be quite common to say that one walking 'takes shank's horses.' In roller skating the same 'shank's horses' are employed. If a baby creeps into the highway or a boy is running, jumping or sliding, or a girl skipping therein, is it conceivable that all such persons are without the safeguard of the statute? Certainly not.

"The purpose of the statute is to safeguard human life, and it should not receive a construction making it applicable only to persons walking heels and toes. In construing the statute we cannot escape the conviction that the term 'walking in the highway' was intended to be inclusive of all persons in the highway, standing or moving therein, using their legs and feet." 198 N.W. at page 587.

The rationale of those decisions applies here. Plaintiff was proceedng on one foot, aided by his scooter.

[3] The context in which the Legislature has used the word "pedestrian" lends emphasis to this view. In respect to traffic regulations, two major classifications are observable: vehicular traffic and pedestrian traffic. The Vehicle Code defines "Road

way" as that portion of a highway designed or ordinarily used for "vehicular" travel (sec. 83); a "Sidewalk" as that portion of a highway other than the roadway, set apart for "pedestrian" travel (sec. 84). It indicates that a "Crosswalk" is for the use of a pedestrian (sec. 85) and that a "Safety zone" is an area set apart within a roadway for the exclusive use of "pedestrians" (sec. 88). By the provisions of section 459.4, the Legislature permits local authorities to regulate "vehicular and pedestrian traffic" in subways and upon bridges.

The traffic regulations appear in division 9, sections 449–604.12, of the code. Here are defined the rights and duties of the "driver of a vehicle" (for example, sections 510, 511, 512, 516, 525, 527–531, 550–553); the "motorman of any street car" (sections 476 & 554); the "operator of a trolley coach" (sections 452.5 & 452.10), and the "pedestrian" (sections 476, 554 & 560–565). A person "riding a bicycle or riding or driving an animal upon a highway" has the rights and is subject to the duties of the driver of a vehicle (sec. 452). The duties of the owner of livestock, in respect to the use of a highway, are defined in section 423 of the Agricultural Code.

Appellant, traveling upon his scooter, enjoyed none of these rights and was subject to none of these duties unless he was a "pedestrian," for his scooter was not a vehicle (defined in section 31 of Veh.Code), moved as it was by human power. An intent to exempt him cannot reasonably be ascribed to the Legislature. We conclude that the word "pedestrian" as used in the code included appellant when propelling himself across the roadway on his scooter.

This holding does not carry the inference that every person on a highway is a pedestrian if not the driver of a vehicle or of an animal, the motorman of a street car, the operator of a trolley coach, or the rider of a bicycle or of an animal. The traffic regulations apply to persons controlling movement upon the highways. A mere passenger riding in a vehicle does not control its movement. A person whose work requires him to be upon the roadway is not, while at work, using it for the purpose of travel, a fact recognized by statute (Veh.Code, sec. 453) and by judicial decision. Scott v. City and County of San Francisco, 91 Cal.App.2d 887, 206 P.2d 45.

We have examined the decisions cited by respondent in support of the view that appellant was not a pedestrian, and find them inapplicable. In Spears Dairy v. Bohrer, Tex.Civ.App., 54 S.W.2d 872, 874, the court deemed a newsboy's little wagon (in which he carried his papers when delivering them) a "vehicle," as used in a statute which made it the duty of the person in charge of a vehicle, upon changing its course, "if the movement or operation of other vehicles" might be affected thereby, to signal his intention to the person "in charge of such [other] vehicle". The report of the decision does not indicate that the statute in question placed any limitation upon the meaning of "vehicle," as our statute does when it excludes devices moved by human power. Hattie v. Shaheen, 37 Ohio App. 50, 174 N.E. 20, held that a person riding in a coaster wagon, propelling it with one foot, was an operator of a vehicle, not a pedestrian. But the applicable statute, a local ordinance, defined "vehicle" as including equestrians, led horses, and everything on wheels or runners, except street cars or baby carriages; a definition not comparable to our statutory definition of vehicle. Wright v. Salzberger & Sons, 81 Cal.App. 690, 254 P. 671, involved a coaster upon which two boys were sitting, propelling it with their feet, but is not particularly significant in the present inquiry. A local ordinance required vehicles to carry lights, excepting, among others, vehicles that might be propelled by a pedestrian. That excepted the coaster from the light carrying requirement but could not make it a "vehicle" as defined by section 31 of the Vehicle Code. There are decisions which, while not discussing the meaning or status of pedestrian, inferentially treat a person coasting upon a sled as the operator of a vehicle. Post v. Richardson, 273 Pa. 56, 116 A. 531, will serve to illustrate. There, the plaintiff's decedent was coasting on a sled, down hill, upon a snow covered road, at a speed of 15 to 25 miles per hour. In such a case, under

our Vehicle Code, the sled might well be deemed a vehicle. It was propelled by the force of gravity, not by human power. That is quite consistent with the view that a person drawing a sled, or a four-wheel scooter, upon or across a roadway, or propelling himself upon it with one foot on the pavement, is a pedestrian.

[4–6] Respondent further contends that the requested instruction which was couched in the terms of subdivision (a) of section 560 of the Code, was inapplicable even if appellant were entitled to the rights of a pedestrian, because neither party knew the other was using or intending to use the highway. This point lacks merit. It is proper to instruct the jury as to a pedestrian's right of way in a crosswalk even though the driver of the vehicle testified that he could not or did not see the pedestrian prior to the collision. Fischer v. Keen, 43 Cal.App.2d 244, 248–249, 110 P.2d 693; Nicholas v. Leslie, 7 Cal.App.2d 590, 594, 46 P.2d 761. Here, appellant testified that, after stopping to observe traffic, he entered the roadway and proceeded along and in the crosswalk. Respondent testified that when he stopped at the intersection he could see the area of the crosswalk but not the pavement all the way across; the front of his car prevented his seeing the pavement all the way across because tilted upward on a hill; that, as he started to turn, he could see the area above the crosswalk, not the crosswalk itself, and did not see anyone in the crosswalk. From this, and other relevant evidence in the case, it was for the jury to determine whether or not respondent exercised care in the performance of his duty toward pedestrians in the crosswalk. To perform that function properly, the jury needed adequate instructions concerning the applicable provisions of law.

[7–9] Respondent claims that the second requested instruction was improper because it charged that if respondent violated section 560 of the Code (failed to yield the right of way), he was negligent as a matter of law. There is merit in this point. We have reviewed the record and can not say that, if such a violation occurred, reasonable men could draw but one inference and that an inference that such violation was the sole effective cause of the injury. See Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 590, 177 P.2d 279. But that did not justify the refusal of the other requested instruction, couched in the words of section 560. Nor did it justify the instruction, not requested by appellant, that appellant, "at the time and place of this accident, did not occupy the legal position of a pedestrian crossing the street." As said in Oliphant v. Brown, 7 Cal.App.2d 584, at page 587, 46 P.2d 790, at page 791, of the refusal of a pedestrian right of way instruction and the giving of a misinstruction: "Plaintiff's right of way had an important bearing upon the issues of negligence and contributory negligence. For these reasons, we conclude that the case of appellants is one fully meeting the requirements of article VI, § 4½, of the Constitution. We are strengthened in this view by the fact that the court gave an instruction, the first sentence of which reads as follows: 'This is not a case occurring in a marked crosswalk.' By this instruction the jury was told, inferentially, that plaintiff's rights would have been greater had she been crossing in a marked crosswalk. It also might have been inferred that the rights of plaintiff and defendant were equal, or even that the defendant, as the driver of the vehicle, had a right which was superior to that of pedestrians." In Satterlee v. Orange Glenn School Dist., supra, 29 Cal.2d 581, 177 P.2d 279, after holding an instruction on the rights of way of vehicles at intersections was properly refused because too broad, the Supreme Court found prejudicially erroneous an instruction given by the trial court of its own motion on this subject. Concerning the prejudicial character of such an error, the Supreme Court said: "The instruction given by the court on its own motion had the effect of minimizing, if not completely negativing the code provision. It was, therefore, erroneous and considering the direct conflict in the evidence, constituted 'a miscarriage of justice' within the meaning of article VI, section 4½ of the California Constitution." 29 Cal.2d 593, 177

P.2d 279, 286. The judgment should be reversed.

Other points urged by appellant are not well taken and do not require discussion.

The judgment appealed from is reversed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.



109 Cal.App.2d 215

PEOPLE v. TOMPKINS.

Cr. 4709.

District Court of Appeal, Second District, Division 1, California.

Feb. 13, 1952.

Bruce H. Tompkins was convicted in the Superior Court of Los Angeles County, Edwin L. Jefferson, J., of a violation of Penal Code, § 337a, subd. 3, penalizing person who holds money for purpose of being wagered on a horse race and defendant appealed from the judgment, verdict and sentence and from denial of motion for new trial. The District Court of Appeals, White, P. J., held that evidence sustained conviction.

Attempted appeal from verdict and sentence dismissed. Judgment and order denying defendant's motion for new trial affirmed.

1. Criminal Law ⇐1023(10)

There is no appeal from the verdict and sentence.

2. Gaming ⇐93(3)

Evidence sustained conviction on charge that defendant, received, held or forwarded money or receipt or memorandum thereof which had been staked, pledged, bet or wagered on outcome of a horse race. Pen.Code, § 337a, subd. 3.

3. Criminal Law ⇐260(11), 1159(2)

It is only where, as a matter of law, there is no substantial legal evidence to support conviction that a reviewing court may disturb a verdict or decision.

4. Criminal Law ⇐1144(13)

On an appeal in a criminal case, appellate tribunal must assume in favor of finding of trier of fact existence of every fact reasonably deducible from evidence, and then determine whether guilt of accused can reasonably be inferred therefrom.

5. Gaming ⇐94(1)

In prosecution for receiving, holding, or forwarding any money or receipt or memorandum which had been staked, pledged, bet or wagered on outcome of a horse race, it is not necessary for prosecution to either allege or prove that a particular transaction does not come within statutory exception to offense under statute providing that a wager made inside an enclosure under pari-mutuel system for a principal who was not within enclosure shall be considered a wager made within enclosure. Pen.Code, § 337a, subd. 3; Business and Professions Code, § 19595.

6. Gaming ⇐96

If defendant charged with receiving, holding, or forwarding any money or receipt or memorandum thereof which had been staked, pledged, bet or wagered on outcome of a horse race sought to excuse himself by reason of statute providing that a wager made inside an enclosure under pari-mutuel system for a principal who was not within enclosure shall be considered a wager made within enclosure defendant was required to show such excuse as a matter of defense. Pen.Code, § 337a, subd. 3; Business and Professions Code, § 19595.

7. Gaming ⇐71

Where inference was fairly deducible from testimony of arresting officer that defendant was doing such a volume of betting, on horse races on behalf of friends on track that it was necessary for defendant's wife to tabulate sheets containing record of those bets, claim that such conduct and actions were within statute providing that wager made inside an enclosure under pari-mutuel system for a principal who was not within enclosure

shall be considered a wager made within enclosure would be regarded as a mere subterfuge and an attempt to circumvent established policy of state against commercial gambling. Pen.Code, § 337a, subd. 3; Business and Professions Code, § 19595.

8. Gaming ⇐73

In prosecution for receiving, holding or forwarding any money or receipt or memorandum thereof, which had been staked, pledged, bet or wagered on outcome of horse race, it is not necessary that a definite piece of currency or memorandum thereof be transferred from a bettor to accused. Pen.Code, § 337a, subd. 3.

9. Criminal Law ⇐517(4)

To authorize reception and consideration by jury of an extrajudicial confession or admission of defendant, people need not establish corpus delicti by proof of clear and convincing character required to support a conviction and it is sufficient if there is some proof, or prima facie proof, or even slight proof of corpus delicti.

10. Criminal Law ⇐406(1), 412(1), 517(4)

In prosecution for receiving, holding, or forwarding any money, receipt or memorandum thereof which had been staked, pledged, bet or wagered on outcome of horse race, where there was evidence that at time race officer testified to his conversation with defendant, it had been previously established by officer's testimony that money had passed from third party to defendant, that defendant had a scratch sheet in his hand at time and had on his person numerous items of betting paraphernalia, allowing admission of extrajudicial declarations, admissions, or confessions of defendant was not error. Pen.Code, § 337a, subd. 3.

Joseph T. Forno, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. Fitzpatrick, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County defendant was accused in Count I of violating subdivision 1, section 337a of the Penal Code. Count II charged a violation of subdivision 3 of the same code section, while in Count III defendant was charged with a violation of subdivision 6 of the aforesaid Penal Code section.

Following the entry of pleas of not guilty, a jury was waived, and the cause proceeded to trial before the court, resulting in the acquittal of defendant on Counts I and III and conviction of the offense charged in Count II. A motion for a new trial was denied, judgment was pronounced, execution thereof suspended, and defendant granted conditional probation.

[1] Defendant appeals from the judgment, verdict and sentence, and from the denial of his motion for a new trial. The attempted appeal from the verdict and sentence must be dismissed for the reason that there is no such appeal known to our law, People v. Clark, 106 Cal.App. 2d 271, 273, 235 P.2d 56; People v. D'Elia, 73 Cal.App.2d 764, 766, 167 P.2d 253; People v. Rose, 26 Cal.App.2d 513, 519, 79 P.2d 737.

A review of the record discloses the following as a fair epitome of the testimony which gave rise to this prosecution. On March 3, 1951, Officer Joel Clark, attached to the vice detail of the Los Angeles Police Department, had occasion to observe the movements of defendant between the hours of 11:30 a. m. and 12:30 p. m. After following defendant in an automobile, during which time the defendant drove around the block three or four times, the officer observed him park in front of a market at 10425 Glenoaks Boulevard. The police officer thereupon stopped and parked his car opposite one side of the market. He observed defendant enter the store and walk up to a man later identified as Roy Beanblossom. The latter held a short conversation with defendant outside the hearing of the officer. Following the conversation defendant and

Beanblossom walked out of the store through the front door. They stopped and held another conversation on the sidewalk. The officer approached the men and saw Beanblossom hand defendant a slip of paper.

Thereupon defendant was seen handing Beanblossom what appeared to the officer to be a $5 bill, saying, "I think that is what I owe you, isn't it?" Beanblossom replied, "Yes, I believe it is. *I was a little confused about which horse I bet on yesterday, but I think that is correct.*" Thereupon, Beanblossom put the $5 bill in his pocket.

At that time the officer exhibited his badge to the defendant and Beanblossom and at the same time removed two pieces of paper from the defendant's right hand. One piece of paper found in defendant's hand was a copy of the National Scratch Sheet, a publication listing horses running in the various races and predicting the odds on such horses.

At the trial, the officer, after being qualified as an expert on betting methods and paraphernalia utilized by bookmakers in Los Angeles County, identified the other piece of paper found in defendant's hand as a betting marker. A number of sheets of paper taken from the defendant's coat pocket were described by the officer as "owe" sheets and "betting markers". The officer described the use of the "owe" sheets as follows: He termed the sheet as a written memorandum of a wager or wagers made on horse races. That noted on the "owe" sheet would be "the amount of money bet, the manner in which it is to be bet, the horse it is bet on; and at the end of the day the amount of money won or lost". The officer also interpreted certain numbers on the betting markers as indicating the number of races, the horses' handicap number, and the number, bet on each place position. There were names or symbols at the top of each betting marker.

After recovering the aforesaid papers from defendant he and Beanblossom were taken to the former's automobile. There, the defendant in conversation with the officer stated he was taking bets out to the racetrack for Mr. Beanblossom's brother to bet for him in the pari-mutuel system. Defendant stated that the "owe" sheets were a record of bets made for friends while he was at the track. He stated that the sheets were tabulated by his wife on an adding machine. Defendant identified the names at the top of the "owe" sheets as "Tommy", being a person who ran a newsstand in the San Fernando section of Los Angeles, and "Mrs. Fenny" as a friend of his. Another "owe" sheet had "No. 10" at the top, and another had the word "Empire". These defendant contended he was unable to identify.

A portion of the foregoing conversation was corroborated by officer Foster.

One of the betting markers had the name "Beanblossom" at the bottom of it and contained a list of horses which the officer testified were entered in races held on the day of the arrest.

Roy L. Beanblossom testified that he and defendant had business dealings of a mercantile nature and that the aforesaid $5 which the officer saw defendant hand Beanblossom was for groceries purchased by the former from the latter and to correct an overcharge. He denied having a conversation with defendant regarding horses.

Defendant as a witness in his own behalf testified that he was in the business of selling office supplies and had been so engaged for something over six months. He corroborated Roy Beanblossom's explanation of the conversation and the exchange of the $5 bill. He admitted having one betting marker in his possession, the same being the one which bore the name "Ben" on it, and also admitted having the National Scratch Sheet in his possession. He denied that he had ever seen the other betting markers and "owe" sheets which the officer testified were found in his coat pocket. Defendant explained the betting marker with Beanblossom's name on it as being used to indicate bets which Floyd Beanblossom, a brother of the aforesaid Beanblossom had asked him to make at the track. He stated that Floyd Beanblossom had told him the night before that he was going to leave money with the cashier of the store for defendant to pick up and bet on behalf of Floyd Beanblossom while defendant was at the track. He stat-

ed further that the cashier at the market had given him $36 or $37 to bet on behalf of Floyd Beanblossom.

The memorandum which accompanied the money, previously referred to as a betting marker with Beanblossom's name on it, totalled $37.00. Defendant testified that some of the sheets introduced into evidence as betting markers or "owe" sheets were in fact written by him at the request of the arresting officer and that they had been written after he was arrested. He testified that he had around $50 on his person, exclusive of the $36 or $37 he received from the cashier in the grocery store. It appeared, however, at the trial, that defendant had in the neighborhood of $138.00 in cash on his person. He explained the discrepancy by saying that he carried $50 around as "mad money", which he rarely counted.

Floyd Beanblossom testified that he had left money with the cashier of the grocery store to be bet at the track by defendant and that the slip showing horses to be bet on and the amount of bets was in his handwriting.

He further testified that defendant made these bets for him gratuitously.

Appellant's first contention is that the evidence is insufficient to sustain the judgment of conviction in that "there was no evidence that appellant received, held, or forwarded any money or receipt or memorandum thereof which had been staked, pledged, bet or wagered upon the outcome of a horse race."

[2–4] This claim is untenable. While there was a sharp conflict in the evidence as given on the side of the prosecution by police officers and that given by witnesses for the defense, it was within the province of the trial judge to determine which witnesses and what evidence was entitled to credence. It is only where, as a matter of law, there is no substantial legal evidence to support the conviction that a reviewing court may disturb a verdict or decision. Upon an appeal in a criminal case, the appellate tribunal must assume in favor of the finding of the trier of fact the existence of every fact reasonably deducible from the evidence, and then determine whether or not the guilt of the accused can be reasonably inferred therefrom, People v. Rose, 26 Cal.App.2d 513, 517, 79 P.2d 737. In the case at bar, the evidence conclusively establishes that appellant in fact did receive and hold money belonging to the witness Floyd Beanblossom and which money was to be bet for Beanblossom within the enclosure of a licensed horserace track.

Although he does not mention section 19595 of the Business and Professions Code (included in the Pari-mutuel Act), appellant apparently seeks to rely upon the provisions thereof to exculpate himself.

The section in question provides that "A wager made inside an inclosure under the pari-mutuel system for a principal who is not within the inclosure shall be considered a wager made within the inclosure for the purpose of this chapter and any activity of the principal in connection with such wager shall not be considered a wager made outside the inclosure."

[5, 6] The assumption that appellant seeks to bring the transaction here in question within the provisions of the aforesaid statute does not however aid him because he failed to make such a showing at his trial. It is not necessary for the prosecution to either allege or prove that a particular transaction does not come within the exception to section 337a of the Penal Code provided for by section 19595 of the Business and Professions Code. If appellant sought to excuse himself from the charge preferred against him by reason of the provisions of the last-mentioned section he was required to show such excuse as a matter of defense, People v. Torrey, 16 Cal. App.2d 470, 473, 60 P.2d 900. This he did not do.

However, under the facts here present such a defense would have been futile. To sustain it would be to permit commercialized gambling conducted away from the race track to flourish. It would permit the solicitation and acceptance of bets in any amount so long as such bets were transmitted or communicated to the track and there placed through the pari-mutuel ma-

chine. To hold that section 19595 of the Business and Professions Code immunized the practices of appellant herein would be to ascribe to the legislature an intent to eliminate most of the protective regulations designed to prohibit widespread commercial gambling on horse races. Before such a legislative intent can be assumed the statute must clearly compel it because, as stated by this court in Re Goddard, 24 Cal.App.2d 132, 140, 74 P.2d 818, 823, "The policy of the state toward commercial gambling is clear and unequivocal. A mere superficial reference to the Penal Code reveals that commercial gambling in all of its phases has been uniformly condemned for many years. * * * There is nothing in the Horse Racing Act indicating the slightest intention to depart from the public policy of the state condemning commercial gambling. To the contrary, a determination to adhere to such policy is obvious. See also In re Walker, 11 Cal.2d 464, 80 P.2d 990, 117 A.L.R. 825.

That appellant herein was engaged in commercial gambling is amply supported by the evidence and reasonable inferences to be drawn therefrom. The conversation between appellant and the witness Roy Beanblossom shortly before the arrest was made, as related by Officer Clark, could be well termed as typical of a conversation between bookmaker and customer. The fact that appellant was seen to hand Roy Beanblossom a $5 bill is a fact which must be considered when taken in conjunction with the conversation testified to by the officer. While it may be urged that in most cases transactions between bookmaker and customer would be characterized by an exchange of money from the latter to the former, it is only reasonable to assume that the customer would win on occasions, and in that event the transfer of money from the bookmaker to the customer would be in order. There is also the fact that a number of "owe" sheets and betting markers were found on appellant's person which may be regarded as a strong indication that he was engaged in commercial bookmaking rather than in taking an occasional bet to the track for a friend. Furthermore, the betting markers and "owe" sheets were described by Officer Clark as being of the type commonly used in the business of bookmaking in Los Angeles County.

[7] The inference is also fairly deducible from the testimony of Officer Clark that appellant was doing such a volume of betting on behalf of "friends" at the track that it was necessary for appellant's wife to tabulate the sheets containing the record of these bets. In view of the foregoing, the claim that such conduct and actions are within the purview of section 19595 of the Business and Professions Code must be regarded as a mere subterfuge and an attempt to circumvent the established policy of the state against commercial gambling, and is without legal sanction either in the Horse Racing Act as originally adopted or as subsequently amended. With reference to appellant's methods of operation the Supreme Court in Re Walker, supra, 11 Cal.2d at page 469, 80 P.2d at page 992, had this to say: "Although the stipulation in the instant case does not disclose that petitioner maintained a place of business for his operations, and only one act of soliciting is charged herein, we see no material difference, in so far as the present statute is concerned, between soliciting bets on the street or in a shop, or in each case the acts of the agents take place outside the enclosure".

[8] Appellant's contention that there was no evidence that he received, held or forwarded any money, receipt or memorandum thereof which had been staked, pledged or bet upon the outcome of a horse race cannot be upheld. In a prosecution under subdivision 3 of section 337a of the Penal Code it is not necessary that a definite piece of currency or memorandum thereof be transferred from a bettor to the accused. In People v. Raze, 91 Cal.App.2d 918, 922, 205 P.2d 1062, a conviction was sustained where the defendant orally accepted and transmitted a bet by telephone, and where the bet was predicated upon a profit made by the bettor on another race, but which was not evidenced by any memorandum or writing.

Finally, appellant urges that the court committed reversible error in admitting into evidence, over his objections, the conversations between him and the arresting

officer when no *corpus delicti* had been shown.

In the case of People v. Raze, supra, 91 Cal.App.2d at page 921, 205 P.2d 1064, the court had under consideration an appeal from a conviction for violation of subdivision 3, section 337a of the Penal Code, which is the identical offense charged herein and now engaging our attention. In disposing of the contention that the *corpus delicti* must be proved by evidence other than the extrajudicial declarations of the appellant, Mr. Justice Vallée, speaking for the court, said, "Proof of the corpus delicti (that the specific offense charged has actually been committed by somebody) should be made prior to the presentation of evidence of admissions or confessions. The pronouncement found in some of the cases that the corpus delicti cannot be established by the extrajudicial statements and declarations of the accused is not an accurate statement of the rule. The rule is limited to admissions and confessions. 8 Cal.Jur. 167, sec. 248. Where the gist or essence of the offense charged consists of statements or declarations of the accused,—that is, where statements or declarations of the accused are essential in order to establish that the specific offense charged was committed,—such statements and declarations are admissible as proof of the corpus delicti. There are many criminal offenses predicated upon fraud, such as false pretenses by fraudulent representations (now called theft in this state, Penal Code, section 484) in which the corpus delicti obviously cannot be established without proof of statements or declarations of the accused."

[9] There is no question but that slight proof is all that is necessary to justify the admission of confessions and admissions. "To authorize the reception and consideration by the jury of an extrajudicial confession or admission of a defendant, the People need not establish the *corpus delicti* by proof of the clear and convincing character required to support a conviction. It is sufficient if there is some proof, or *prima facie* proof, or even slight proof of the *corpus delicti*" 8 Cal.Jur. p. 235, sec. 303. See also People v. Hudson, 139 Cal.App. 543, 34 P.2d 741.

[10] There is in the record evidence that at the time Officer Clark testified as to his conversations with appellant, it had been previously established by the officer's testimony that money had passed from Beanblossom to appellant; that the latter had a National Scratch Sheet in his hand at the time, and had upon his person numerous items of betting paraphernalia.

Viewed in the light of the rules above referred to, it is manifest there was no error committed in allowing into evidence extrajudicial declarations, admissions or confessions of appellant.

The attempted appeal from the verdict and sentence is dismissed. The judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

DORAN and DRAPEAU, JJ., concur.



109 Cal.App.2d 123

RIVIELLO et al. v. JOURNEYMEN BARBERS, HAIRDRESSERS & COSMETOLOGISTS' INTERNATIONAL UNION OF AMERICA, LOCAL NO. 148 et al.

No. 14841.

District Court of Appeal, First District, Division 1, California.

Feb. 7, 1952.

Rehearing Denied March 8, 1952.

Hearing Denied April 3, 1952.

A. V. Riviello, and others, copartners doing business under the firm name and style of Riviello Barber Shop, brought an action against Journeymen Barbers, Hairdressers and Cosmetologists' International Union of America, Local No. 148, and others, to enjoin defendants from demanding that plaintiff join unions and from enforcing such demand by removing union shop card from and picketing plaintiffs' barber shop. The Superior Court of the State of California in and for the City and County of San Francisco, Frank T. Deasy, J., granted an injunction and defendants appealed. The District Court of Appeal, Bray, J., held that constitu-

tion of international union discriminated against employer members so that local union and international union were not entitled to make or so enforce such demand.

Judgment affirmed.

1. Labor Relations ⇐134

Under provision of constitution of international barbers' union which required working employers to become proprietor members of local union, and another provision, working employer members were discriminated against, so that local and international were not entitled to threaten to withdraw union shop card from shop of working employer whose employees were union members or to picket such shop unless working employer joined union.

2. Labor Relations ⇐134

Constitution of international barbers' union, without ambiguity, discriminated against members who were working employers by prohibiting them from voting on matters pertaining to wages, hours of labor etc., and otherwise, so as to preclude local and international from threatening to withdraw union shop card from shop of union employer whose employees were union members unless working employer joined union, and ruling of president of international that under constitution working employers had equal rights with other members was not binding upon court as being interpretation of ambiguity.

Todd & Todd, San Francisco, for appellants.

Chauncey Tramutolo, Harold B. Lerner, San Francisco, for respondent.

BRAY, Justice.

Defendants appeal from a judgment restraining them from demanding that plaintiff join the International and Local Union and from enforcing such demand by removing the union shop card from, and picketing, plaintiff's barber shop.

Question Presented.

Does the constitution of the International offer plaintiff equal membership with other members? If not, does the constitution or the interpretation thereof by the International President and Executive Board control?

Facts.

Plaintiff A. V. Riviello owns and operates a barber shop in San Francisco.[1] Plaintiff employs journeyman barbers and in addition to being the proprietor of the shop he works therein at the trade as a journeyman barber. Plaintiff has a union shop card issued by defendant union, as his journeyman barber employees are members thereof. He has executed agreements with the union concerning working conditions, hours and wages. The union has threatened to withdraw the union card and to picket his shop unless he joins the union. Plaintiff brought this action to restrain them from so doing. An application for a preliminary injunction was denied and plaintiff appealed. Riviello v. Journeyman Barbers etc. Union, 88 Cal.App.2d 499, 199 P.2d 400. We there held that to compel an employer who works at the trade in competition with union members, to join an employee union, is a proper labor objective, provided the organization offers such working employer[2] the same rights of membership held by the other members. It appeared from the constitution of the International, as it then stood, that the only membership offered plaintiff was a "non-active membership" which denied him, among other things, the right to attend meetings or to vote therein. We instructed the trial court to issue the preliminary injunction.

On the trial of the case, it appeared that the constitution had been amended, and a decision of the president of the International and the executive board obtained to the effect that the constitution now permitted working employers full membership in, and equal rights with, the other mem-

1. After the filing of this action by the partnership of which A. V. Riviello was a member, it was dissolved and he became the sole owner of the business. He will be referred to herein as plaintiff.

2. The term "working employer" used herein means an employer who, in addition to employing others, works with them with the tools of his trade.

bers of the union. A letter from the local to plaintiff, offering him such rights, was admitted in evidence. The trial court, however, held that the constitution does not permit a working employer full membership and that the interpretation thereof by the president and International executive board could not change its plain language, and gave judgment granting plaintiff an injunction restraining defendants from demanding that plaintiff join the union and from removing the union card or picketing plaintiff's shop. This injunction is to remain in effect unless the constitution is amended to provide full membership rights for working employers.

The provisions of the amended constitution applicable here follow: Article VIII, section 3, Constitution of the Journeyman Barbers, Hairdressers, Cosmetologists and Proprietors' International Union of America, after defining an employer as any person who owns or operates a barber shop and employs steadily one or more full time barbers, states: "* * * provided, however, that employers who are working with the tools of the trade must become proprietor members of the local *union* and International Union if barbers or beauticians." (Emphasis added.) Article XVII, section 3, provides: "A proprietor, shop owner, or employer working at the trade and who has never been a member of this organization and who desires to operate a union shop must make application for membership. A proprietor member working with the tools of the trade shall be entitled to voice and vote in meetings of the local union, *but shall be ineligible to vote on matters pertaining to wages, hours of labor, etc. And shall also be ineligible to any office in the local or International Union or to act as delegate or alternate to conventions.*" (Emphasis added.)

The constitution provides for two types of organizations under the International, one, called employers' guild, the other, called the local union. There does not appear to be any definition of the difference between them. Article VIII, section 1, provides: "Any competent barber * * * may, upon application to and being accepted by the nearest local union or employers' guild, become a member thereof * * *." What the functions of the guild as distinguished from the local union are, does not appear. Apparently, although the constitution does not say so, it is the intention that employers (as distinguished from working employers) shall join the guild, while employees shall join the union. The regulation of hours of labor, prices and wages, is exclusively in the union. Members of local unions may attend meetings of the guild and vice versa, and are entitled to all "courtesies" including the privilege of the floor, except where the local or the guild president declares the meeting in executive session.

[1] It is obvious from a reading of article VIII, section 3, which expressly requires working employers to become "proprietor members of the local *union*" (not guild; emphasis added) with that portion of section 3, article XVII which provides that a working employer, although entitled "to voice and vote in meetings of the local union" is expressly made "ineligible to vote on matters pertaining to wages, hours of labor, etc.," and "ineligible to any office in the local or International Union or to act as delegate or alternate to conventions"—that the working employer member does not have equal rights with the other members, and hence a discrimination exists. In our decision in 88 Cal.App.2d 499, 199 P.2d 400, we held that there must be no discrimination. It should be said that some of the discrimination which existed at the time of that decision has been removed by amendment of the constitution, but it is obvious that all discrimination has not been removed.

Ruling of the President and Executive Board.

Defendants earnestly contend that the ruling of the president and executive board to the effect that the constitution gives working proprietors equal rights with other members controls.

Article VI, section 1, provides that the General President - Secretary - Treasurer[3]

3. Herein, for brevity, referred to as "president."

"shall have the power to decide all questions of law * * *." Article III, section 6, provides: "Should any question arise which would tend to demoralize or affect the welfare of the International Union" the president is empowered to call a meeting of the general executive board "and settle any and all questions pertaining to the welfare and advancement of the International Union." There was introduced in evidence the decision of the president, which reads: "A question of law having arisen respecting the membership rights of employing barbers who work with the tools of the trade and who desire to affiliate with a local union, and this question and differences of opinion thereon having created some confusion in the operations of the International and of various local unions, the General President-Secretary-Treasurer, under his powers as such officer and in particular under the powers conferred upon him by Article VI, section 1 of the constitution, hereby makes the following decision and adjudication on the question of law involved:

The requirement to make application for membership, found in the third paragraph of section 3 of Article XVII of the constitution (page 46), means application for membership in this International either for membership in the Employers Guild or in a local union.

"The words 'proprietor-members,' as used in the fourth paragraph of section 3, Article XVII (page 46) of the International constitution, is hereby interpreted and means a proprietor-member of the International who is not a member of the local union, that is to say, who is a member of the Employers Guild. While such member has a right to attend meetings of the local union, as provided in section 10 of Article XVII, he shall in no case be entitled to vote in the local union on matters pertaining to wages, hours of labor, and other related matters.

"It is further decided and adjudged that any employing barber who works with the tools of the trade and who desires to become a member of the local union may apply to the nearest local union, under the provisions of Article VIII of the constitution; and if qualified under the provisions of Article VIII his application for membership shall be considered and voted upon on exactly the same terms as the application of a journeyman barber. If admitted to membership in the local union he shall have the same voting and office holding rights as any other member of the local union.

"It is further decided and adjudged that the provisions of section 3 of Article VIII, requiring that employers working with the tools of the trade must become proprietor-members of the local union, means that if they are otherwise qualified for membership in the local union under Article VIII of the constitution they shall, if elected to membership, have full voting and office holding rights in the local union.

"(Union Seal)

"This is to certify that said ruling was adopted by the unanimous vote of the General Executive Board of the Journeyman Barbers, Hairdressers, Cosmetologists and Proprietors' International Union of America, as submitted April 6, 1949.

Signed /s/ W. C. Birthright

"General President-Secretary-Treasurer."

"(Union Seal)

Upon the making of this decision defendant union notified plaintiff in writing that pursuant to resolution of its members, he was invited to affiliate with it "as an active member, with all rights of membership, including the right to vote and the right to hold office, including the right to serve as a delegate to all conventions, if elected to such position."

[2] Defendants contend that either the constitution clearly shows no discrimination against working proprietors (we have heretofore pointed out that it does), or the provisions bearing on the subject are ambiguous and hence the ruling of the president and executive board clearing up the ambiguity controls. It cannot be contended that, in the guise of clearing up an ambiguity, the president or the executive board or both, can, in effect, amend the constitution, if actually no ambiguity exists. So the question now is, is there any ambiquity in the language of the constitution? We are unable to find any. The ruling of the presi-

dent and board attempts to add to article VIII, section 3, which deals with admissions to membership and which requires working employers to join the local union, a whole new thought, namely, that such membership will give him full voting and office holding rights in that union. It is clearly an attempt to amend that section. Then the ruling attempts to read into article XVII, section 3, the meaning that the working employers referred to therein (and who under article VIII must belong to the local union) are only those who join the guild and not the union. This does not make sense, because besides violating the plain intendment of the section, working employers are not compelled to join the guild but must join the union, and because such interpretation completely ignores the provisions of section 10 of the same article which provide, in effect, that guild members visiting a union "*may* be extended all *courtesies* including the privilege of the floor" (emphasis added) except when the meeting is in executive session. Certainly no one would contend that the permissive granting of courtesies to a guild member would include the right to the limited "voice and vote" in meetings of the local union set forth in section 3 as to working employer members of the union which the ruling attempts to make applicable solely to guild members. We can see no escape from the proposition that, laudable as the efforts of the president and executive board are in endeavoring to eliminate from the constitution any discrimination against working employer members of a union, their ruling is an attempt to amend the constitution, which admittedly they had no power to do.

Defendants have cited certain cases as authority for their contention that the interpretation of the constitution by the president and executive board is binding on the courts. The cases do not support that proposition. Stoica v. International etc. Employees, 78 Cal.App.2d 533, 178 P.2d 21, and Killeen v. Hotel & R. Emp. etc. League, 84 Cal.App.2d 87, 190 P.2d 30, merely held that members of either parent or affiliated voluntary associations may not resort to the courts to review decisions of their officers in the absence of exhausting the remedies provided by the constitution of their organization. In De Mille v. American Fed. of Radio Artists, 31 Cal.2d 139, at page 147, 187 P.2d 769, at page 775, 175 A.L.R. 382, the court stated: "The practical and reasonable construction of the Constitution and by-laws of a voluntary organization by its governing board is binding on the membership and will be recognized by the courts." In our case, however, the construction of the constitution by the president and executive board is not a reasonable one.

Defendants state that they are seeking no technical advantage, and that they, in the utmost good faith, are offering plaintiff full membership in the local and International without any discrimination. They are even willing that this court amend the judgment and injunction in such manner as to permit its application if at any time after plaintiff joins the union there is any discrimination against his rights as a member. Moreover, they point out that plaintiff has stated, in effect, that he will not join under any circumstances. Unfortunately we must consider the constitution as we find it. It may well be that defendants will completely ignore its restrictions. We, however, are bound, in considering the legal rights of the parties, by its terms. Until defendants are legally in a position to assure and guarantee under the provisions of the constitution of the organization a working employer member of the local union, equal rights with other members, we cannot remove from him the protection which is rightfully his. On the other hand, once he can be given those equal rights and he refuses to join, then, as we held in our prior decision, he is subject to union sanctions.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; CARTER, TRAYNOR, and SCHAUER, JJ., dissenting.

WEST v. STAINBACK.

STAINBACK v. WEST.

Civ. 18355.

District Court of Appeal, Second District, Division 3, California.

Jan. 25, 1952.

As Modified Jan. 28, 1952.

Rehearing Denied Feb. 15, 1952.
Hearing Denied March 24, 1952.

Action by Stuart N. West against Katherine Elizabeth Stainback to impress a trust on a parcel of realty, record title to which was in defendant, and to compel a conveyance thereof or to impose an equitable lien thereon. The Superior Court, Los Angeles County, Henry M. Willis, J., entered judgment for plaintiff and both parties appealed. The District Court of Appeal, Vallée, J., held that a constructive trust was properly imposed upon the parcel of realty to extent of plaintiff's interest.

Affirmed.

1. Trusts ⇐95

Trusts arising from transactions within scope of statute providing that one who gains a thing by fraud or other wrongful act is involuntary trustee of thing gained, fall within class of trusts created by operation of law, and are constructive trusts. Civ.Code, § 2224.

2. Trusts ⇐95

Constructive trusts based on fraud or other wrongdoing are not based primarily on the intention of the parties but are forced on the conscience of trustee by equitable construction and operation of law. Civ.Code, § 2224.

3. Trusts ⇐95

In constructive trusts based on fraud or wrongdoing, oral promise is sufficient and existence or absence of confidential relationship between parties, in strict sense, is not controlling. Civ.Code, § 2224.

4. Trusts ⇐95

Constructive trusts based on fraud or wrongdoing are creatures of equity, and take form whenever title is obtained by means of chicanery, deceit or other variety of fraud actual or constructive. Civ.Code, § 2224.

5. Trusts ⇐95

To create constructive or involuntary trust under statute providing that one who gains a thing by fraud or other wrongful act is involuntary trustee of thing gained, no conditions other than those stated in statute are necessary. Civ.Code, § 2224.

6. Wills ⇐59

Where mother used undue influence to cause daughter to execute will excluding daughter's husband, who dismissed contest of wife's will and petition for removal of mother as guardian of daughter's estate on sole consideration of oral promise of mother to will husband equivalent of daughter's estate, oral agreement was supported by a sufficient consideration.

7. Frauds, Statute of ⇐144

Where mother through undue influence caused daughter to execute will excluding daughter's husband, who dismissed contest of wife's will and petition for removal of mother as guardian of daughter's estate on sole consideration of oral promise of mother to will husband equivalent of daughter's estate, full performance by husband removed oral agreement, by means of equitable estoppel, from bar of statutory provision requiring agreement not to be performed within lifetime of promisor or agreement to devise or bequeath any property to be in writing, to be valid. Code Civ.Proc. § 1973, subd. 6.

8. Frauds, Statute of ⇐144

Where mother through undue influence caused daughter to execute will excluding daughter's husband, who dismissed contest of wife's will and petition for removal of mother as guardian of daughter's estate on sole consideration of oral promise of mother to will husband equivalent of daughter's estate, full performance by husband removed oral agreement, by means of equitable estoppel, from bar of statute of frauds. Civ.Code, § 1624.

9. Limitation of Actions ⇐5(3)

Where mother through undue influence caused daughter to execute will excluding daughter's husband, who dismissed contest of wife's will and petition for removal of mother as guardian of daughter's estate on sole consideration of oral promise of moth-

er to will husband equivalent of daughter's estate, husband's right to quasi specific performance of agreement was not barred by any statute of limitations.

10. Trusts ⇐92½

In action by promisee to impress constructive trust upon certain real property to effect performance of oral promise of defendant's predecessor in interest to will to promisee equivalent of estate of promisee's wife in consideration of promisee's dismissal of contest of wife's will and petition to remove promisor as guardian of wife's estate, defendant niece, who had obtained promisor's realty and had been named sole heir in will through exercise of undue influence, was equitably estopped from pleading or relying upon bar of statute of frauds. Civ.Code, § 1624.

11. Wills ⇐67

Where agreement to make a will is valid and agreement is fair and reasonable and adequately supported by consideration, equity will grant sort of quasi specific performance by making party who receives estate constructive trustee for intended beneficiary in accordance with terms of agreement.

12. Deeds ⇐196(3)
Wills ⇐163(2)

Fiduciary relationship between niece, who was sole heir in aunt's will and who had been conveyed all her real property, and aunt constituted basis for presumption of exercise of undue influence by niece in securing through will and deeds property rightfully belonging to promisee of valid oral agreement by aunt to make will.

13. Wills ⇐67

Where valid agreement to make will is certain and definite and founded upon adequate consideration, court, in action by promisee, though estate may be probated and property distributed accordingly, will impose constructive trust upon any particular property in hands of individual distributee.

14. Novation ⇐1

Where oral promise of mother to will daughter's husband equivalent of daughter's estate was valid and mother, who stated she wanted to make good her promise, purchased realty which she stated could be left to husband, in whole or part, or used to satisfy promise and husband acquiesced, statement, purchase and acquiescence did not constitute novation. Civ. Code, § 1531.

15. Trusts ⇐95

Where mother through undue influence caused daughter to execute will excluding daughter's husband, who dismissed contest of wife's will and petition for removal of mother as guardian of daughter's estate on sole consideration of oral promise of mother to will husband equivalent of daughter's estate and niece of mother used undue influence to obtain her realty and to be named in will as sole heir, constructive trust was properly imposed upon parcel of realty to which niece held title to extent of husband's claim. Civ.Code, § 2224.

16. Trusts ⇐375(2)

Decree imposing constructive trust upon realty was properly declared to be lien on realty as security for satisfaction thereof. Civ.Code, § 2224.

17. Trusts ⇐92½

Where promisee sought to impress constructive trust upon realty to effect performance of oral promise of defendant's predecessor in interest to will equivalent of promisee's wife's estate in consideration of promisee's dismissal of contest of wife's will and petition to have promisor removed as guardian of wife's estate, action was not barred by statute of frauds. Civ.Code, § 1624.

18. Limitation of Actions ⇐102(8)

Where promisee sought to impress constructive trust upon realty to effect performance of oral promise of defendant's predecessor in interest to will equivalent of promisee's wife's estate in consideration of promisee's dismissal of contest of wife's will and petition to have promisor removed as guardian of wife's estate, action was not barred by statute of limitations.

19. Trusts ⇐365(5)

Where promisee sought to impress constructive trust upon realty to effect per-

formance of oral promise of defendant's predecessor in interest to will equivalent of promisee's wife's estate in consideration of promisee's dismissal of contest of wife's will and petition to have promisor removed as guardian of wife's estate, action was not barred by laches.

20. Appeal and Error ⇐994(3), 1012(1)

Credibility and weight to be given testimony of witnesses, and whether such evidence is clear and convincing, is for trier of fact and is conclusive on appeal.

21. Executors and Administrators ⇐224

Presentation of claim is not condition precedent to maintenance of action in quasi specific performance.

22. Trusts ⇐375(1)

In action by promisee to impress constructive trust upon certain real property to effect performance of oral promise of defendant's predecessor in interest to will to promisee equivalent of estate of promisee's wife, wherein promisee was seeking to enforce by quasi specific performance oral agreement to make will against defendant, who had wrongfully prevented promisor from carrying out agreement, judgment awarding promisee $30,000 and imposing lien as security for satisfaction thereof was proper. Civ.Code, § 2224.

23. Wills ⇐67

Where promisor orally agreed to will promisee equivalent of promisee's wife's estate and promisor purchased realty with equivalent amount as source of satisfaction of promise, as property which was to be source of satisfaction of promise could be reached by promisee after death of promisor, imposition of lien against the property, under decree declaring constructive trust, to extent of equivalent of wife's estate satisfied promisor's obligation in full.

24. Trusts ⇐219(2)

Where constructive trust was impressed upon certain realty to effect performance of oral promise of trustee's predecessor in interest to will beneficiary equivalent of estate of beneficiary's wife in consideration of beneficiary's dismissal of contest of wife's will and petition to remove promisor as guardian of wife's estate, in absence of knowledge of promise to will, trustee was not guilty of abuse of trust which entitled beneficiary to compound interest from date of death of promisor. Civ.Code, § 2224.

25. Trusts ⇐219(2)

Only where trustee has been guilty of some positive misconduct or willful violation of duty can trustee be charged with compound interest.

26. Trusts ⇐219(1)

Whether trustee is chargeable with even simple interest must be determined by trial court from all circumstances of particular case. Civ.Code, § 3288.

27. Trusts ⇐219(2)

In action by promisee to impress constructive trust upon real property, title of which was held by defendant, to effect performance of oral promise of defendant's predecessor in interest to will to promisee equivalent of estate of promisee's wife, where defendant niece had obtained promisor's property through undue influence but had no knowledge of oral agreement, award of interest only from date of entry of judgment in favor of promisee was not abuse of discretion. Civ.Code, §§ 2224, 3288.

Margolis & McTernan, William B. Murrish, John W. Porter and Ben Margolis, all of Los Angeles, for plaintiff-respondent and appellant.

Knight, Gitelson, Ashton & Hagenbaugh, Los Angeles, for defendant-appellant and respondent.

VALLÉE, Justice.

Plaintiff brought this action to impress a trust on a parcel of realty, the record title to which is in defendant, and to compel a conveyance thereof or to impose an equitable lien thereon. Judgment was rendered for plaintiff, impressing a trust on the property and decreeing that plaintiff has an equitable lien thereon to the extent of $30,000. Both parties appeal from the judgment.

The Honorable Henry M. Willis, the trial judge, filed a memorandum opinion which is part of the record on appeal.

Rules on Appeal, rule 5(a), 36 Cal.2d 1, 5. Thereafter findings of fact and conclusions of law, substantially in the same form as set forth in the opinion, were made and judgment entered accordingly. We are in accord with that opinion, and it is adopted and made a part of this decision, with deletions and additions for the purpose of discussing contentions made by the parties in their respective appeals.

The opinion reads: "[The causes of action on which relief will be granted are in] the nature of specific performance (of late denominated 'quasi-specific performance') whereby plaintiff seeks to impress a trust upon certain real property described, and of which title is held by defendant, to effect performance of an oral promise of defendant's predecessor in interest [Pearl P. Arbuckle] to will to plaintiff at her death the equivalent of the estate of plaintiff's deceased wife [Edith Arbuckle West], to which such predecessor [Pearl P. Arbuckle] was about to secure title and possession under a will of plaintiff's wife. That estate consisted of bonds, stocks, money, notes and real property. Prayer was also included for an accounting of rents, issues and profits accruing upon the real property described since the death of the predecessor [Pearl P. Arbuckle] on February 23, 1947.

"Plaintiff relies upon the provisions of Section 2224 of the Civil Code as the foundation of his first cause of action. That section reads as follows: 'One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.'

"In the most recent decision of our appellate courts upon this subject, the court, on March 8, 1950, in the case of Strausburg v. Connor, [96 Cal.App.2d 398] at pages [399 and 340, 215 P.2d 509] after quoting Section 2224 C.C. in part, presented a sort of accurate preview of this case by a thumbnail sketch of the legal aspect of a typical case under the section quoted in the following language:

[1] "'Trusts arising from transactions within the scope of the code provisions fall within the class of trusts created by operation of law and are commonly called constructive trusts. Concerning such trusts it was said in Rankin v. Satir, 75 Cal.App. 2d 691, 695 [171 P.2d 78]:

[2–5] "'"Constructive trusts of this form are not based primarily on the intention of the parties but are forced on the conscience of the trustee by equitable construction and the operation of law. (Millard v. Hathaway, 27 Cal. 119.) In such trusts, based upon fraud or wrongdoing, an oral promise is sufficient and the existence or absence of a confidential relationship between the parties, in the strict sense, is not controlling. (Brison v. Brison, 75 Cal. 525 [17 P. 689].) 'Such trusts are creatures of equity, and take form whenever title is obtained by means of chicanery, deceit or other variety of fraud actual or constructive.' (Sanguinetti v. Rossen, 12 Cal.App. 623 [107 P. 560].) In order to create a constructive or involuntary trust, as defined in section 2224 of the Civil Code, no conditions other than those stated in that section are necessary. (Lauricella v. Lauricella, 161 Cal. 61 [118 P. 430].) * * * As was said in Brazil v. Silva, 181 Cal. 490 [185 P. 174], 'The instances of its application are as various nearly as the ways in which property can be wrongfully acquired.'" (See, also, Steinberger v. Steinberger, 60 Cal.App.2d 116 [140 P.2d 31].)'

"In the case of Murdock v. Swanson, 85 Cal.App.2d 380, at page 384 [193 P.2d 81], the Court stated: 'In some cases where some form of fraud sufficiently appears, and where no remedy at law exists, it has been held that equity will intervene and in effect permit a quasi specific performance by impressing a trust upon the property for the benefit of a claimant who would otherwise be defrauded and deprived of any remedy. * * * (citing cases) In all of these cases * * * the injured party had given up property on an oral agreement that he or his heirs would receive certain things, the defendant or his heirs had received the benefits and then re-

fused to comply, a definite fraud appeared, and no other remedy existed.'

"With this preview of the legal principles guiding and controlling in such cases, it becomes proper, in order of presentation, to present at this point a brief sketch of the pertinent and ultimate facts, as distinguished from the probative facts (too numerous to recount or state), which have been developed during the long trial of this case and which will be used as basis for the legal conclusions to follow.

"Mrs. Pearl P. Arbuckle (now deceased) was a widow residing * * * for many years * * * in Venice, California. With her lived her infant daughter Edith, whose father had died leaving an estate to the daughter consisting of lands, stocks, bonds, notes, mortgages and money, and on August 17, 1904, the mother, Pearl P. Arbuckle, was appointed guardian of the daughter's estate by the Probate Court in Los Angeles County, which estate was appraised at and shown to be of the value of approximately $30,000.00.

"On August 16, 1916, the daughter Edith, then seventeen years of age, while on her way to return to a school in Tennessee, met and married plaintiff, Stuart N. West, at Memphis, Tennessee, and the couple proceeded to take up residence in plaintiff's home in Mississippi. To that home came Pearl P. Arbuckle, the mother, for a visit in the spring of 1917, and learning that the daughter was to bear a child, prevailed upon her and her husband to permit the mother to remove her daughter to the home in Venice so that the mother could care for her daughter during the period of childbirth. They arrived in California on or about March 1, 1917, plaintiff remaining in his home and at his work in Mississippi. After her arrival in California Edith became seriously ill from some complaint not related to her pregnancy. The plaintiff husband was sent for and upon his arrival it was decided to take her to a hospital. On the day she was taken to the hospital, and prior to her removal, the mother, without the knowledge of plaintiff, prevailed upon her daughter Edith to execute a witnessed will leaving all her estate to her mother in trust for her unborn child, and in case of predecease of said child, all the estate was left to the mother, no mention being made of the husband. It is clear from the surrounding circumstances and later admissions of the mother that she used undue influence to secure this will, as the daughter Edith intended, and so declared almost simultaneously with her execution of the will, that she was going to will all her estate to her husband.

"Edith's baby was still-born on July 7th and on July 9th, 1917, she died. Plaintiff was present at the time of death and was made aware a few days later of the contents of his wife's will. He was shocked and aggrieved by such information and became ill for a short time and then, nursing his grief, he returned to his home in Mississippi.

"On July 25, 1917, Pearl P. Arbuckle filed her petition for probate of Edith's will. On January 18, 1918, Edith's estate was appraised in the sum of $29,111.56. On August 21, 1917, plaintiff, having returned to Los Angeles, retained counsel and filed objections to the probate of Edith's will on the grounds, among others, of undue influence and unsound mind, and at the same time filed a petition for the removal of Pearl P. Arbuckle as guardian of the estate of Edith, her daughter, for mismanagement and maladministration thereof. The immediate effect of these charges was to produce in Pearl P. Arbuckle a great exhibition of fear of exposure of wrongdoing.

"On August 29, 1917, after conferences between plaintiff and Pearl P. Arbuckle and others, including counsel, and upon Mrs. Arbuckle's urgent pleading, plaintiff executed documents by which he dismissed his contest of his wife's will and his petition for removal of Pearl P. Arbuckle as guardian of the daughter's estate, in sole consideration of an oral promise made by Pearl P. Arbuckle that she would at her death leave to plaintiff the equivalent of Edith's estate. No money or other consideration was paid to plaintiff. No specification of the character of such bequest or devise was stated, but at the time it was known to them all that Mrs. Arbuckle had a number of parcels of land of very considerable value in addition

to that left her by her daughter Edith. At the time of the execution of the dismissals, and upon the same promise, plaintiff, without any consideration except said promise, also signed a quitclaim deed and a bill of sale conveying to Pearl P. Arbuckle all possible interests in his wife's estate.

"After this plaintiff returned to Mississippi, Mrs. Pearl P. Arbuckle proceeded with the probate of the daughter's will and the closing up of the guardianship estate. The estate of Edith West was distributed to Pearl P. Arbuckle by order entered March 15, 1919, and the final account of the guardian was approved, showing a balance to be turned over to the estate of Edith West of the value of $28,669.95, and the final discharge of the guardian was filed April 3, 1919.

"In 1923 Pearl P. Arbuckle visited plaintiff in Mississippi and prevailed upon him to return with her to California and live in her home as her son. She stated she had misjudged him in assuming he had married Edith for her money only, and had done him an injustice, in prevailing on her daughter to leave him nothing in her will, and that she wished to make good her promise to will him an equivalent of that estate by purchasing with moneys derived from Edith's estate, with down payment of $30,000.00, a parcel of real estate which he could operate during her lifetime and which could be left to him at her death, in whole or in part, or used to satisfy her promise. He acquiesced in this plan and Pearl P. Arbuckle purchased the lots described as Parcel A in paragraph VIII of the second amended complaint [the property here involved], situated at the corner of Figueroa Street and Slauson Avenue in Los Angeles, California.

"This episode and the statements and acts connected therewith served only to confirm and make more certain the terms of the promise originally made, and no change in that promise or substitution of a new obligation with intent to extinguish the old obligation was intended by either party.

"On this parcel was located an oil service station which Pearl leased to plaintiff, title being held in her name, but after several months it appeared that the use of the property for an oil station was not profitable to Pearl, so she canceled the lease to plaintiff and leased it to others for a general market. Plaintiff continued to live at the Arbuckle home for a year or so after that, engaging in other occupations, and then ceased, except for visits, because his other business ventures called him elsewhere. This situation remained about the same until the year 1938, when, because of failing health of Mrs. Arbuckle, an attending nurse wrote to Mrs. Arbuckle's half sister, Mrs. Virginia Stainback, in Memphis, Tennessee, suggesting that some member of the family should come out and live with Mrs. Arbuckle and take care of her and her property, with poorly covered suggestion of succeeding to the same by will. As a consequence, the Stainbacks—wife, husband and daughter—decided to send and did send the daughter, Katharine Stainback, defendant herein, to live with Mrs. Arbuckle, arriving May 26, 1938. This niece of Mrs. Arbuckle was a young, unmarried woman of pleasing manner and gracious, and was well liked by her aunt. She immediately took charge of the Arbuckle household affairs. In December, 1938, the half sister, Virginia Stainback, mother of Katharine, arrived and took up residence with Mrs. Arbuckle.

"During the period in which Katharine and her mother lived with Mrs. Arbuckle, there began and was carried out a gradual sequestration of Mrs. Arbuckle from visits or interviews with others excluding former intimate friends, as well as her longtime business agent and plaintiff himself, who never saw Mrs. Arbuckle after 1938. In the first week in November 1939, William Stainback, an experienced real estate broker, Katharine's father, arrived and took up residence in Mrs. Arbuckle's home and at once assumed to conduct and manage her affairs. He promptly vetoed advice of Mrs. Arbuckle's longtime and trusted agent who had managed all her business affairs and real estate transactions for some years, resulting in his retirement as her business agent, consulted attorneys, and he also prepared or had prepared a will for Mrs. Arbuckle to sign; and with his wife's aid and his daughter's full knowledge and ac-

quiescence he procured her to execute the same, while confined to her bed by illness, on November 19, 1939, by which she left all her property to Katharine Stainback, her niece, without mention of plaintiff or the promise she had made him long years before, and which up to this last period from 1938 onwards she had often expressed an intention of performing. Then on February 16, 1940, Pearl P. Arbuckle, without advice of any person outside the Stainback family, executed deeds conveying to Katharine all her real property, a bill of sale of all personal property, and a general power of attorney to take and handle all her affairs, including the bank accounts of the donor, all without any consideration. This finally accomplished the plan by which Katharine became owner and in possession of all of her aunt's estate, and as a result of which Mrs. Arbuckle was prevented from ever performing her promise to plaintiff.

"It is made manifest that at all times after Katharine arrived in 1938, Mrs. Arbuckle was of weakened mind and a ready victim of undue influence. Her memory was failing to the extent that she did not recognize old friends and constantly confused Katharine, her niece, with Edith, her daughter, long dead. In 1942, her mental and physical condition was such that the Stainbacks procured her entry into a private sanitarium for proper care, attention and restraint, Katharine paying all expenses incurred. There she remained until her death on February 23, 1947. In the meantime, Katharine had not only appropriated all the personal income derived from rents and bank accounts, but had sold two of the parcels of real estate deeded to her by her aunt, for a substantial amount aggregating the sum of $28,000.00, and had paid all that and more into the purchase of an extensive farm in Mississippi, where she had installed her parents and to which she removed in 1945, leaving the aunt in the sanitarium where she died in 1947. The Parcel A, located at the corner of Figueroa and Slauson in Los Angeles, and which was purchased in 1923 by Mrs. Arbuckle for about $57,000.00, still remains in Katharine's name and is available for disposition under proper order of this court.

"Upon the death of Pearl P. Arbuckle, her will of November 19, 1939, was offered for probate on March 27, 1947 and was admitted to probate April 17, 1947. The inventory filed therein showed only an amount of cash in bank in the sum of $920.22. * *

"Legal Conclusions

[6] "1. The oral agreement of Pearl P. Arbuckle to will to plaintiff the equivalent of the estate of Edith West was supported by a sufficient consideration. (Bacon v. Kessel, 31 [Cal.App.]2d 245, 248 [87 P.2d 857]; Shive v. Barrow, 88 [Cal.App.] 2d 838, 843 [199 P.2d 693].)

[7, 8] "2. The full performance by plaintiff of his part of the oral agreement with Pearl P. Arbuckle removes the agreement, by means of equitable estoppel, from the bar of the provisions of Section 1973, subdivision 6, of the Code of Civil Procedure, and from that of Section 1624, Civil Code—commonly called the statute of frauds. (Bacon v. Kessel, supra, [31 Cal. App.2d 245, 250, 87 P.2d 857].

[9, 10] "3. Under the circumstances herein, involving a change of position on his part as to Mrs. Arbuckle, plaintiff's right to quasi specific performance is not barred by any statute of limitations, and defendant is equitably estopped from pleading or relying upon the bar of the statute of frauds. (Bacon v. Kessel, supra, [31 Cal. App.2d 245, 251, 87 P.2d 857]; Notten v. Mensing, 3 Cal.2d 469, 473 [45 P.2d 198]; Ryan v. Welte, 87 [Cal.App.]2d 897, 903 [198 P.2d 357].

[11] "4. The agreement to make a will was valid in respect to its character of being clear, certain and definite in its terms, and was fair and reasonably and adequately supported by consideration, and therefore is basis for equity to grant a sort of quasi specific performance by making the party who receives the estate a constructive trustee for the intended beneficiary in accordance with the terms of the agreement. (Lauricella v. Lauricella, 161 Cal. 61, 67 [118 P. 430]; Notten v. Mensing, supra [3 Cal.2d 469, 477, 45 P.2d 198]; Rolls v. Allen, 204 Cal. 604, 607 [269 P. 450]; Shive v. Barrow, supra [88 Cal.App.2d 838, 843, 199 P.2d 693]; Rogers v. Schlotterback, 167 Cal. 35, 45 [138 P. 728].)

[12] "5. A fiduciary relationship between Katharine Stainback and her aunt, Pearl P. Arbuckle, was clearly shown to exist herein and constitutes basis for the presumption, not overcome in the proofs, of the exercise of undue influence by the niece in securing through a will and grant deeds that which rightfully belonged to plaintiff. ([In re] Estate of Teel, 25 Cal.2d 520, 528 [154 P.2d 384]; Brison v. Brison, 75 Cal. 525, 529 [17 P. 689].)

[13] "6. The court herein under the foregoing state of facts and law is empowered to impose a constructive trust upon any particular property in the hands of a distributee under a will or a grantee under a deed by the promisor. (Shive v. Barrow, supra, [88 Cal.App.2d 838, 843, 199 P.2d 693] and cases therein cited.)

[14] "7. The incident of the purchase by Pearl P. Arbuckle in 1923 of the Parcel A described in the complaint, and her statements in connection therewith to the plaintiff and his acquiescence therein did not amount to or constitute a novation, but served only to confirm and make more certain the terms of the promise originally made, and without any intention to extinguish the old obligation by substitution of a new obligation (C.C. 1531).

[15, 16] "8. Herein plaintiff is entitled under his first cause of action to a decree imposing a trust in his favor upon the property described as Parcel A in the complaint herein, to the extent of $30,000.00, the equivalent of the estate left to Pearl P. Arbuckle by Edith West at her death, and as promised by Pearl P. Arbuckle to plaintiff upon her death. That this decree adjudge that the said sum of $30,000.00 should be declared a lien upon said property as security for the satisfaction thereof. (Ohio Electric Car Co. v. Duffet, 48 Cal.App. 674, 678–[679, 192 P. 298]; Citizens' Bank v. Rucker, 138 Cal. 606 [72 P. 46]; Brodie v. Barnes, 56 Cal.App.2d 315 [132 P.2d 595].) That unless the said sum of $30,000.00 be paid to plaintiff by defendant within 90 days from notice of entry of the judgment herein, a commissioner be appointed to sell said property in the usual manner as on execution, and from the proceeds of said sale to deliver to plaintiff the said sum of $30,000.00 with interest thereon from date of entry of judgment herein at the legal rate of 7%, in full satisfaction and dissolution of said trust and said judgment, and to deliver the balance of said proceeds, after payment of costs and expenses of said sale, to defendant.

[17–19] "9. Plaintiff's first cause of action is not barred by [the statute of frauds, the statute of limitations, or laches] * * *."

The foregoing answers the contentions made by defendant with respect to the certainty and definiteness of the oral agreement, and the consideration therefor, performance by plaintiff, equitable estoppel, the statute of limitations, the statute of frauds, and laches.

[20] Defendant attacks nine specifically numbered findings, or portions thereof, as being unsupported by the evidence. The attacks are unwarranted. It would serve no useful purpose to tackle each finding and summarize the oral testimony and documentary evidence contained in some 1490 pages of reporter's transcript. It is enough to say the findings are supported by abundant evidence of a substantial character. The trial court simply accepted and believed the testimony of plaintiff and his witnesses as against defendant and her witnesses, and drew reasonable inferences and conclusions therefrom. The fact that some of the witnesses testified to facts occurring some thirty years ago is of no moment under the circumstances. The credibility and weight to be given the testimony of the witnesses, and whether such evidence was clear and convincing, was for the trier of fact and is conclusive on appeal.

Defendant says the judgment awarding plaintiff $30,000 and imposing a lien as security for the satisfaction thereof is a judgment at law for money and not a decree in equity; and because the action is not based on a creditor's claim, the judgment is contrary to law.

[21] Defendant misconceives the theory of plaintiff's action. Plaintiff is not asserting a claim against Mrs. Arbuckle's estate but is seeking to enforce by quasi

specific performance Mrs. Arbuckle's agreement to make provision for him in her will by having defendant declared an involuntary trustee of the realty, title to which is in her name and which is not a part of Mrs. Arbuckle's estate. His action does not seek a money judgment; it seeks to have the parcel of realty impressed with a constructive trust. The law does not require the presentation of a claim as a condition precedent to the maintenance of an action in quasi specific performance. Trower v. Young, 40 Cal.App.2d 539, 542–548, 105 P.2d 160; Walker v. Calloway, 99 Cal.App.2d 675, 683, 222 P.2d 455.

[22] According to the facts found, defendant and her parents wrongfully prevented Mrs. Arbuckle from carrying out her agreement to will plaintiff the equivalent of her daughter's estate. The case is therefore a typical one under section 2224 of the Civil Code for the intervention of equity to prevent one who acquires title to property by fraudulent or other wrongful act—here by undue influence—from retaining and enjoying the benefits thereof by declaring the wrongdoer an involuntary trustee of the property for the benefit of the person who would otherwise be entitled to it.

Other specifications of error urged by defendant are palpably without merit and need not be discussed.

In his appeal from the judgment, plaintiff contends the trial judge, as a matter of law under the facts found,[1] should have impressed the entire parcel of realty with the trust and decreed a conveyance thereof, together with an accounting for rents and profits. He argues that the $30,000 of Edith's money constituted the "whole of the money paid" for the property and not merely a part thereof because the $27,000 received in the eminent domain proceeding was used by Mrs. Arbuckle to pay the balance of the purchase price. The argument is fallacious. The fallacy is in assuming that the $30,000 belonged to plaintiff at the time of the purchase, and that upon the down payment thereof he acquired an interest in the property. He did not. The agreement which plaintiff made with Mrs. Arbuckle was, as found by the court, that in 1917 Mrs. Arbuckle "promised to leave to plaintiff upon her death the equivalent of the estate of Edith Arbuckle West," and that she, in 1923, for "the purpose of rendering more definite and certain the oral agreement of 1917 * * * and relating the same to a specific and identified piece of property *as a source of satisfaction of said agreement* proposed to plaintiff that she utilize monies derived from the estate of Edith Arbuckle West to the extent of $30,000.00 as down payment, to purchase said Parcel 'A' and to leave said Parcel 'A' in whole or in part to plaintiff on her death, or use it to satisfy her promise, stating that she believed that such purchase and disposition or use of Parcel 'A' by her would be full, fair and reasonable performance on her part of the whole of her promise to him contained in said 1917 oral agreement, and asked him if he, on his part, would agree to accept this proposal as fair and reasonable performance of her obligation to him; that plaintiff accepted said proposal and agreed that the same would constitute fair and reasonable performance by Pearl P. Arbuckle of the whole of her obligations to plaintiff under the 1917 oral agreement; that in the offer and acceptance of the above described proposal Pearl P. Arbuckle and plaintiff intended to and did confirm and make more certain the terms of the promise originally made to plaintiff by Pearl P. Arbuckle in said 1917 oral agreement, and neither Pearl P. Arbuckle nor plaintiff intended nor understood that said promise was or should be modified or changed, or that the obligation of Pearl

1. "* * * that Pearl P. Arbuckle paid a down payment thereon of $30,000, such payment being made by her out of monies derived from the estate of Edith Arbuckle West; that the total purchase price agreed to be paid by Pearl P. Arbuckle for said Parcel 'A' was $57,000; that subsequently and prior to 1930 Pearl P. Arbuckle paid off the entire balance of said purchase price out of monies derived from eminent domain damages awarded to her for the severance from said Parcel 'A' of a portion thereof. * * *"

P. Arbuckle thereunder was or should be superceded by the substitution of a new obligation." (Italics added.) The court further found that the "equivalent of the estate of Edith Arbuckle West" was $30,000.

[23] When Mrs. Arbuckle purchased Parcel "A" in 1923, the agreement was that it be purchased as a "source of" satisfaction, not in satisfaction, of the 1917 agreement. The parties did not intend by the agreement of 1923 that the agreement of 1917 be modified or changed or that the obligation of Mrs. Arbuckle thereunder "be superceded by the substitution of a new obligation." Mrs. Arbuckle's obligation under the agreement of 1917 was to leave the equivalent of Edith Arbuckle West's estate to plaintiff upon her death, and nothing more. Until her death and her failure to perform the agreement of 1917, plaintiff had no cause of action against Mrs. Arbuckle, her estate, or defendant. Since the property which was to be the source of satisfaction of the agreement of 1917 could still be reached by plaintiff after the death of Mrs. Arbuckle, the imposition of a lien thereon to the extent of the equivalent of the estate of Edith Arbuckle West satisfies Mrs. Arbuckle's obligation in full. Rest., Restitution, p. 650, § 161; 3 Scott on Trusts, p. 2323, § 463.

[24–27] Plaintiff claims the court erred in not awarding him compound interest from the date of death of Mrs. Arbuckle "since defendant was a trustee guilty of abuse of her trust." He argues that a trustee who wilfully converts trust property to his own use is liable for interest from the date of his misconduct. The premise that defendant was guilty of a wilful abuse of her trust is fallacious. The court found defendant had no knowledge of the agreement which Mrs. Arbuckle made with plaintiff. In the absence of such knowledge it cannot be said defendant was guilty of "an abuse of her trust." It is only in cases in which a trustee has been guilty of some positive misconduct or wilful violation of duty that he is charged with compound interest. Katz v. Enos, 68 Cal.App.2d 266, 279, 156 P.2d 461. Civil Code section 3288 reads: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury." "The rule charging * * * [a trustee] with interest is, however, limited to cases in which it is either shown or presumed that the * * * [trustee] has himself profited by his acts, or has been guilty of such willful misfeasance as to justify the court in requiring from him compensation therefor. Whether in any instance the * * * [trustee] is chargeable with even simple interest, must be determined by the trial court from all the circumstances of that case." Wheeler v. Bolton, 92 Cal. 159, 173, 28 P. 558, 562. We cannot say, as a matter of law, that the court abused its discretion in awarding interest only from the date of entry of the judgment.

Affirmed. Plaintiff shall bear the cost of his filing fee, his brief and that of defendant on plaintiff's appeal; all other costs of the appeals shall be borne by defendant.

SHINN, P. J., and WOOD, J., concur.

109 Cal.App.2d 210

O'NEILL v. DENNIS.

Civ. 14857.

District Court of Appeal, First District, Division 2, California.

Feb. 13, 1952.

Dorothy O'Neill brought action against Robert M. Dennis to quiet title to realty and to have deed set aside on ground of fraud. The Superior Court of the State of California in and for the City and County of San Francisco, Lile T. Jacks, J., entered a judgment for defendant, and plaintiff appealed. The District Court of Appeal, Jones, J. pro tem., held that defendant's evidence was sufficient to sustain burden cast on him to overcome presumption of fraud and undue influence arising out of confidential relationship between parties.

Judgment affirmed.

1. Deeds ⇐196(2)

Where a grantee in a deed occupies a relation of trust and confidence toward grantor and is active in preparation of deed and stands to profit unduly by transaction, burden is on him to show that grantor acted with full and complete knowledge of facts and with complete understanding of transaction and not on any reliance or confidence placed in grantee.

2. Deeds ⇐196(2)

Where 80 year old woman was in poor health and had no near relatives except a sister who lived in another part of the city, and employee of the sister was a frequent visitor at home of elderly woman and did numerous small things for her and looked after payment of her taxes, and he procured preparation of a deed whereby elderly woman made a gift to him of a remainder interest in her realty, burden was on him in action against him by elderly woman to quiet title, to show that she acted with full knowledge of facts and not on confidence placed in him.

3. Appeal and Error ⇐901

Where 80 year old woman was in poor health and had no near relatives except a sister who lived in another part of city, and employee of sister was a frequent visitor at home of elderly woman and did numerous small things for her and looked after payment of her taxes, and he procured preparation of a deed whereby elderly woman made a gift to him of a remainder interest in her realty, and sister's employee prevailed in action by elderly woman to quiet title, it was incumbent on her, in order to prevail on appeal, to show that no credible evidence was produced from which reasonable inference might be drawn that she acted voluntarily and with full knowledge of facts and complete understanding of effect of execution of deed.

4. Appeal and Error ⇐989

Function of District Court of Appeal on appeal is to determine if there is any evidence of substantial character, either direct or circumstantial which tends to support judgment, and if there is, District Court of Appeal can not overthrow it.

5. Deeds ⇐196(2, 3)

In suit to have deed set aside on ground that grantee, who occupied a relation of trust and confidence toward grantor, procured deed through fraud, evidence was sufficient to sustain burden cast on grantee of overcoming presumption of fraud and undue influence arising out of the confidential relationship.

6. Deeds ⇐70(6), 72(3)

Where 80 year old woman was in poor health and had no near relatives except a sister who lived in another part of city, and employee of sister was a frequent visitor at home of elderly woman and did numerous small things for her and looked after payment of her taxes, and he procured preparation of a deed whereby elderly woman made a gift to him of a remainder interest in her realty, lack by elderly woman of independent advice was not of and in itself a ground for vitiating deed, but was merely a fact to be weighed by a trial court in determining whether grantor acted voluntarily and with complete understanding of transaction.

7. Deeds ⇐208(3, 4)

Evidence of actual delivery of deed coupled with fact that grantee recorded and retained deed, amply supported finding of title in grantee.

Paolini & Paolini, San Francisco, Fahey, Castagnetto & Gallen, Daly City, for appellant.

Roger Anderson, San Francisco, for respondent.

JONES, Justice pro tem.

The appeal in this case is from a judgment quieting respondent's title to an improved lot on Rayburn Street in San Francisco.

On April 1, 1949 appellant executed to him a deed of this lot reserving a life estate in herself. The deed was delivered on April 1, and on April 8, respondent had it recorded and has retained it ever since. No consideration was given, making the deed a gift of the remainder interest in the property to the respondent.

The complaint is in two counts. The first count alleges fraud and seeks to have the deed set aside on that ground. The second count alleges title in appellant and is to quiet title. The trial court found against the claim of fraud and entered a judgment quieting title in the respondent subject to a life estate in appellant. It is from this judgment that she has appealed.

The appellant was in her 80th year when the deed was given. She made her home on the property as she had since 1906. Her health was poor and she was unable to hear except through the medium of a hearing aid. She had no near relatives except a sister, Mrs. Brickdale, who lived in another part of the city, and by whom the respondent, Dennis, was employed. The old age pension was the only income which Mrs. O'Neill, the appellant, enjoyed. The respondent was a frequent visitor at her house, did numerous small things for her, and looked after the payment of her taxes. He testified that he had the deed in question prepared by a scrivener whom he selected and that he procured the notary who took the acknowledgment. He also testified that he secured the description of the lot set out in the deed from a title company.

[1, 2] When a grantee in a deed occupies a relation of trust and confidence toward the grantor, as the respondent did here, Bank of America Nat. Trust & Savings Ass'n v. Crawford, 69 Cal.App.2d 697, 160 P.2d 169, and is active in the preparation of the deed and stands to profit unduly by the transaction the burden is cast upon him to show that the grantor acted with a full and complete knowledge of the facts and with complete understanding of the transaction and not upon any reliance or confidence placed in the grantee.

In Webb v. Saunders, 89 Cal.App.2d 732, 735, 201 P.2d 816, 818, it is said that "Gifts or benefits from a principal to one occupying a fiduciary or confidential relation to him, while not absolutely void, are presumptively void" and "Such transactions will be set aside upon the discovery of the least fraud *and the burden* is upon the party benefited to show that the confidence was not abused, by proving that the other party acted, not upon any reliance or confidence placed in the former, but with full knowledge of the facts, and entire understanding of the effect of the transaction." (Italics added.)

[3] Where the burden shifts to the defendant to show fairness and good faith in the transaction as it does under the facts in this case, it is nevertheless incumbent upon the appellant in order to prevail upon the appeal to show that no credible evidence was produced from which the reasonable inference might be drawn that the grantor acted voluntarily and with full knowledge of the facts and a complete understanding of the effect of the transaction. In Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550, 552, the court said: "As ground for reversal defendants urge the insufficiency of the evidence to sustain the findings that the realty involved was their community property, and not the separate property of Mrs. Mitchell. Such contention requires defendants to demonstrate that there is no substantial evidence to support the challenged findings. As was stated in the oft-cited case of Crawford v. Southern Pacific Co., 3 Cal.2d 427, at page 429, 45 P.2d 183, at page 184: '* * * the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' which will sup-

port the findings, and when 'two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.'"

The testimony of the respondent is that when Mrs. O'Neill first mentioned making the deed in February, 1948, she said to him: "You have been very kind to me any time I have asked you to do anything; you was always right there to help me and you never turned me down at any time or place, and you brought my sister any time I wanted her when I didn't feel good", and she says, "You are the man I want to have the property." He also testified that Mrs. O'Neill had talked the matter over with him several times in the presence of her sister and had said that she would give him the property because he had been "good to her and kind to her and her sister wouldn't want it"; and that about ten days before the deed was made "she said she was sick, for me to go and get a notary and have it done." With respect to the actual execution of the deed he testified: "She was asked and she read it over, if she knew and thoroughly understood it and she says, 'I do' and she was asked, 'What do you want to do with this' and she said, 'I want to give it to Mr. Dennis.'"

Mrs. Helen Schrick, the notary who took the acknowledgment to the deed, was called as a witness by the respondent. She testified that she had not known the respondent, Dennis, until he came into her office to enlist her services for Mrs. O'Neill. Mrs. Schrick and a Mr. Sam McKee, drove to the O'Neill home where they were introduced to Mrs. O'Neill by Dennis. At that time Dennis had the deed. As Mrs. Schrick narrated the events, "She, (Mrs. O'Neill) took the deed in her hand. She had the deed and she looked at it, and she even remarked, 'I wonder if this is the right description'". This witness testified that "Mr. McKee asked her (Mrs. O'Neill) if she realized what she was doing and it was a deed and she would have a life estate in that deed, and she said she understood it. * * * He asked her if she knew what she was doing and she said that was who (Dennis) she wanted to give it to."

McKee, who had been in the real estate and insurance business in San Francisco since 1914, testified that he had never known Dennis prior to April 1, 1949; that on this date, "Mr. Dennis came into my office with a deed of gift already prepared and told me he had to get a notary public. Mrs. Schrick, who is a notary public in my office, was present and I reminded him that he must have a notary as well as a witness. * * * I drove Mrs. Schrick to Rayburn Street in my car, and we met Mr. Dennis in front of the house and went in together and met Mrs. O'Neill. It was quite apparent that Mrs. O'Neill was deaf so we had to talk loudly and she asked to change the batteries in her hearing aid, and I proceeded to explain to her who I was also why Mrs. Schrick was present and I explained everything in that instrument to Mrs. O'Neill. If I wasn't satisfied that she understood everything in the deed of gift I wouldn't have proceeded. * * * I explained the contents of the instrument, including the names, and I wouldn't say now that I read the description in that particular deed of gift, but I invariably do."

The witness Malatesta, testified that in February, 1948, he heard Mrs. O'Neill say she was going to leave the property to Dennis.

[4] The only contradictory testimony is that given by Mrs. O'Neill. Substantially she testified that the proceeding was confusing to her; that she did not read the deed nor was it read to her; and that she had no intention of disposing of her property while she was living. The function of this court is to determine if there is any evidence of a substantial character either direct or circumstantial which tends to support the judgment, and if there is, we may not overthrow it. Laherty v. Connell, 64 Cal.App.2d 355, 148 P.2d 895; Azevedo v. Leavitt, 76 Cal.App.2d 321, 172 P.2d 704.

[5] The evidence produced by the defendant with reference to volition on the part of the grantor and knowledge and understanding on her part of the facts and the effect of the transaction stands almost uncontradicted and is amply sufficient to sustain the burden cast upon him. It overcomes the presumption of fraud and undue

influence arising out of the confidential relationship.

[6] Appellant makes the point that she was entirely without the benefit of independent advice in the transaction and urges reversal of the judgment on this ground. Lack of independent advice by the grantor is not of and in itself a ground for vitiating a deed under such circumstances as we have here presented, but is a fact to be weighed by the trial court in determining whether the grantor acted voluntarily and with a complete understanding of the transaction. Brown v. Canadian Industrial Alcohol Co., 209 Cal. 596, 289 P. 613; Laherty v. Connell, supra; Azevedo v. Leavitt, supra.

[7] The evidence of actual delivery coupled with the fact that respondent recorded and retained the deed amply supports the finding of title in him. 9 Cal.Jur. p. 185, sec. 74.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.



109 Cal.App.2d 130

OLSON et al. v. STANDARD MARINE INS. CO., Ltd. et al.

Civ. 18398.

District Court of Appeal, Second District, Division 3, California.

Feb. 7, 1952.

Rehearing Denied March 3, 1952.

Hearing Denied April 3, 1952.

Clara Olson and Madalynne Paul brought an action against Standard Marine Insurance Co., Ltd., and others, under policy insuring jewelry and furs belonging to plaintiff Olson, and other property of her family of the same domicile. The Superior Court, Los Angeles County, Charles E. Haas, J., rendered a judgment in favor of plaintiffs against the named defendant and in favor of the other defendants and the named defendant and plaintiff appealed. The District Court of Appeal, Vickers, J. pro tem., held that insured property of a member of the family of plaintiff Olson was not restricted to property in which such plaintiff had an insurable interest.

Judgments affirmed.

1. Insurance ⇐146(3)

Insurance contract should be most strongly construed against insurer if such construction is fairly reasonable.

2. Insurance ⇐146(3)

An insurance contract should be given such construction as will fairly carry out its object by securing indemnity to insured for losses to which insurance relates.

3. Insurance ⇐146(3)

If insurer fails to use such language in insurance contract as to make contract provisions clear any uncertainty or reasonable doubt is to be resolved against insurer.

4. Insurance ⇐146(3)

If there is doubt as to whether words used in insurance contract are used in an enlarged or restricted sense, other things being equal construction of contract will be adopted which is most beneficial to insured.

5. Insurance ⇐164(1)

Under policy reciting that it insured a named person thereinafter called the assured, "on jewelry and furs, as per schedule attached, the property of the assured and members of his or her family of the same domicile while in all situations, against all risks", insured property of a member of family of named assured was not restricted to property in which named assured had insurable interest.

6. Domicile ⇐10

In action by mother and daughter to recover under policy insuring mother's jewelry and furs, and the property of mother's family of the same domicile, testimony of plaintiffs that they had made their home in a hotel jointly owned by them and had lived together in same room since before policy was issued, and testimony of daughter that she had not intended to change domicile when she went to another city and lived in apartment from which theft occurred, or to make such apartment her home unless hotel was sold and she married, sustained implied

finding of common domicile of mother and daughter.

7. Appeal and Error ⇐1010(1)

Where evidence was substantial that mother and daughter had common domicile within policy insuring mother's jewelry and furs and the property of mother's family of same domicile, and evidence adequately supported implied finding of common domicile, Supreme Court on appeal was required to accept such evidence as true.

8. Insurance ⇐559(1)

Where insurer renounced policy insuring jewelry and furs and denied liability by notice of rescission to one insured before expiration of time within which insured was required to file proof of loss, failure of such insured to file such proof within prescribed time did not preclude such insured from recovering under policy.

9. Insurance ⇐559(1)

Where policy insured against theft a mother's jewelry and furs, and property of mother's family of same domicile, and mother was agent of daughter from earliest negotiations with insurer after theft of insured property belonging to mother and daughter, notice of rescission of policy which was given to mother by insured prior to expiration of time within which proof of loss was required to be filed was notice to daughter, and failure of daughter to file such proof within prescribed time did not preclude daughter from recovering under policy.

10. Insurance ⇐646(2)

In action by mother and daughter to recover under policy insuring against theft a mother's jewelry and furs, and the property of mother's family of the same domicile, wherein insurer pleaded concealments as affirmative defenses, insurer had burden of proof both as to concealments and materiality thereof. Insurance Code, § 332.

11. Insurance ⇐260

Concealments, like false representations, do not affect validity of insurance policy unless material. Insurance Code, § 332.

12. Insurance ⇐668(4)

In action by a mother and daughter to recover under policy insuring against theft mother's jewelry and furs, and the property of mother's family of same domicile, alleged fact that plaintiffs had had insurance policies cancelled by other insurers and under different names prior to issuance of involved policy, and alleged fact that plaintiffs had operated houses of prostitution and that plaintiff's daughter had been arrested on charges of prostitution, which alleged facts were allegedly concealed by plaintiffs, were not material to risk as a matter of law so as to void policy. Insurance Code, § 332.

13. Trial ⇐191(3)

In action by a mother and daughter to recover under policy insuring against theft mother's jewelry and furs, and property of mother's family of same domicile, giving of instruction that plaintiffs owned stolen property was not error where evidence of such ownership was without conflict and only issue in that regard was as to effect of such ownership.

14. Trial ⇐253(5)

In action by a mother and daughter to recover under policy insuring against theft mother's jewelry and furs, and property of mother's family of same domicile, portion of instruction reciting that fraud must be proved and that when insurer's case went no further than to establish state of facts from which inference of fraud might or might not reasonably be drawn, insurer failed to establish case by preponderance of evidence and jury should find in favor of innocence, was incorrect in that it omitted necessary condition that inferences be equally balanced, but did not require reversal of judgment for plaintiffs where omission was supplied elsewhere in instructions.

15. Appeal and Error ⇐1064(1)

In action by a mother and daughter to recover under policy insuring against theft mother's jewelry and furs, and property of mother's family of same domicile, portion of instructions relative to degree of proof required in fraud cases, which was so phrased as to indicate that insurer had

failed to establish alleged fraud, did not affect jury's determination of fraud issue which was based upon alleged concealments by insured, in view of insubstantial character of fraud claim.

16. Appeal and Error ⇐928(5)

On appeal from judgment for plaintiffs in action by mother and daughter to recover under policy insuring from theft mother's jewelry and furs, and property of mother's family of same domicile, District Court of Appeal would assume that instruction which failed to declare that plaintiffs were required to have same domicile when theft occurred as well as when policy was issued was considered by jury with instructions covering such point.

17. Trial ⇐312(2)

In action to recover under policy insuring property against theft, wherein jury returned after considering case and desired to have some instructions re-read on domicile, fraud and investigation, and court read some instructions which jury indicated answered its questions, failure of court to re-read all instructions on such subjects was not error.

Fulcher & Wynn, Los Angeles (Walter R. Trinkaus, Los Angeles, of counsel), for appellant Standard Marine Ins. Co., Ltd.

Irwin R. Buchalter and Jerry Nemer, Los Angeles, for appellants and respondents Clara Olson and Madalynne Paul.

Spray, Gould & Bowers, Los Angeles, for respondents Hirschfield Ins. Agency, Inc., and Armond J. Hirschfield.

VICKERS, Justice Pro tem.

On December 5, 1947, the defendant insurance company issued its "Jewelry-Fur Floater" insurance policy reciting that it "Does Insure Mrs. Clara Olson Hereinafter called the Assured, Whose address is 649 Jones Street San Francisco, California * * * to an amount not exceeding eighteen Thousand Seven Hundred Twenty and No/100 Dollars on Jewelry and/or Furs, as per schedule attached, *the property of the Assured and members of his or her family of the same domicile,* whilst in all situations, against All Risks * * *." (Italics ours.) Attached to the policy was a schedule which itemized the articles covered and the amount of coverage for each. The policy also contained certain conditions. Those that are material to this proceeding will be referred to hereafter. On February 26, 1948, the defendant insurance company issued extended endorsement No. 1 whereby it insured a Hamilton diamond wrist watch and bracelet in the sum of $4,500. This recited "Issued to Mrs. Clara Olson" and was attached to the above policy.

On July 12, 1948, certain of the articles listed on the above schedule and on the endorsement were stolen from an apartment in Los Angeles then occupied by Clara Olson's daughter, the plaintiff, Madalynne Paul, who on June 1, 1948 had subleased it from her fiancé, George Miller. The loss was promptly reported by respondent's agent to the defendant insurance company's agent. On September 1, 1948, the defendant addressed a letter to the plaintiff Olson at her San Francisco address, stating that it "elects to rescind the * * * contract of insurance from the date said contract was entered into * * * on account of various concealments and misrepresentation made in connection with the issuance of said policy * * *." Enclosed with the letter as received by the plaintiff Olson was appellant's check in the full amount of the premium theretofore paid by her. On November 10, 1948, plaintiff Olson returned this check to appellant, together with a notice of rejection of its attempted rescission.

Plaintiff Olson, on February 4, 1949, filed this action against the defendant insurance company in the form of two counts with herself as the sole named plaintiff. By the first count she sought declaratory relief by reason of the attempted rescission of the policy, and by the second count the value of the insured articles stolen in the sum of $22,975. Defendant having demurred, and its demurrer having been ordered off calendar, plaintiff Olson filed a first amended complaint. It consisted of only one count and sought the value of the stolen articles in the same amount of $22,975. Appellant demurred thereto and its demurrer was sustained, respondent Olson being given

leave to amend and to join new plaintiffs. Plaintiffs Olson and Paul thereupon joined in filing a second amended complaint. This complaint is divided into two counts. The first one is on behalf of plaintiff Olson and the second on behalf of plaintiff Paul. The first count alleges the issuance of the policy and endorsement No. 1 by the defendant insurance company to plaintiff Olson, the fact that no written application was submitted or requested, the loss of most of the scheduled articles by theft, the ownership of five of them by plaintiff Olson, the failure of such defendant to pay their agreed and insured value, as obligated, to-wit: $5,025, and the performance by plaintiff Olson of the contract. The second count adopts by reference all of the allegations of count I, except those referring to plaintiff Olson's five articles. It then alleges that plaintiff Paul is the natural daughter of plaintiff Olson and that they at all times mentioned have resided in the same domicile, that plaintiff Paul owned all of the articles stolen except the five claimed by plaintiff Olson, that their agreed and insured value was $17,945, appellant's failure to pay the same as obligated, and plaintiff Paul's performance of all conditions of the policy. The prayer seeks $5,025 and interest for plaintiff Olson, and $17,945 and interest for respondent Paul. After its demurrer to the last pleading was overruled the defendant insurance company filed its answer thereto. A demurrer to this answer was filed by plaintiffs which was sustained. Defendant insurance company then filed its first amended answer whereby it admitted the issuance of the policy and endorsement No. 1 to plaintiff Olson and denied most of the other allegations. It also set up two affirmative defenses. By the first it alleged the failure of both plaintiffs to file with it or its agents a detailed or any proof of loss as required by the policy. By the second affirmative defense it set forth a paragraph of the policy which declared it would be void if the assured had concealed or misrepresented any material fact or circumstance or committed any fraud touching any matter relating to the insurance or the subject thereof. It then alleged that plaintiffs had been guilty of such concealment and misrepresentations. It also alleged that plaintiffs had used various names, that between 1937 and 1941 each of them had conducted houses of prostitution and had been arrested therefor, that plaintiff Paul had been arrested upon many occasions for prostitution, vagrancy and other offenses, and was known to police departments as an associate of persons suspected of being burglars and bookmakers. It further alleged that the plaintiffs, or one of them, prior to the issuance of the policy in question and in 1947 and 1948, had caused several similar floater polices to be issued by other insurance companies, insuring similar articles under the names of Mrs. C. M. Paul and/or Madalynne Paul, all of which had been cancelled by such companies shortly after their issuance. It further alleged that plaintiffs concealed from it all of the above facts, and the ownership by plaintiff Paul of the articles claimed by her for the purpose of deceiving it. It also alleged that plaintiffs represented that plaintiff Olson was the owner of all the articles scheduled. It then alleged that it had no knowledge of such facts, believed the representations, was so deceived and upon discovery gave the notice of rescission set forth in the complaint.

Plaintiffs thereafter were permitted to file their third amended complaint in which they re-alleged counts I and II of their second amended complaint and added a third and fourth count against defendants Armond J. Hirschfield and the insurance agency corporation bearing his name. In these added counts they alleged that they had employed the new defendants as their agents to obtain the insurance policy in question, that if any false representations or concealments had taken place such were by the new defendants without the knowledge of plaintiffs and that if the defendant insurance company was successful in defeating plaintiffs' recovery under the policy that plaintiffs would then be entitled to recover the amount so lost from the new defendants.

The case went to trial upon the pleadings as above set forth before a court sitting with a jury. Thereafter a verdict was rendered in favor of plaintiff Olson for

$5,025 and interest and in favor of plaintiff Paul for $18,150 and interest against defendant insurance company and in favor of the other defendants. From the resulting judgment against it the defendant insurance company has appealed. The plaintiffs have filed a separate appeal from that portion of the judgment in favor of the other defendants but ask that it be considered only if they are unsuccessful in resisting the appeal taken by the defendant insurance company. In view of our determination of the latter appeal no further consideration need be given to the former.

[1–5] Appellant relies in a considerable measure for a reversal of that portion of the judgment in favor of the respondent Paul on its contention that she was not an insured under the policy and that therefore count II fails to state a cause of action. Appellant argues that the clause "Does Insure Mrs. Clara Olson Hereinafter called the Assured," designates the insured and that the sentence "On Jewelry and/or Furs, as per schedule attached, the property of the Assured and members of his or her family of the same domicile, whilst in all situations, against All Risks, except as hereinafter excluded", designates what property was insured. It reasons therefrom that only respondent Olson was insured and only as to such property in which she had an insurable interest. With this construction of the policy we can not agree. It not only violates the clear import of the language but also is contrary to the well established rules of construction of insurance policies. Appellant would have us hold that only the property owned by a member of respondent Olson's family that is insured is that in which respondent Olson has an insurable interest such as a community property interest in the property of a spouse or an interest in that of a minor child. Such a construction would give little if any effect to the "family" clause since members of a family own much of such property outright. Furs and jewels of a wife are frequently the result of gifts and therefore not community property. It would result in appellant being absolved from liability on eighty percent of the articles for which it accepted a premium. If we considered these terms of the policy were ambiguous we would be forced to come to the same conclusion because of the established rules of construction. A contract of insurance should be most strongly construed against the insurer if such construction is fairly reasonable, see Pendell v. Westland Life Ins. Co., 95 Cal.App. 2d 766, 214 P.2d 392; it should be given such construction as will fairly carry out its object by securing indemnity to the insured for the losses to which the insurance relates, see Fageol Truck & Coach Co. v. Pacific Indemnity Co., 18 Cal.2d 748, 117 P.2d 669; if the insurer fails to use such language as to make the provisions of the contract clear any uncertainty or reasonable doubt is to be resolved against it, see Pacific etc. Co. v. Williamsburg, etc. Co., 158 Cal. 367, 111 P. 4; if there is doubt whether the words are used in an enlarged or restrictive sense, other things being equal, the construction will be adopted which is most beneficial to the insured, see Berliner v. Travelers' Ins. Co., 121 Cal. 458, 53 P. 918, 41 L.R.A. 467.

Reference to property of the named insured's family is frequently made in policies similar to the one here involved. However, as is to be expected, appellant has not been able to cite us to any case that supports its construction of the language in question. On the other hand respondents Olson and Paul have cited several cases supporting our conclusion. In the case of Central Manufacturers' Mut. Ins. Co. v. Friedman, 1948, 213 Ark. 9, 209 S.W.2d 102, 103, 1 A.L.R.2d 557, the policy recited that it covered property owned by the named insured "and members of the Insured's family of the same household, while in all situations * * *." The insured's minor son, having been drafted, lost certain of his property by theft from his quarters in an army post. The court held the insurance company liable for the value of the property lost. In doing so it assumed that the son alone owned the property. In the case of Balzer v. Globe Indemnity Co., 1942, 211 App.Div. 98, 206 N.Y.S. 777 at page 778, the policy read "* * * this policy shall

apply to all such property owned by the assured or any permanent member of the household of the assured * * * or by a relative of the assured permanently residing with him." The insured's mother, with whom he resided, lost certain of her property by theft from the family home. The court held the insurance company liable therefor.

[6, 7] Appellant also contends that "the evidence is overwhelming" that respondent Paul was not "of the same domicile" as the respondent Olson. Both mother and daughter testified they had made their home in the hotel jointly owned by them and had been living together in the same room ever since long before the policy was issued. This hotel was located at the address described in the policy as 649 Jones Street, San Francisco. Respondent Paul testified that by coming to Los Angeles she had not intended to change that domicile or to make the apartment in Los Angeles her home unless the hotel was sold and she married her fiancé George Miller. The hotel was not sold until long after the articles were stolen and respondent Paul never married Mr. Miller. Such evidence is substantial, adequately supports the implied finding of common domicile, and therefore must be accepted as true. See Murphy v. Travelers Ins. Co., 92 Cal.App.2d 582, 587, 588, 207 P.2d 595.

[8, 9] Appellant next urges that respondent Paul can not prevail because she failed to file with appellant's agent "a detailed sworn proof of loss within ninety days from date of loss" as required by the policy. There was no evidence that either of these respondents complied with this requirement. Yet appellant makes no such contention as to respondent Olson. This is undoubtedly due to appellant's recognition that that point is not available to it because it renounced the policy and denied liability by its notice of rescission to respondent Olson before the expiration of the 90 days, see Mercer Casualty Co. v. Lewis, 41 Cal.App.2d 918, 922, 108 P.2d 65. Neither is the point available to it in so far as respondent Paul is concerned. It is clear that respondent Olson was the agent of respondent Paul from the earliest insurance negotiations with appellant. While the notice of rescission was directed to respondent Olson it declared that appellant "* * * elects to rescind [the policy] from the date said contract was entered into * * *." This was a renouncement of the entire policy. Notice thereof to respondent Olson was notice to her principal, respondent Paul.

[10–12] The "concealments" upon which appellant relies are of two types. One, that both respondents Olson and Paul had had insurance policies cancelled by other insurance companies and under different names within a year prior to the issuance of this policy. Two, that such respondents had admittedly operated houses of prostitution and that respondent Paul had been arrested on several occasions on charges of prostitution. These matters were pleaded as affirmative defenses and the burden of proof therefore was upon appellant, both as to the concealments and as to the materiality thereof. Such concealments, like false representations, do not affect the validity of an insurance policy unless material. See Ins.Code, § 332 and Employers' L. A. Corp. v. Industrial Acc. Com., 177 Cal. 771, 171 P. 935. The jury did not consider them material and we can not say that as a matter of law they were material. Counsel for appellant has cited us no case so holding. Respondents' counsel on the other hand has cited three cases in which California courts have held that even though the insured falsely represented that there had been no prior cancellation of insurance on the property insured such a representation was not material to the nature of the risk there involved. See Employers' L. A. Corp. v. Industrial Acc. Com., supra; Hawley v. Liverpool L. & G. Insurance Company, 102 Cal. 651, 36 P. 926; Kleiber M. T. Co. v. International I. Co., 106 Cal.App. 709, 289 P. 865. There was no direct evidence as to why the prior policies had been cancelled. On the other hand there was evidence that insurance companies were reluctant to carry burglary risks if the assureds, as did the respondents Olson and Paul, lived in hotels. We cannot hold as

a matter of law that such cancellations were because of respondents' prior immoral activities and arrests, the last of which had occurred five years before, or that appellant would have refused to issue the policy if it had known of them. A number of cases have been cited in which the concealments relied upon were somewhat similar to ones here charged. In each case the defendant insurance company was held liable. In Blair v. National Security Ins. Co., 3 Cir., 126 F.2d 955, the insured had failed to disclose prior losses under similar policies issued to her under different names. In Roberto v. Hartford Fire Ins. Co., 7 Cir., 177 F.2d 811, the insured, an alien, had been convicted of perjury and ordered deported. In Stecker v. American Home Fire Assur. Co., 1949, 299 N.Y. 1, 84 N.E. 2d 797, the insured had been convicted of the crime of concealing assets. The cases last cited above declare that it must be shown that the concealment is tainted with a fraudulent intent. The appellant so charges in our case. However the jury was of a contrary opinion. We cannot say as a matter of law that either respondent Olson or Paul or their agent concealed the facts in question or did so with the intent to defraud appellant. In the case of Roberto v. Hartford Fire Ins. Co., supra, 177 F.2d at page 814, the court said: "We think the correct rule is that where, as here, the insurer fails to question the insured, the latter cannot be said to have concealed facts so as to void the policy unless they are facts which he, or which a reasonable man should have known, to be material to the risk and unless he does so for the purpose of obtaining insurance which could not have been obtained after a disclosure of such facts."

Appellant by its own conduct evidenced its lack of interest, and therefore the materiality to it, as to who were the members of respondent Olson's family there domiciled with her, what was the moral and criminal history of respondent Olson and such family members, under what names insurance policies had been issued to them and why such policies had been cancelled. Before it would assume the offered risk appellant caused an investigation to be made by a recognized insurance investigating agency. Through it appellant could easily have discovered the facts in question. Yet the written report given appellant by this agency, which was received in evidence, discloses that while some questions were asked about members of the named insured's family, none were asked about the subject matter which appellant claims as misrepresentations and concealments.

Appellant complains of the court's failure to give some of its proposed instructions to the jury and also that some of the instructions given were legally erroneous. We find little cause for such complaints. Most of the instructions so refused were based on appellant's erroneous interpretation of the clause "members of his or her family." Many of appellant's complaints of instructions given are based on its misconceptions of the law referred to earlier in this opinion.

[13] Appellant's attack upon plaintiffs' instruction No. 7 is not well founded. It instructed the jury that the ownership of the property was in defendants Olson and Paul. The evidence of such ownership was without conflict. The only issue in that regard was as to the effect of such ownership.

[14, 15] Appellant attacks plaintiffs' instruction No. 11 on the grounds that it is argumentative in form and is an erroneous statement of the law on the degree of proof required in fraud cases. This instruction reads as follows: "You are instructed that where a question of fraud is involved, if there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of the jury to draw the inference favorable to fair dealing. *Fraud must be proved, though not necessarily by direct evidence, but when the defendant Standard Marine Insurance Co., Ltd.'s case goes no further than to establish a state of facts from which the inference of fraud may or may not be reasonably drawn, it has failed to establish its*

case by a preponderance of the evidence, and it becomes your duty to find in favor of innocence and uprightness. [Italics ours.]

"Now, where the defendant Standard Marine Insurance Co., Ltd., has come into court and set forth in its answer certain reasons why the policy has become void, and certain reasons why no recovery can be had thereof, then you are instructed as to those defenses the burden of proof is on the defendant Standard Marine Insurance Co., Ltd., to show to your satisfaction by a preponderance of the evidence in the case that the matters set forth by it in order to void the policy are true. You are not authorized to presume fraud. It must be, as the court has instructed you, proven, and the burden of proof is upon the defendant Standard Marine Insurance Co., Ltd., and it must prove fraud by a preponderance of the evidence and must not be presumed." While the instruction is somewhat argumentative in form it is not phrased so as to infringe upon the jury's province in determining the question of fact involved. It is true that the portion of the instruction which we have italicized above is an incorrect statement of the law in that it omits the necessary condition that the inferences of fraud be equally balanced. However that omission is supplied by the opening sentence of that paragraph and the jury should not have been misled in that regard by the instruction when read as a whole. An identical instruction, except for the argumentative form, was approved in the case of Singleton v. Hartford Fire Ins. Co., in 127 Cal.App. 635 at pages 647 and 648, 16 P.2d 293. It is also true that the italicized portion of the instruction is so phrased as to indicate that the defendant insurance company had failed to establish fraud. But in view of the insubstantial character of the claim of fraud we do not believe that the error was such as to affect the jury's determination of that issue.

[16] Appellant also complains because plaintiffs' instruction No. 4 refers only to the respondents Olson and Paul having had the same domicile when the policy was issued and fails to declare that respondent Paul was required to have the same domicile as respondent Olson at the time of the loss. However that point was well covered by the giving of defendant insurance company's instruction No. 15, which declares that if the jury found the respondent Paul prior to loss had changed her domicile by moving to Los Angles she could not recover. We must assume that the jury considered these two instructions together. By doing so it could not be misled on this point.

[17] After the jury had been considering the case for some time it returned and indicated its desire to have some instructions re-read on domicile, fraud and investigation. The court read some but not all of such instructions following which the jury answered affirmatively the following questions by the court: "Now does that cover your question of domicile? Does that answer your questions?" Appellant made no request that other instructions be read. A similar situation arose in the case of People v. Finali found in 31 Cal.App. 479, 160 P. 850. At page 489 of 31 Cal. App., at page 854 of 160 P., the court said: "Defendant was not entitled as matter of right to have instructions read which the jury had not called for or to have all the instruction on a given subject read when such as were read were satisfactory to the jury."

Read as a whole we find the instructions are adequate and correctly state the law. The jury should not have been misled in any of the particulars claimed by appellant.

The judgments are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; EDMONDS, J., dissenting.

109 Cal.App.2d 42

IN RE LEKOS' ESTATE.

VAGANAS v. ANGELONIDES et al.

Civ. 14793.

District Court of Appeal, First District, Division 1, California.

Jan. 30, 1952.

As Corrected Feb. 7, 1952.

Hearing Denied March 27, 1952.

Proceeding in the matter of the estate of Hareklea Lekos, also known as Harriett Lekos, also known as Harriet Lekos, deceased. Constantine Vaganas filed a will contest opposed by John Angelonides and Chresanthe Angelonides and Peter Angelonides and others. In the Superior Court for the City and County of San Francisco, Preston Devine, J., a verdict was directed against the contestant on the issue that the will was procured by fraudulent representations, the jury returned special verdicts that the decedent was of sound mind but that the will was procured by undue influence and John and Chresanthe Angelonides moved for judgment notwithstanding the verdict or for a new trial. The Superior Court denied the motion, entered judgment on the verdict and granted a motion for new trial for insufficiency of evidence. Constantine Vaganas appealed from the order granting a new trial and John and Chresanthe Angelonides appealed from the judgment entered on the special verdict and from the order denying the motion for judgment notwithstanding the verdict. The District Court of Appeal, Fred B. Wood, J., held that the will was not invalid for undue influence and that the question of testamentary capacity was for jury.

Order granting a new trial affirmed. Appeals from the judgment and order denying the motion for judgment notwithstanding the verdict dismissed.

1. Appeal and Error ⇐979(2)
New Trial ⇐6

Granting of or refusal to grant a new trial rests largely within discretion of trial court which discretion is extremely wide, and its ruling will not be disturbed where a new trial has been granted on insufficiency of evidence, unless there is a clear and affirmative showing of a gross manifest or unmistakable abuse of discretion.

2. New Trial ⇐72

In considering a motion for new trial, it is not only trial court's province but duty, to scrutinize and weigh evidence, and if in its opinion, facts upon which decision of jury is based are insufficient to justify that decision or if it believes that weight of evidence is against the decision, a new trial should be granted even though inferences it may draw are opposed to those drawn by the jury.

3. Evidence ⇐313

Evidence of declarations of a decedent though admitted without objection is of inconsiderable weight.

4. Wills ⇐400

In will contest, province of the trial court and not reviewing court was to determine weight and bearing of circumstances respecting undue influence.

5. Wills ⇐166(1)

In will contest, evidence justified finding of the trial court that the will was not procured by undue influence.

6. Wills ⇐394, 400

An order denying proponents' motion in will contest for judgment notwithstanding verdict made after denial of their motion for a directed verdict was not appealable but could be reviewed upon contestant's appeal from the order granting a new trial.

7. Judgment ⇐199(3.9)

Right of trial court to set aside a verdict and enter a contrary judgment is the same as the right to grant a nonsuit.

8. Judgment ⇐199(3.10)

Trial court should grant a motion for judgment notwithstanding the verdict only when disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled and indulging in every legitimate inference that may be drawn from that evidence, result is a determination, that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff.

9. Wills ⇐158, 163(2)

It is not the law that confidential adviser who has opportunity to influence a

testatrix and aids her in making of the will must directly benefit as a devisee thereunder for the burden of going ahead to shift to the protestants in the will contest and if the beneficiary is a spouse of the confidential adviser the activity of the latter may be imputed to the former.

10. Judgment ⇐199(3.2)

Incompetent evidence if relevant and if not objected to is sufficient and in relation to a motion for judgment notwithstanding verdict may be considered as any other relevant testimony.

11. Wills ⇐322

In will contest where objection to admission of evidence was solely upon the ground of hearsay the objection was not appropriate to exclude evidence of an admission made by one of the proponents.

12. Wills ⇐396

In will contest where evidence of a beneficiary's activities in guiding the testatrix in making of the will was admissible as evidence of another's activities concerning admissibility of which protestants made no objection, no complaint could be made on appeal.

13. Wills ⇐324(2), 400

In will contest on issue of testamentary capacity, it was not for the trial court nor the reviewing court to select from the various inferences deducible from the circumstances in evidence the inferences which should be drawn but that was a function of the jury.

14. Wills ⇐324(2)

In will contest, question of testamentary capacity was properly submitted to jury.

Charles A. Christin, San Francisco, for appellant.

Stanley P. Mamalakis, San Francisco, for respondents.

FRED B. WOOD, Justice.

Hareklea Lekos died September 19, 1948. Her nearest relatives, surviving her, were two sisters, two brothers, and an adopted sister.

A purported will was presented for probate by John Angelonides, husband of decedent's sister Chresanthe. Constantine Vaganas, a brother of decedent, filed a contest, upon five grounds. A nonsuit was granted as to the allegations that the will was not duly executed and that decedent was not aware of its testamentary character. A verdict was directed against contestant in respect to the charge that it was procured by fraudulent representations. The jury returned special verdicts to the effect that decedent was of sound mind but that the will was procured by undue influence.

John and Chresanthe Angelonides moved in the alternative for judgment notwithstanding the verdict or for new trial. The court denied the motion for judgment, entered judgment on the verdict, and granted the motion for new trial for insufficiency of evidence.

Contestant, Constantine Vaganas, appeals from the order granting a new trial; proponents, John and Chresanthe Angelonides, from the judgment entered on the special verdict and from the order denying their motion for judgment notwithstanding the verdict.

[1, 2] (1) *As to contestant's appeal,* it is important to bear in mind that "'The granting of or refusal to grant a new trial rests very largely within the discretion of the trial court—a discretion which is extremely wide; and its ruling will not be disturbed, especially where, as here, a new trial has been granted on the insufficiency of the evidence, unless there is a clear and affirmative showing of a gross, manifest, or unmistakable abuse of the discretion it is called upon to exercise. * * * Furthermore, * * * in considering such a motion it is not only the trial court's province but its duty to scrutinize and to weigh the evidence, and if in its opinion the facts upon which the decision of the jury is based are insufficient to justify that decision, or if it believes that the weight of the evidence is against the decision, a new trial should be granted, even though the inferences it may draw are opposed to those drawn by the jury.'" Devens v. Goldberg, 96 Cal.App.2d 539, 542, 215 P.2d 935, 937.

By this will, executed July 17, 1948, decedent gave $3,000 to certain charities and the remainder of her estate to Chresanthe and John "for the benefit of their children, Peter and Irene"; upon John's death, all to Chresanthe for life; upon Chresanthe's death, one-half to Peter and Irene, the other half to John and upon his death to Peter and Irene. It was not dissimilar in pattern to a will of June 14, 1947, in which she left her property to her sisters, Adamantia Couris and Chresanthe; Adamantia's share to go to her husband, Chresanthe's to her children, if either predeceased the decedent. Contestant was not a beneficiary under either will.

There was no direct evidence of undue influence. The evidence upon which contestant relies is circumstantial. He claims it is substantial and without conflict.

[3] Contestant testified that decedent told him she had made a will, leaving her property "Equal to every one of us," but another witness said contestant told her she had left it to the children of Mr. and Mrs. Angelonides. Evidence of declarations of a decedent though admitted without objection, is of inconsiderable weight, and in this instance conflicting.

Contestant also testified that decedent said the Angelonides told her something about him, against him, but that she did not believe them. That falls short of compelling the conclusion that they prevented her from disposing of her property in accordance with her wishes.

Contestant invokes his own testimony and that of his wife tending to show weakness of mind short of testamentary incapacity, but that is counterbalanced by other testimony of opposite import.

[4] Contestant relies upon a number of other circumstances which, for reasons similar to those we have discussed, fall short of establishing undue influence as a matter of law. It was the province of the trial court, not that of a reviewing court, to determine the weight and bearing of those circumstances.

From 1935 to 1947, decedent and her husband, Mike Lekos, operated a food market and managed real estate in Oakland. Shortly after Mike's death, she moved to San Francisco, taking her meals with the Angelonides, and after October, 1947, lived at their home. During that period she made trips to Oakland to visit friends and to see her attorney. Contestant claims that when she moved from Oakland he did not know where she was; that he was not informed by the relatives; nor did they advise him of her illness. But there is evidence that he had ready avenues of inquiry which apparently he did not pursue, and that the relationship between the Lekos and Vaganas families had never been close. Mrs. Lukas, the adopted sister, testified that in 1935 before coming to this country decedent had a quarrel with contestant and after that never mentioned contestant to the witness, yet frequently mentioned her sister Chresanthe whom she loved a great deal. H. S. Henion, the attorney who drew the will (he had been the Lekos' attorney for thirty years) testified: "of all the years that I knew Mrs. Lekos and I knew Mike, * * * this brother here [contestant] was never mentioned. * * * I didn't know until after her death that this brother here existed."

About ten days before the execution of the will decedent told Henion she contemplated making a will. No other person was present on that occasion. A few days later she sent him word through her brother-in-law, Sam Couris, to come and take instructions for a new will. He then went to her home with Couris, who was present during the interview. Decedent told Henion she wanted to change her will; wanted to remember the orphans in Greece, and to be sure that Peter and Irene were taken care of because she was very fond of them; wanted her property to go to them for their education and benefit but as they were children she wanted John and his wife to have a life estate and when they died it would pass to the children. There is evidence that she gave him these instructions directly, not through Couris, and that she spoke English and understood it if one spoke slowly and pronounced carefully.

When the will had been drafted, Henion took it to decedent, picking up Couris en route, and one Felix Levy, an employee of Couris, to serve as a witness. Henion said he read the will and explained it to decedent, step by step. He did not merely read it. He read and explained it, and asked her if she understood it and she said yes, and he would take up the next paragraph. Then Sam Couris read it to her in Greek. He would read it in English and then translate it into Greek. Henion then asked her if it was entirely satisfactory. She said, "Yes." Asked if she wanted to sign it, she said, "Yes," and did sign it.

There was evidence that the relationship between decedent and the Couris and Angelonides families was such as to afford an opportunity to influence the testamentary act. After her husband died, she consulted Sam Couris in the management of her affairs. She was living at the Angelonides home when the will was executed. During May and June, 1948, decedent delivered three of her bonds to Sam Couris. He used the proceeds, $31,000, together with $10,000 of his and John's funds to construct buildings on land belonging to Sam and John. Sam testified that she offered him the money to build a home for her and "cabins for us, to have an income and return the money to her out of the income" and he agreed to pay her back out of the income; and that he keeps the income in a special bank account, separate from other funds. In April, 1948, she delivered to Sam a power of attorney, authorizing Sam and John in her name to deposit her bonds for payment and to collect and use the proceeds thereof. It is not entirely clear from the record that Sam ever used this power of attorney. John said he did not know about the power of attorney until the trial; that Sam took care of the business and he, John, did not know what kind of agreement Sam had with decedent concerning the money. There is no direct evidence that any of the beneficiaries under the will participated in its making or knew its provisions, or that Sam Couris tried to influence decedent in selecting her beneficiaries.

The will was not an unnatural one, in view of decedent's expressed interest in the children, Peter and Irene. Peter lived with decedent for some time when a young child, and was at the Lekos home and store frequently. The will comported with the general plan of an earlier will save for the omission of the sister Adamantia Couris, who was an incompetent. Adamantia's son was also an incompetent, committed to a state institution.

[5] We cannot say as a matter of law that the trial judge was not justified in finding the weight of the evidence insufficient to prove that the will was procured by undue influence. The order for new trial should be affirmed.

[6] (2) *The order denying proponents' motion for judgment notwithstanding the verdict,* made after denial of their motion for a directed verdict, is not appealable, but may be reviewed upon contestant's appeal from the order granting a new trial. Estate of Green, 25 Cal.2d 535, 545 and 546, 154 P.2d 692.

[7, 8] The principles which govern the review of such an order are well stated in Estate of Green, supra, quoting from Card v. Boms, 210 Cal. 200, 202, 291 P. 190, as follows: "'The right of the trial court to set aside a verdict and enter a contrary judgment is absolutely the same as its right to grant a nonsuit. [Citing authorities.] The court should, therefore, grant such a motion when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff. [Citing authorities.]'" 25 Cal.2d at page 546, 154 P.2d 698.

Our examination of the record in the light of these principles convinces us that the trial court committed no error in denying the motion for judgment notwithstanding the verdict. There was a combination of circumstances which, taken together, with the reasonably deducible inferences,

furnish evidence of sufficient substantiality to support the verdict.

There was evidence that the relations between contestant and decedent and her husband had always been friendly. Also, contestant's relations with the Angelonides and Couris families had been friendly until some time in 1946 when a discussion occurred between contestant and Sam Couris concerning the manner in which the latter was handling the Couris community property (Mrs. Couris, an incompetent, was contestant's sister and Sam was her guardian), whereupon Sam terminated contestant's services as accountant for him.

Decedent's husband died in March 1947. A little over a month later, decedent left her home in Oakland and took up her residence at the Couris home at San Francisco, having her meals at the Angelonides home until October, 1947, when she moved to the Angelonides home, where she stayed until taken to the hospital during her last illness. Contestant testified that when decedent left Oakland he tried repeatedly to get in contact with her but was unable to find her; that he finally learned from some people in Oakland and went to see her around August 10, 1948. She was in bed, in pain, and could not get up. The Couris and Angelonides families had been aware of the serious character of decedent's illness for some little time but did not inform contestant of her illness. During that first visit, decedent told contestant she had tried to get him and could not find him, said she told Chresanthe to call and get in touch with him but the latter had reported there was nobody there, that she could not get contestant. During that period contestant's telephone would ring but as soon as he or his wife answered, the party calling would hang up, which did not occur after decedent's death. Contestant said that when he went to the house that day, Chresanthe "didn't say anything, but she was not so pleasant to see me," "didn't want me to see my sister alone," though she did leave him alone with the decedent about ten minutes. Contestant had a conversation with Chresanthe the day after decedent died in which she told him "they didn't want my sister [decedent] to go over in Oakland and see her friends" because "they have some friend who was single and they wanted to marry my sister Hareklea to this man for the benefit of themselves when she dies" and "that is the time she told me they tried to persuade her [decedent] not to go over to Oakland to see those people, and also of Carcouris * * * one of the friends of hers have a son by the name of Carcouris who was a lawyer. They were afraid maybe he would make the will and benefit himself more than anybody else so they tried to keep her close her[e] in San Francisco instead of letting her go to Oakland."

Concerning decedent's mental condition as bearing upon her susceptibility to influence as distinguished from testamentary capacity, there was evidence that the sudden death of her husband in March 1947 was a great shock to her, with the result that she talked of "something and then something else she answered." She could not carry on a conversation. At the time of contestant's visit with her on August 10, 1948, her mental condition was still "muddled." When contestant's wife visited decedent July 31 or August 1, 1948, physically decedent was very sick, said she could not sleep because of the pain. She was not speaking very clearly. In her conversation she would go from one subject to another.

In September 1948 when contestant and his wife were visiting decedent at the hospital, decedent said, according to contestant: " 'I arrange things and I make my will and Chresanthe and John told me something about you,' she says, 'but I don't believe them. Against you, but I don't believe them at the time.' When she was making her will." She also said to contestant that she left the property "equally to everyone" * * * "equal to every one of us." Contestant's wife testified that he asked decedent if she had a will and decedent responded: " 'Yes, Gus, I have it, and I leave equally for your share and for the brother in Greece and the six children,' and then they talk Greek again. They say Chresanthe and John. They

take [talk] more again, but I am not listening. She say, 'I leave my will—everything in the will to everyone.'"

There is evidence from which a jury could find that Couris and Angelonides occupied a confidential relationship toward the decedent. Proponents, in their brief, concede this as to Couris, in these words: "Sam Couris was the only member of the family who spoke good English. The English of Mr. Angelonides, his wife's and that of the testatrix was very poor. For that reason, Sam Couris acted in the capacity of the leader in the family. He was in the grocery business with John Angelonides, and all the management was done by him. Couris and Angelonides purchased some lots in Sonoma County and Couris was the one who made all the arrangements for the financing and building on the lots. After the testatrix's husband died, Sam Couris assisted his sister-in-law in the management of her affairs. In a few words, Sam Couris could be adequately described as the public relations man for the entire family." This family leadership quality points, also, to the possibility that Couris may have acted on behalf of Angelonides as well as in his own behalf, in the influence, if any, which he exercised over the decedent.

Sam's activities in connection with the preparation or execution of a will of the decedent are evidenced as early as June 17, 1947, when he accompanied her to the office of her attorney in Oakland upon the occasion of the execution of her first will, June 17, 1947. Sam was not present when the decedent previously gave her instructions concerning that will. He was present on the day of its execution. That was the will by which decedent gave half of her property to her sister, Adamantia Couris, and if the latter died before distribution, that half to Sam Couris, the other half to her sister, Chresanthe Angelonides, and if she died before distribution, her share to her children, Peter and Irene. That was about a year after the break between contestant and Sam Couris and the severance of their business relations.

Concerning the will of July 17, 1948, Sam was present when decedent gave her instructions to her attorney, as well as the day when she executed it. Concerning the giving of instructions for the will, Sam testified that he interpreted from English to Greek and from Greek to English for the attorney and for decedent and was in the room with them throughout that interview; that decedent had previously told him she wished to change her first will and for him to ring up the attorney and get him over there; and that prior to this interview with the attorney, on the same day or the day before, decedent told Sam how she wanted the new will to be drawn. In discussing it she said how she wanted to make the will. Sam said decedent understood English a little, not much. Concerning the conference the day the will was executed, Henion testified that the will with those life estates was complicated; decedent could not read English; that he did not read the life estate provisions of the will to her; that he would not attempt to do so even to an average English speaking person, he would explain it to them as he did to decedent; that he left it to Sam Couris to translate it into Greek, but that he, Henion, went through it, step by step, because he realized by going through it that way, decedent would understand it more clearly than if he read it off in legal phraseology; that he read it and explained it to her step by step and asked if she understood it and she said "yes" and then he took up the next paragraph or sentence; then Couris took the document and read it to her in Greek, reading it in English and then translating it into Greek. Henion also said that at neither of these conferences did anyone mention the contestant in his presence, so far as he knew; that the other two were talking Greek rapidly and one could not catch the names of any of the relatives if they were mentioned; nor did he hear mentioned the name of decedent's brother who was in Greece, nor the name of the sister, Adamantia Couris (save when the instruction was given him about leaving her out and about leaving out some

other members of the family); nor was anything said about the power of attorney to Sam and John, nor about decedent having given Couris money to build the cottages; that he, Henion, just followed out decedent's wishes and asked no questions and made no statements. Incidentally, it is observable that the 1948 will includes a direction to the executor, John Angelonides, to employ Henion as the attorney for the probate of that will.

The gift or loan of the $31,000 to Couris and Angelonides is not without significance. Chresanthe testified that decedent said she "gave the money to erect a home for all of us" meaning "the family. Spiro [Sam], myself, Hareklea, Adamantia." Sam said there were no papers written or signed concerning it. The power of attorney in relation to decedent's bonds was executed in April, 1948. The bonds were cashed, or their proceeds became available to Couris, in May and June. Decedent turned over to Sam an additional bond for $5,000, apparently in July 1948. When the bond redemption check came through, Sam presented it to decedent for her signature but she was too sick to sign. That was toward the last two or three days before she went to the hospital the second time. After she died, Sam turned that check over to the estate. It is inferable that $31,000 is not the measure of the amount by which Sam and John might have benefited by gifts, or by loans payable out of income, had decedent's life, health and strength lasted longer than they did.

Proponents direct attention to the lack of direct evidence that anyone exerted pressure upon the decedent which caused the execution of a will that did not represent her wishes. Contestant's case then depends, they say, upon Sam Couris (who occupied a confidential relationship toward decedent and was active in the preparation and execution of her will) unduly benefiting under the will, whereas he did not benefit at all, for he and his wife, beneficiaries under the first will, take nothing under the second. Proponents claim that in such a case the burden of going ahead with the proof did not shift to the proponents, that contestant did not make out a prima facie case.

[9] That argument overlooks some of the significant circumstances which were before the jury for their consideration. The coincidental gift or loan transaction, by which Sam Couris distinctly benefited, merited their consideration. Nor were they required to balance the second will solely against the first, to infer benefit or detriment to Couris. If, by the spring or summer of 1948, decedent had decided to make a new will, apportioning her estate among all of her next of kin, the disposition of the whole of it to the members of the Angelonides family might have appeared to Couris a feasible and advantageous alternative, thus keeping these properties within a close family circle and within the sphere of his influence. Or, he may have been motivated by a generous impulse toward his brother-in-law, friend, and partner, who looked to him for guidance and whose business affairs he managed, acting as the agent or representative of John Angelonides, who did directly and measurably benefit under the will which was prepared and executed with the aid of Couris. It is not the law that the confidential adviser who has the opportunity to influence a testatrix, and aids her in the making of her will, must directly benefit as a devisee or legatee under that will, for the burden of going ahead to shift to the protestants of the will. If the beneficiary is the spouse of the confidential adviser, the activity of the latter may be imputed to the former. Estate of Trefren, 86 Cal.App.2d 139, 148, 194 P.2d 574, which in addition cites cases involving other relationships between the beneficiary and the confidential adviser which similarly operate; see, also, In re Daly's Estate, 59 S.D. 403, 240 N.W. 342; Little v. Sugg, 243 Ala. 196, 8 So.2d 866, 867. If the confidential adviser and active participant is the agent or representative of the beneficiary, the former's acts are those of the beneficiary.

[10] Proponents speak also of the evidentiary scope of the testator's oral dec-

larations, that they bear only upon her state of mind, are not proof of the facts stated by her. However, as the trial judge correctly observed in the opinion which he wrote and filed, "there was but one objection to the admission" of that testimony, "which objection came after the answer, and was not renewed" and "there was no request that such evidence be limited to a single purpose," concluding, "*Incompetent* evidence, if *relevant* and if not objected to, is sufficient * * * and in relation to the motion for judgment notwithstanding the verdict, must be considered as any other relevant testimony."

[11, 12] Proponents further claim that contestant's testimony concerning his conversation with Chresanthe and her not wanting decedent to consult a certain attorney in relation to her will, was erroneously admitted over protestant's objection. The objection was solely upon the ground of hearsay, not appropriate to exclude evidence of an admission made by one of the proponents. There was no objection upon the ground that this was an admission by but one of the beneficiaries under the will, nor any motion or suggestion to limit the scope of the testimony to Chresanthe. Moreover, it would seem that evidence of Chresanthe's activities in guiding the decedent in the making of a will would be as admissible as the evidence of Sam Couris' activities, concerning admissibility of which proponents entertain no objection.

[13, 14] It was not for the trial court, nor is it for a reviewing court, to select, from the various inferences deducible from the circumstances in evidence, that inference or those inferences which should be drawn. That was the function of the jury. The trial judge, after reciting most of the facts which we have narrated, and a few others, expressed the opinion that "So far as the motion for judgment notwithstanding the verdict is concerned, they [the facts which he had recited] must be accepted as true, in the light most favorable to contestant, and all inferences which may be drawn legitimately from them likewise must be indulged in favor of contestant, and conflicting evidence must be disregarded." Applying these principles, he correctly denied the motion for judgment notwithstanding the verdict.

The order granting a new trial is affirmed. The appeals from the judgment and the order denying the motion for judgment notwithstanding the verdict, are dismissed.

PETERS, P. J., and BRAY, J., concur.

LACEY v. BERTONE.

No. 14816.

District Court of Appeal, First District, Division 1, California.

Feb. 5, 1952.

As Corrected Feb. 20, 1952.

Rehearing Denied March 6, 1952.

Hearing Denied March 31, 1952.

Suit by E. V. Lacey, etc., against S. Bertone, etc., for specific performance of agreement for sale of real property. The Superior Court, City & County of San Francisco, Preston Devine, J., entered adverse orders and defendant appealed. The District Court of Appeal, Bray, J., held that the second judge in making his final judgment could change such of prior judge's findings which he felt the evidence required, provided only that he had heard all of evidence on that subject.

Orders affirmed.

1. New Trial ⇐159

Where after interlocutory judgment was entered, judge to whom case was referred for accounting, but who had not tried case originally, as concerned findings of latter judge made on issues submitted to him, had power on motion for new trial to change or modify them. Code Civ. Proc. § 662.

2. New Trial ⇐159

Where judge, who entered interlocutory judgment that provided for accounting, died and accounting issues were fully heard by another judge, latter judge had power on motion for new trial to grant further trial on issues of accounting. Code Civ.Proc. § 662.

3. Appeal and Error ⇐907(2)

Where judge, who entered interlocutory judgment that provided for accounting, died and another judge heard evidence on accounting trial and District Court of Appeal did not have record of testimony, Court could presume that testimony covered all phases of accounting and to some extent duplicated testimony bearing on issues heard by first judge.

4. Appeal and Error ⇐931(5)

Where judge, who entered interlocutory judgment that provided for accounting, died and another judge heard evidence on accounting trial, in absence of showing that second judge did not base his action on complete evidence produced before him but acted on comparison of evidence which he heard with record of evidence before first judge, District Court of Appeal had to assume regularity of judge's action.

5. Judges ⇐32

Where judge, who entered interlocutory judgment that provided for accounting, died and another judge heard evidence on accounting trial, second judge in making his final judgment could change such of prior judge's findings which he felt evidence required, provided only that he had heard all evidence on subject and was not merely contrasting evidence he had heard with cold record of testimony before other judge.

6. New Trial ⇐114

Party litigant is entitled to decision upon facts of his case from judge who hears evidence, where matter is tried without jury, and he cannot be compelled to accept decision upon facts from another judge.

7. New Trial ⇐114

Where after interlocutory judgment was entered, judge to whom case was referred for accounting, but who had not originally tried case, pending further proceedings for which case was reopened, set aside both interlocutory and final judgments and findings might be changed on new hearing, though there would be no finality until new final judgment had been rendered, parties were entitled to ruling as to powers of substitute judge.

8. New Trial ⇐114

On motion for new trial substitute judge may on review of record alone grant new trial where judge who made judgment has died.

9. Appeal and Error ⇐925(2)

As to reopening of cases for further evidence, District Court of Appeal must assume that reopening was in furtherance of desire to reach just conclusion upon merits.

10. Judges ⇐32

Where after interlocutory judgment was entered, judge to whom case was referred for accounting, but who did not originally try the case, heard evidence fully developed upon accounting issues, hearing on accounting issue was in effect trial de novo.

Allen Spivock, San Francisco, for appellant.

Andrew J. Eyman, Bernard B. Glickfeld, San Francisco, for respondent.

BRAY, Justice.

Appeals from two orders of the superior court, one denying plaintiff a new trial but reopening the case for further proceedings and amending certain findings and portions of the interlocutory judgment; the other, denying defendant's motion to correct the first order.

Question Presented.

Fundamentally the question is whether under the circumstances of this case, after an interlocutory judgment is entered, a judge to whom the case is referred for an accounting, but who did not try the case originally, may change or modify the prior findings and decree.

Record.

The action was one for specific performance of an agreement for the sale of real property. It was originally tried before Hon. Pat R. Parker, who made findings of fact and conclusions of law and rendered an interlocutory decree to the effect that plaintiff was not entitled to specific performance, but that defendant recover judgment on his cross-complaint cancelling said agreement and restoring possession to plaintiff of certain real and personal property, including certain moneys. The decree then provided that plaintiff account to defendant for certain sums; "that in the event said E.V. Lacey fails to render such account, or in the event that the Court finds such account unsatisfactory, incomplete or otherwise objectionable, the Court will fix a time and place for a hearing to be held before the above entitled Court upon such notice as the Court may designate and fix, to determine the amount due said S. Bertone from said E. V. Lacey pursuant to the terms of the contract of August 1, 1945, to the date of this decree." From this decree plaintiff appealed. On that appeal, Lacey v. Bertone, 33 Cal.2d 649, 203 P.2d 755, the Supreme Court held that the appeal was premature because the judgment was merely interlocutory, and left undetermined certain items as to which an accounting was required. The cause was remanded for determination of these items. In the meantime Judge Parker died. The further hearing was before Hon. Preston Devine. After taking evidence, Judge Devine made his findings of fact, conclusions of law and final judgment and decree. Plaintiff thereupon moved for a new trial. It is the order made upon this motion from which the first appeal is taken. Defendant moved "to Correct Minute Order Denying Motion for New Trial or to Enter Previous Judgment as Final." The second appeal is from the order denying this motion. Defendant, contending that the order made on motion for new trial should be corrected to read simply "Motion for new trial denied," attacks all of said order except the portion denying the new trial. The two appeals will be considered together, for, if the first order was valid, the second order refusing to change it was likewise valid. On the other hand, if the first order was invalid, then the court should have granted plaintiff's motion to enter the previous judgment as final.

Power of Second Judge.

The order complained of[1] first denied plaintiff's motion for new trial "so far as specific performance is concerned." It then proceeded to modify or vacate certain findings contained in Judge Parker's findings of fact, certain findings contained in Judge Devine's findings of fact, one finding in Judge Parker's interlocutory judgment, and certain findings in Judge Devine's final judgment. It then provided: "The cause is reopened for further proceedings and the introduction of additional

1. Referred to herein as "order denying new trial."

evidence in accordance with the provisions of Section 662 of the Code of Civil Procedure, and the judgments heretofore rendered, interlocutory and final, are hereby set aside pending said further proceedings."

The changes in the findings all had to do with matters of accounting. They in no wise affected the findings upon which the denial of specific performance was based. They did, however, in two instances, at least, materially change Judge Parker's findings of payments made by plaintiff. Thus, what Judge Devine did in the order denying the new trial was to permit Judge Parker's findings and decree to stand on the issue of whether plaintiff was entitled to specific performance, but to change both his own and Judge Parker's findings on matters of accounting, and then grant a further trial on the accounting issues.

[1, 2] There can be no question but that so far as the findings Judge Devine made on the issues submitted to him, are concerned, he had the power on motion for new trial to change or modify them. Nor can there be any question but that he had the power on such a motion to grant a further trial on the limited issues of the accounting. These powers are granted by section 662, Code of Civil Procedure, which provides in part: "* * * or, in lieu of granting a new trial, may vacate and set aside the findings and judgment and reopen the case for further proceedings and the introduction of additional evidence * *". See also Gardner v. Rich Mfg. Co., 68 Cal. App.2d 725, 158 P.2d 23; Veterans' Welfare Board v. Burt, 4 Cal.App.2d 659, 41 P. 2d 587.

[3–6] Defendant's chief attack is based on the theory that Judge Devine had no power to change any finding made by Judge Parker. He relies on City of Long Beach v. Wright, 134 Cal.App. 366, 25 P.2d 541, which is based on DeMund v. Superior Court, 213 Cal. 502, 2 P.2d 985. In that case findings and an interlocutory judgment were entered by one judge and then they were amended by a second judge. It was held that a second judge cannot on motion for new trial change, modify or reverse findings of a prior judge who actually saw the witnesses, heard the evidence, arguments of counsel, and with conflicting evidence before him made findings thereon. However, that case is distinguishable from ours in that there the second judge based his action merely on a review of the record of the proceedings before the first judge and took no evidence. Here Judge Devine made his findings on the evidence brought before him in the eight days of the accounting trial. We do not have the record of the testimony taken but we have the right to presume that it covered all phases of the accounting and to some extent duplicated testimony bearing on that issue heard by Judge Parker. In the absence of a showing that Judge Devine did not base his action on complete evidence produced before him but acted on a comparison of the evidence which he heard with the record of the evidence before Judge Parker, we must assume the regularity of his action. It is obvious that where an issue is referred to a second judge by an interlocutory judgment and all the evidence on that issue is heard by that judge there is no reason why he may not make new findings on that issue, regardless of the findings of the first judge. Here, there was a judgment which was not a final one. Had the first judge proceeded with the accounting matter, at the time of making the final judgment he could have changed any of his prior findings if he felt that the evidence required it, even including the findings on the main issue. So a second judge in making his final judgment may change such of the prior judge's findings which he feels the evidence requires, provided only that he has heard all of the evidence on that subject and is not merely contrasting the evidence he has heard with the cold record of the testimony before the other judge. Thus he would be complying with the rule laid down in the Wright case, supra, 134 Cal.App. 366, at p. 370, 25 P.2d at page 542: "It has long been the law of this state that 'a party litigant is entitled to a decision upon the facts of his case from the

judge who hears the evidence, where the matter is tried without a jury,' and that 'he cannot be compelled to accept a decision upon the facts from another judge.'"

[7] There is another aspect of the matter which should be considered. The court, pending the further proceedings for which the case was reopened, set aside both the interlocutory and final judgments. It may be that after hearing the additional evidence the court may change or modify the present findings. Thus there is no finality until a new final judgment has been rendered and is made final by a denial of a new trial in the event one is sought. Therefore a discussion of the present findings is academic, although the parties are entitled to this ruling as to the powers of the substitute judge.

[8–10] It has long been the law that on motion for new trial a substitute judge may on a review of the record alone grant a new trial where the judge who made the judgment has died. Halperin v. Guzzardi, 95 Cal.App.2d 31, 212 P.2d 9; Jones v. Sanders, 103 Cal. 678, 37 P. 649. As said in Hohn v. Pauly, 11 Cal.App. 724, 106 P. 266, concerning the reopening of cases for further evidence, "we must assume that it [the reopening of the case] was in furtherance of a desire to reach a just conclusion upon the merits, and this certainly is not to be condemned." 11 Cal.App. at page 733, 106 P. at page 26. McAllen v. Souza, 24 Cal.App.2d 247, 74 P.2d 853, dealt with a situation somewhat similar to the one here, except that a total new trial was granted. After making findings and an interlocutory judgment the judge died. Defendant appealed, as in our case. The appeal was held premature because the interlocutory judgment was not a final judgment. The judge who originally tried the case died. A motion was made before a new judge to set aside the interlocutory judgment on the ground that the case had been only partly tried and no final judgment entered and that defendant was entitled to have a decision upon all the facts by a judge who had heard all the evidence. This motion was granted. On appeal from the final judgment, defendant contended that the new judge had no power to set aside the interlocutory judgment made by the prior judge. In denying this contention, the reviewing court pointed out 24 Cal.App.2d at page 250, 74 P.2d at page 855: "The interlocutory judgment here was not final in any sense of the word. It was not appealable (McAllen v. Souza, supra [7 Cal.App. 2d 130, 45 P.2d 832]), it required no findings to support it (Welch v. Alcott, 185 Cal. 731, 761, 198 P. 626), and any findings or conclusions made at the time of the entry thereof were subject to change or modification at the time of entry of the final judgment." It then goes on to state that where a judge dies before the entry of a final judgment, a new judge may not render a valid judgment without a trial de novo because a party litigant is entitled to have a decision on the facts of the case from the judge who hears the evidence. It then holds that this rule applies to cases requiring an accounting after an interlocutory judgment. This supports our conclusion, for on the accounting issue there was, in effect, a trial de novo before Judge Devine.

The orders are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



109 Cal.App.2d 24

CHULA v. SUPERIOR COURT IN AND FOR ORANGE COUNTY et al.

Civ. 4444.

District Court of Appeal, Fourth District, California.

Jan. 29, 1952.

Proceeding in certiorari to review an order of the Superior Court of Orange County, Robert Gardner, J., adjudging petitioner in contempt of court. The District Court of Appeal, Griffin, J., held that defense attorney was not in contempt of court in respect to examination of medical witness.

Order annulled.

1. Contempt ⇐67

In proceeding in certiorari to review order for contempt committed in presence of trial judge, reviewing court may examine allegations of contemptuous acts alleged to determine if they do in fact constitute contemptuous acts sufficient to give court jurisdiction to punish petitioner for contempt and review may extend to whole of record of trial court where it is necessary to determine the jurisdictional facts.

2. Contempt ⇐40

A proceeding to punish a defendant for contempt is in its nature a criminal proceeding and charge and finding thereon and judgment of court are to be strictly construed in favor of the accused.

3. Criminal Law ⇐707

A broad latitude should be allowed counsel for defendant interposing defense of insanity in meeting the burden imposed on defendant by law of introducing evidence and proving insanity by a preponderance of the evidence. Pen.Code, § 1027.

4. Evidence ⇐553(1)

Hypothetical questions directed to an expert witness are not necessarily leading questions.

5. Criminal Law ⇐707

Where trial court makes an erroneous ruling as to admissibility of a certain line of evidence, counsel for defendant should be given much latitude in pressing his point and in convincing the court of the error at the time it is made.

6. Evidence ⇐558(1)

When an expert witness has testified that in his opinion a defendant was sane at a particular time, considerable latitude should be allowed counsel for the defendant to cross-examine the witness so testifying on the subject matter.

7. Attorney and Client ⇐14
Contempt ⇐10

Defense counsel, however zealous in his client's behalf, has, as an officer of the court, a paramount obligation to the due and orderly administration of justice and at all times should maintain a respectful attitude toward the court, and a disavowal of intentional disrespect or wrongful intent is no defense to a contempt order.

8. Contempt ⇐10

An attorney, whether right or wrong in his position upon the legal question under argument, has the right to an opportunity to present his theory of the case on any occasion where the exigency of the pending point in his judgment requires or justifies it.

9. Attorney and Client ⇐14
Contempt ⇐10

An attorney has the duty to protect the interests of his client and he has a right to propound a legitimate argument and to protest an erroneous ruling, and there is no rule permitting a court to punish an attorney because he is honestly mistaken in his interpretation of the law when he presents his mistaken views to the court in a proper and respectful manner.

10. Contempt ⇐10

Defense attorney was not in contempt of court in respect to examination of medical witness.

Head, Jacobs & Corfman, Santa Ana, by Robert Jacobs, Otto A. Jacobs, Winthrop O. Gordon, Mize, Kroese, Larsh & Mize, all of Santa Ana, Wm. H. Cree, Long Beach, R. C. Mize, Marjorie Mize, Delbert L. Larsh, Ira Kroese, Robert B. Webb, Jack J. Rimel, James C. Monroe, all of Santa Ana, John W. Solomon, Laguna Beach, Joseph A. Ball, Long Beach, for petitioner.

Joel E. Ogle, County Counsel, George F. Holden, Stephen K. Tamura, Deputy County Counsel, Robert J. Switzer, Deputy County Counsel, all of Santa Ana, for respondents.

GRIFFIN, Justice.

Petitioner, an attorney at law, was cited for contempt in the above entitled court for certain alleged contemptuous acts committed in the presence of the trial judge, who sentenced petitioner to five days in the county jail. By this writ petitioner seeks to annul the order of contempt.

Counsel for the respective parties stipulated in open court in response to the order to show cause here issued, that the return herein filed by respondent may be considered as a "rejoinder" and it was agreed that the entire matter may be submitted to the court for decision on its merits.

[1] A reviewing court may, in such a proceeding, examine the allegations of contemptuous acts alleged to determine if they do in fact constitute contemptuous acts sufficient to give the court jurisdiction to punish petitioner for contempt, and the review may extend to the whole of the record of the court below where it is necessary to determine the jurisdictional fact. Hotaling v. Superior Court, 191 Cal. 501, 506, 217 P. 73, 29 A.L.R. 127; Bennett v. Superior Court, 73 Cal.App.2d 203, 210, 166 P.2d 318.

[2] A proceeding to punish a defendant for contempt is in its nature a criminal proceeding, and the charge and finding thereon, and the judgment of the court, are to be strictly construed in favor of the accused. Schwarz v. Superior Court, 111 Cal. 106, 43 P. 580.

Here the action of the trial judge grew out of the trial of Henry Ford McCracken, who was charged with murder, kidnapping, and child stealing, in Orange County. Petitioner, a young attorney of limited trial experience, was appointed by the court to defend the defendant. After a protracted jury trial of many weeks, attracting much publicity, a jury returned a verdict of guilty of child stealing, not guilty of kidnapping, and disagreed on the charge of murder. Immediately thereafter, a trial was had on the charge of murder, which trial consumed a considerable amount of time and resulted in a verdict of guilty of that charge. Thereafter his plea of not guilty by reason of insanity was heard. The jury found defendant sane at the time of the commission of the offense. The several trials involved days of testimony and no doubt the parties concerned were tired, in a high state of anxiety, and desirous of an early determination of the issues presented.

It appears that during the sanity hearing a Dr. Musfelt was called as one of the court's appointed psychiatrists. He testified, in substance, about the medical examination he made of the defendant and concluded that in his opinion the defendant was sane at the time of the commission of the alleged offense. Petitioner, as counsel for defendant, cross-examined this witness and consumed about 112 pages of transcript in so doing. A small portion of that cross-examination bore upon the subject of "schizophrenia". After terminating this cross-examination, on the following day, petitioner, who had made some further study of the subject, asked permission of the court to recall the witness for further examination. The request was granted and the following examination was had:

"By Mr. Chula: Q. Dr. Musfelt, I called you back because I would like to ask you a few questions, a few more questions on schizophrenia and what it is, and certain facts about it.

"Now, is schizophrenia an organic disease, in other words, I mean, would you explain what we mean by organic disease?

"Mr. Kneeland: Your Honor, I object to that, the matter has already been gone into on direct examination.

"The Court: Objection sustained.

"Mr. Chula: If your Honor please, we are calling this witness as our own at this time. We had him on cross-examination as the Court's witness previously, and we haven't gone into this; that is, it may have been gone into very lightly. As a matter of fact, I hadn't read about the matter up to that time.

"The Court: The objection will be sustained.

"Mr. Chula: Q. Is schizophrenia a mental disorder which is a various, is a composite of various personality conflicts, in other words, the cause of that type rather than of a disease such as a scar on the brain or something?

"Mr. Kneeland: I object to that question as leading and suggestive, improper direct examination.

"The Court: Objection sustained. . .

"Mr. Chula: If your Honor please, I would like the record to show that the defense doesn't have any money to call their own witnesses or hire anybody to—

"The Court: Just a moment, Mr. Chula, you can take those matters up outside the hearing of the jury at the Judge's bench.

"Mr. Chula: And I would like the record also to show, your Honor, the reason that we have approached the bench here, it was for the same reason, we have approached the bench for the same purpose, and the reason we have approached the bench at these various times is because of the order of the Court on these subjects and not to hide any thing from the jury.

"May we approach the bench?

"The Court: Yes.

"(The following proceedings took place at the Judge's bench, outside the presence and hearing of the jury:)

"Mr. Chula: If your Honor please, as I understand the Code, the Court has a right to call those witnesses as their own, the prosecution has a right to call them as their own, and when any one of the sides to the action, or the Court, call a witness, the other parties have a right to cross-examination.

"The last time the doctor was on the stand we cross-examined him as to a small part of schizophrenia. As to those matters that we have questioned him about, I still feel that we have a right on direct examination to take over this witness as our own at this time and the prosecution can cross-examine him if they wish.

"The Court: Nobody is arguing with you because the objection was that the question was leading and suggestive. If you see fit to call him as your own witness, that's all right, but no cross-examination as you started to do right there.

"Mr. Chula: And, further, in this particular case the rule is, if I understand it correctly, and I have been incorrect and I probably am about many matters, it is not that I am going against the rules of the Court, but the rule, as I understand it, is that leading and suggestive questions may be used on certain types of witnesses under certain conditions, at the discretion of the Court, and that they should be in this case, inasmuch as the defense hasn't had ample opportunity to go over this with this witness, we have had no opportunity to talk with him privately; that he is a Court-appointed witness, that we should be able to use reasonable leading questions with him, we just can't start in saying, 'Tell us what we talked about yesterday', we have got to give him leading and suggestive questions and ask him about various phases of it, and we should be allowed to lead this witness, since the defendant doesn't have any money for their own experts * * *.

"Mr. Chula: Q. Would you tell us, what is the general characteristic of schizophrenia?

"Witness: A. There is no one general character—

"Mr. Kneeland: Just a minute, Doctor, I will object to that question. I think the matter was gone into fully with Dr. Musfelt the other day.

"The Court: Objection sustained. * *

"Mr. Chula: Q. Isn't the concept of schizophrenia one that is really not too concrete?

"Mr. Kneeland: Object to that, your Honor, as leading.

"The Court: Objection sustained.

"Mr. Chula: Q. That concept of schizophrenia, that the concept of schizophrenia in the past years originally evolved by Kraepelin and then by Meyer later, and Bleuler, have all been various, they have defined it in various ways, and they have meant different things when they have said schizophrenia, isn't that correct?

"Mr. Kneeland: Your Honor, I object to that as leading and cite the conduct of defense counsel as prejudicial in view of the previous rulings of the court.

"The Court: The objection will be sustained.

"In view of the ruling of the Court, Counsel, I would suggest, Counsel, that you govern yourselves by that ruling. You have your recourse if I am in error, and you are not to persist in the face of a ruling.

"Mr. Chula: Is it my understanding, then, your Honor, that the ruling means I am not to ask any questions on schizophrenia at the present time of this witness?

"The Court: Nothing of the kind.

"Mr. Chula: What, sir?

"The Court: Nothing of the kind.

"Mr. Chula: Q. If a person has schizophrenia, Doctor, it won't show up in any organic test, will it, or will it?

"Mr. Kneeland: I object to that as leading, your Honor.

"The Court: Objection sustained.

"Mr. Chula: Q. Well, a person who has schizophrenia, if a person has schizophrenia, will it show up organically?

"Mr. Kneeland: I object to that, your Honor, as leading and improper direct examination at this time. * * *

"The Court: The objection will be overruled.

"Mr. Chula: Q. What do we mean by organic, you know, when we said, can you tell whether there was any organic cause?"

"(Then followed a lengthy dissertation by the witness on the subject.)

"Q. Is schizophrenia a result of, say possibly only one confliction in the emotions, or is it a composite?

"Mr. Kneeland: I object to that, your Honor, as leading.

"The Court: Objection sustained.

"Mr. Chula: Q. Doctor, have I ever, for the record, your Honor, have I ever discussed this, talked this matter over with you as to these questions and answers?

"Mr. Kneeland: Object to that, your Honor, as incompetent, irrelevant and immaterial.

"The Court: Sustained.

"Mr. Chula: May I make an offer of proof, your Honor?

"The Court: Surely.

"(The following proceedings took place at the Judge's bench, outside the presence and hearing of the Jury:)

"Mr. Chula: If your Honor please, I would like to, we could by this witness, by that question, prove that leading questions are necessary in this witness, as stated before, since this witness hasn't talked privately with us except from the standpoint of where I called the doctor on the phone and said, 'Will you come over to court tomorrow, I want to ask you some questions about schizophrenia,' nothing else other than that, and that we haven't had any discussion with him about the matter, and that leading and suggestive, leading questions, especially, I don't know about suggestive, are necessary for proper examination of this witness.

"The Court: Let the record show that the doctor underwent solid cross-examination by the defense on this subject for 112 pages which covered this exact ground, and I can see no occasion for going into it any further.

"(The following proceedings took place in open court, within the presence and hearing of the jury.)

"Mr. Chula: Q. Doctor, if we took an encephalogram test on a person who had schizophrenia, would that show up on the test?

"Mr. Kneeland: I object to that, your Honor, as leading and suggestive.

"The Court: Overruled.

"Witness: A. You mean an electroencephalogram like they do, that you would get—

"Q. This is correct. A. It isn't likely it would show anything.

"Q. And can you tell us whether schizophrenia is a rare mental disease, psychosis, or is it a frequent one? A. Very common.

"Q. And can you tell us in percentages about how many people in the public hospitals and the mental hospitals have schizophrenia?

"Mr. Kneeland: Your Honor, I object to that as incompetent, irrelevant and immaterial.

"The Court: Objection sustained. I believe you testified to that the other day, did you not, Doctor?

"Witness: All about it.

"The Court: And you testified to the question before that, in my recollection. I believe that both of those have been gone into.

"Mr. Chula: I didn't remember that.

"The Court: I have just told you.

"Mr. Chula: Q. With a person who has schizophrenia, Doctor, will they show or have epileptiform or syncopal attacks which suggest seizures of epilepsy?

"Mr. Kneeland: I object to that, your Honor, as leading, improper direct examination.

"The Court: Overruled.

"Witness: A. They may or they may not; I will have to qualify that. I can't say yes or no, some do, some don't. * *

"Q. Now a person who has schizophrenia, how does that affect their mental capacity?

"Mr. Kneeland: I object to that, your Honor, as having been gone into and having been asked and answered.

"The Court: Objection sustained.

"Mr. Chula: Asked and answered on the cross examination, is that what you mean?

"The Court: Several times.

"Mr. Chula: Q. The transition from schizoid type, just a plain schizoid, to the schizophrenic, is that a rapid transition, or is it one that slowly but surely, from the schizoid we fade into the schizophrenic?

"Mr. Kneeland: I object to that as leading and suggestive.

"The Court: Objection sustained."

Thereafter, similar questions were propounded and answered without objections. Objections were sustained to many of them and overruled as to others. The jury was then excused. The trial judge and counsel retired to the court's chambers and the court remarked:

"The Court: In the face of rulings by the Court for the last 12 minutes counsel for the Defendant has had open in front of him at the counsel table a book which I presume is his book on psychiatry, from which he has been obviously reading, asking leading questions and suggestive questions in the face of such rulings which have been made prior to that time. That I consider a direct disobedience of a lawful order made by the Court. It is willful, and intentional and I cite it as such and the matter will be disposed of at a later time.

"Do you have something else to take up at this time?

"Mr. Chula: May I be advised as to what order I was in contradiction to and I would like the record also to show this book which I had was laying on the table in front of me among other papers. No mention was made of the book itself. As a matter of fact reference was also made interminglingly with other papers in front of me and that further I may be dumb about this whole thing and stupid and ignorant, but I can see of no other way to protect this Defendant's rights other than to ask the questions or the Appellate Court or no one else will know what I was going to ask the witness; that I asked the Court whether the ruling he gave would go to all of the questioning on schizophrenia and that statement was that it did not, and that therefore I had no other way of knowing, I honestly had no other way of knowing that until I asked the question, and in all fairness to the defense counsel in this matter and to the court—I know that our nerves are frayed and mine are and the Court's are and everyone concerned—that such tendencies in the outlook on such a matter as contempt have succeeded in my mind especially on many points of failing to act as I thought best for the defense of this Defendant from the standpoint of fear of the Court in the matter that the action of the Court and inferences therefrom with the impending results we must anticipate and the censure upon this counsel that will come from any citing of contempt, which is apparent from this statement are such that —and I am working on this case for nothing. It gives me the feeling that I have nothing to gain and everything to lose from the standpoint of reputation and otherwise, and that as far as this Defendant is concerned I can't really see why my life should be ruined trying to defend a man to the best of my ability under such circumstances, and the same have hastened my action in the insanity trial and the actions of

the Court against counsel have been such that I have become hesitant of doing much of anything in the defense of this man.

"Every time I have been fearful of every consequence because every time I have opened up my mouth I have had threat or inference of contempt before me.

"The Court: The only time you need to worry about contempt is when you commit contempt.

"Mr. Chula: And prior to this time on the contempt I have had no warning, as I recall it, that I should not ask questions of this type as to each question. You said it was leading and the objection was overruled. I was not told not to ask any more questions on schizophrenia. I did ask other questions to the best of my ability; that there was no direct intentional disobedience of the Court order.

"The Court: You deny that there was any direct intentional disobedience of the Court order?

"Mr. Chula: That is right."

This is a fair exemplar of the proceedings leading up to the order of contempt, which we will designate as charge No. 1. Predicated upon this showing, the court found that petitioner willfully, deliberately and with complete disregard of the rulings of the court, asked the witness leading questions and sought to cross-examine him for the purpose of placing before the jury the subject matter excluded; that such actions tended to interrupt the due course of the trial and impair the respect of the authority of the court.

The next charge (designated as No. 2) is that petitioner made disrespectful remarks to the judge in chambers, in this, that petitioner was endeavoring to explain to the court why he was compelled to examine the medical witness produced by the court to prove his defense. He said:

"Mr. Chula: I would like to state this in my own defense; at that time you must realize, and I think the record will show, that we had been through a trying eight weeks and we had thought the relatives would be able to raise money for psychiatrists, *and in addition to that we have felt since then that possibly our only hope lies in an appeal.* (Emphasis added.)

"The Court: For that reason you want to get all the errors in the record possible.

"Mr. Chula: The point is this—*we feel there is enough in the record already*—but the point is this, that we felt that merely by going into this matter and putting ourselves out financially, individually—we are attempting at this time to get this thing over with as fast as possible. (Emphasis added.)

"The Court: That is what I am trying to do.

"Mr. Chula: Further, Your Honor, I would like to state an objection to the statement of your Honor—personally I get along with you, I hope—but this is a matter of legalities, that the statement made by the judge, being in the presence of the press and if the same is so printed, is a prejudicial error on the part of the Judge in this case, and I so cite the same.

"The Court: All right, that is the end of it."

Another incident is cited (which we designate as Charge No. 3) as occurring at the bench when petitioner assigned a statement of the judge as prejudicial error and remarked: "I don't know what number it is" (the number of the assigned errors up to that time).

In another charge (No. 4) respondent claims contempt in the following demeanor:

"Mr. Chula: May I approach the bench?

"The Court: Surely.

"Mr. Davis: May I finish the question?

"The Court: I don't know what we are approaching the bench for.

"(The following took place at the Court's bench outside the hearing of the jury.)

"Mr. Chula: *You know very well what I am approaching the bench for.* (Emphasis added.)

"The Court: Are you talking to me when you say that?

"Mr. Chula: No—Mr. Davis."

These constitute the major acts claimed to be contemptuous. As to the latter's claim (No. 4) a mere recitation of the

dialogue between the parties clearly shows that Mr. Davis may have made the remark instead of the trial judge, or at least the petitioner believed that the remark was made by the prosecuting attorney and not by the court at that time, and so indicated by his answer to the court's question. Apparently the court was satisfied of the fact that petitioner thought that the prosecuting attorney made the remark at the time. The judge did not assign such remark as contemptuous and did not warn petitioner nor rebuke him for making such a remark. He admits in his statement that he did not remember this conversation until he discovered it in reading over the record after the trial was completed.

In Gallagher v. Municipal Court, 31 Cal. 2d 784, at 797, 192 P.2d 905, 913, the court stated: "The heat of courtroom debate, particularly where liberty is concerned, often gives rise to persistence on the part of counsel. If the words used by counsel are respectful and pertinent to the matter before the court, it is not unnecessarily burdensome to require the judge first to warn the attorney that his tone and facial expressions are offensive and tend to interrupt the due course of the proceeding. Otherwise, attorneys could be subjected to fines and jail sentences because of personal annoyance and pique on the part of trial judges; and these penalties could be rendered unassailable, as is contended here, by lengthy recitals in the orders of contempt respecting the demeanor of the contemner." No willful contemptuous conduct thus appears.

As to charge No. 3, the record shows that petitioner did, on other occasions, cite statements of the judge as prejudicial error, and apparently was endeavoring to list the number of such assigned statements in sequence. Petitioner claims that he thought the court was keeping track of the assigned errors by number. Likewise, it also here appears that the judge did not assign this statement as contemptuous at the time, nor did he "warn" nor "rebuke" petitioner for such claimed misconduct. It does not appear that this claim is deserving of particular consideration.

As to charge No. 2, it appears that the statement was made by petitioner in the court's chambers, in which he clearly demonstrated to us that all parties had been through a "trying eight weeks"; that the court felt as though petitioner was merely endeavoring to have it commit some prejudicial error in the trial of the action by its rulings, and the court accused petitioner of such conduct. The petitioner endeavored to explain his actions and probably did unkindly remark: "We feel there is enough in the record already". Petitioner claimed that on the trial of the "not guilty" plea, the court had already committed what petitioner believed were prejudicial errors, and that he did in this manner inform the court of that fact. These remarks rather indicate that both counsel and the trial judge were rather tired and were, to some extent, wearing upon the nerves of each other. Standing alone, it does not appear that this remark would justify the judgment of contempt and the punishment inflicted.

As to charge No. 1, a more serious problem is presented. There is confusion in the record as to whether petitioner recalled the witness for further cross-examination or whether he recalled him for the purpose of making him his own witness. The record shows that the witness was under cross-examination when dismissed. The following day petitioner asked permission of the court to recall the witness for *further examination.* He stated: "Dr. * * I called you back because I would like to ask you a few questions, a few more questions on schizophrenia and what it is, and certain facts about it."

The court sustained an objection to a proper question then propounded on cross-examination, on the ground that the "matter has already been gone into on *direct* examination". The ruling on the named ground was clearly erroneous because the court-appointed witness had testified on direct examination and was then on cross-examination on the subject. The petitioner, to avoid the erroneous ruling, apparently offered to make the witness his own witness and the court thereafter "sustained" an objection to it. The petitioner

then approached the bench, as heretofore indicated, and correctly explained to the court that since the witness was a court-appointed witness and had been examined by the court, the defendant should have had a right to cross-examine the witness on the subject matter. Apparently foreclosed of this right, petitioner then maintained a right to call the witness as his own witness for the purpose of bringing out certain testimony, and the court stated that if petitioner saw fit to make the witness his own he could do so, but it would allow no cross-examination. Thereafter, objections to several questions were sustained as leading, until petitioner propounded the following question: "Well, a person who has schizophrenia, if a person has schizophrenia, will it show up organically?" The court overruled an objection to this question, as "leading" and as "improper direct examination", and thereafter considerable testimony was admitted bearing on the subject. The judge then again sustained objections to a series of similar questions on the subject, on the ground that they were leading, and overruled others. It should be noted that after many such rulings were sustained on the ground that the questions were leading, petitioner inquired of the court:

"Is it my understanding, then, Your Honor, that the ruling means I am not to ask any questions on schizophrenia at the present time of this witness?

"The Court: Nothing of the kind.

"Mr. Chula: What, sir?

"The Court: Nothing of the kind."

Petitioner then proceeded as indicated.

As heretofore stated, the petitioner, being young and inexperienced in the trial of criminal cases, was appointed originally by the court to defend the defendant. The record indicates that petitioner did, on several occasions, ask the permission of the court to withdraw as such attorney, which request was denied. It does appear that he did prosecute the first trial with some degree of success. The trial judge immediately ordered a retrial of the remaining charges at a time when public opinion was aroused and all parties were in a somewhat nervous state of mind. In the trial of the insanity action no doubt the petitioner felt a keen responsibility rested upon him in his efforts towards his client. Apparently the defendant was without funds to employ medical experts in his own behalf and petitioner was endeavoring to make use of the testimony of the medical witnesses appointed by the court for the purpose of establishing defendant's claimed defense of insanity. We see no valid reason why counsel for the defendant should not have taken advantage of this privilege because, as indicated by petitioner in presenting his reasons for further examination of the medical witness, he pointed out that under sec. 1027 of the Penal Code it is the duty of the alienist appointed by the court to examine the defendant and investigate his sanity and to testify in any proceeding in which the sanity of the defendant is in question. He may be called by either party to the action or by the court itself. When called by the court or by either party to the action, the court may examine the alienist and either party may cross-examine him in the order directed by the court. When called by either party to the action the adverse party may examine him the same as in the case of any other witness called by such party.

[3, 4] In People v. Hickman, 204 Cal. 470, 268 P. 909, 270 P. 1117, it was held that a person charged with a crime is presumed to be sane until the contrary is established by a preponderance of the evidence, and it was stated that where insanity is introduced as a defense, to prove it by a preponderance of the evidence does not affect the other rule that the burden of proving sanity is on the prosecution, and that the rule relating to the defense of insanity does not shift the burden of proof from the people to the defendant but only shifts the *burden of introducing evidence* and declares the amount or quantum of evidence which he must produce to overcome the presumption and show his insanity. It therefore appears that a broad latitude should be allowed counsel for defendant under the circumstances in meeting the burden imposed upon

him by law. It does appear that petitioner was somewhat persistent in his endeavors to establish by the witness certain medical testimony, and in doing so he did ask repetitious questions bearing on this subject. Hypothetical questions directed to an expert witness are not necessarily leading questions. In Dees v. Louisiana Oil Refining Corporation, La.App., 162 So. 597, 600, the court said: "Leading questions are always permissible when experts are being interrogated as witnesses". The general rule appears to be that stated in Galveston and H. & S. A. Ry. Co. v. Powers, Tex.Civ. App., 101 S.W. 250, 254, where it is said: "* * * it is ordinarily permissible to ask an expert witness a leading question when his opinion is sought upon a matter about which, by reason of his professional knowledge and skill, he has peculiar information."

See, also, People v. Wheeler, 60 Cal. 581; Rose v. National Lead Co., Mo.App., 94 S. W.2d 1047; Alaska United Gold Min. Co. v. Keating, 9 Cir., 116 F. 561; In re Estate of Melvin, 85 Cal.App. 691, 259 P. 980; 32 C.J.S., Evidence, § 550, p. 344, note 23; State v. Allemand, 153 La. 741, 96 So. 552; Sanguinett v. May Department Stores Co., 228 Mo.App. 1161, 65 S.W.2d 162; Strever v. Woodard, 160 Iowa 332, 141 N.W. 931, 46 L.R.A.,N.S., 644; Edwards v. Burke, 36 Wash. 107, 78 P. 610; 22 C.J. p. 705, § 794, footnote 14(e); 32 C.J.S., Evidence, § 550. There are, however, a few cases, based upon the questions there presented, which we have discovered that might indicate a contrary holding. See, Missouri, K. & T. Ry. Co. of Texas v. Johnson, Tex.Civ.App., 193 S.W. 728; 22 C.J. 710, § 798, 32 C.J.S., Evidence, § 551, and cases cited.

Respondent points out that it was immaterial whether the court's ruling was or was not correct; that it was nevertheless petitioner's duty to abide the ruling of the court and not persist in propounding leading questions, citing Penal Code sec. 1044, and Fisher v. Pace, 336 U.S. 155, 69 S.Ct. 425, 93 L.Ed. 569.

[5, 6] This general statement may be true. However, where the trial court makes an erroneous ruling as to the admissibility of a certain line of evidence, counsel for defendant should be given much latitude in pressing his point and in convincing the court of the error, at the time it is made. The correctness of the ruling may bear upon the question whether such persistence in pressing petitioner's claimed right is solely in the interest of his client's defense or whether his actions constitute wilful disobedience of a ruling, particularly where petitioner inquired of the court, if by its ruling it meant that petitioner should not pursue the subject of schizophrenia any more, and the court remarked: "Nothing of the kind". When an expert witness has testified that in his opinion a defendant was sane at a particular time, considerable latitude should be allowed counsel for the defendant to cross-examine the witness so testifying on the subject matter. 32 C.J.S., Evidence, § 560, p. 369.

It does appear, from the 112 pages of testimony pertaining to the cross-examination of this doctor, that very few pages were devoted to the subject of schizophrenia. From a reading of the questions as propounded, to which questions the court sustained objections on the ground that they were fully covered by a previous cross-examination, it is difficult to determine from the record whether they were in fact fully covered. It is true that the court did allow the witness to answer many of the questions propounded by petitioner on this subject and clearly indicated that it did not intend to preclude the petitioner from propounding questions about schizophrenia. The court did not permit the witness to answer the questions, mainly on the ground that the questions were leading.

[7] As pointed out by respondent, defense counsel, however zealous in his client's behalf, has, as an officer of the court, a paramount obligation to the due and orderly administration of justice, and at all times should maintain a respectful attitude toward the court. A disavowal of intentional disrespect or wrongful intent is no defense to a contempt order. Daily v. Superior Court, 4 Cal.App.2d 127, 40 P. 2d 936.

[8, 9] It is true that an attorney cannot always be right and may be wholly wrong in his position upon the legal ques-

tion under argument, and to the mind of the court so plainly wrong that the latter may conceive that it requires no enlightenment from the argument of counsel. But, whether right or wrong, he has the right to an opportunity to present his theory of the case on any occasion where the exigency of the pending point in his judgment requires or justifies it. Platnauer v. Superior Court, 32 Cal.App. 463, 475, 163 P. 237; Bennett v. Superior Court, 99 Cal.App. 2d 585, 595, 222 P.2d 276. An attorney has the duty to protect the interests of his client. He has a right to propound a legitimate argument and to protest an erroneous ruling, and there is no rule permitting a court to punish an attorney because he is honestly mistaken in his interpretation of the law when he presents his mistaken views to the court in a proper and respectful manner.

In Gallagher v. Municipal Court, 31 Cal. 2d 784, 192 P.2d 905, the court cited with approval Platnauer v. Superior Court, supra, and stated, 31 Cal.2d at page 788, 192 P.2d at page 908: "But certainly a mere mistaken act by counsel cannot render him in contempt of court. Even if a legal proposition is untenable, counsel may properly urge it in good faith; he may do so even though he may not expect to be successful, provided of course, that he does not resort to deceit or to *wilful* obstruction of the orderly processes." (Italics ours.)

In Caldwell v. United States, 9 Cir., 28 F.2d 684, the court held that punishment of an attorney, as for contempt, for repetition in different form of a question to which objection had been sustained, was unwarranted; and that since there was no showing that there was any *wilful* attempt to evade the court's ruling, it pointed out that "unless a ruling is amplified by an explanation of the reasons therefor attorneys, especially in the course of rapid cross-examination, often put a question in different form, as a matter of caution, and with no desire to evade the ruling of the court, or to be contumacious", and said: "Thus suddenly to punish for conduct of doubtful propriety only, where the intent to be insubordinate is not clear, might very well have the result of deterring an attorney of less courage and experience from doing his full duty to his client."

See, also, Sprinkle v. Davis, 4 Cir., 111 F.2d 925, 930, where it is said: "Even if it be conceded that the offered evidence was inadmissible, counsel were nevertheless entitled to offer it in good faith, free from threat of punishment by the court. Actions taken by counsel during the course of trial under a mistaken view of the law do not constitute contempt of court; and a careful examination of the record convinces us that there was no such perseverance by defendant's counsel in a mistaken point of view contrary to the rulings of the court as to constitute improper conduct on their part." And, also, In re Lake, 65 Cal.App. 420, 224 P. 126.

In the instant case the record would not sustain a finding that anything petitioner said or did was boisterous, noisy, offensive, or threatening in any manner. In the contempt proceedings had before the trial judge, he so stated. In that statement he based his order mainly upon the claim that his ruling was that the questions propounded were leading and suggestive; that since petitioner had recalled the witness as his own witness, and so informed the court, and since petitioner thereafter proceeded to cross-examine him after the court admonished petitioner not to do so on several occasions, he violated the court's ruling in pursuing such conduct.

[10] We have examined the entire record presented pertaining to these proceedings and fail to find therefrom, contrary to the trial judge's finding, that the acts complained of show that petitioner did "willfully", "deliberately", and "with complete disregard and in flagrant violation of" the admonitions of the court, ask leading questions for the purpose of placing before the jury improper matter, and that such actions were so contumacious as to justify the order or the penalty inflicted.

Accordingly, the order adjudging petitioner guilty of contempt of court and imposing sentence thereon is annulled.

BARNARD, P. J., and MUSSELL, J., concur.

HANDLER v. BOARD OF SUP'RS OF SAN MATEO COUNTY et al.*

Civ. 14786.

District Court of Appeal, First District, Division 2, California.

Jan. 29, 1952.

Hearing Granted March 27, 1952.

Mandamus proceeding by Marvin Handler against The Board of Supervisors of the County of San Mateo, State of California, and others, to compel payment of a claim. The Superior Court, County of San Mateo, Elmund Scott, J., entered judgment denying writ of mandate, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that where resolution of employment of plaintiff as special assistant to the District Attorney did not comply with any of the terms of the county charter, legal liability was not fixed upon the county and claim for services rendered under such resolution was properly rejected by the controller.

Affirmed.

1. Counties ⇐1, 21½

A county, as distinguished from an incorporated city, is but an agency of the state and its powers are those delegated by the Constitution and by the legislature and they do not extend by implication beyond such delegation.

2. District and Prosecuting Attorneys ⇐8

The district attorney, as an officer of the county, is in a sense a state agent deriving his powers and duties from the legislature.

3. Counties ⇐204(2)

District and Prosecuting Attorneys ⇐3(5)

Where resolution of employment of plaintiff as special assistant to the District Attorney did not comply with any of the terms of the San Mateo county charter, legal liability was not fixed upon the county and claim for services rendered under such resolution was properly rejected by the controller. St.1933, pp. 2953, 2962, 2967, art. 5, § 2(f), art. 7, §§ 2, 3; St.1938, Ex. Sess., p. 125, art. 3, § 2(a, b, d, f, j); St. 1943, p. 3146.

4. Counties ⇐204(2)

It is the duty of the county controller to approve claims which are legal charges against the county and it is not his function to determine whether proposed expenditures might relate to some public welfare. Const. art. 11, § 6.

Paul A. McCarthy, Redwood City, Howard Magee, San Francisco, for appellant.

Louis B. Dematteis, Dist. Atty. of San Mateo County, John A. Bruning, Asst. Dist. Atty., Redwood City, for respondents.

NOURSE, Presiding Justice.

Plaintiff appeals from a judgment denying him a writ of mandate to compel the county auditor to approve and the county treasurer to pay his claim for legal services rendered to a private group of citizens in contesting before the State Public Utilities Commission an application of the Southern Pacific Company for permission to increase passenger fares from points between San Francisco and San Jose. Judgment was rendered upon sustaining a demurrer to the complaint on the theory that it was not a valid claim for which county funds could be expended.

Pending the hearing before the State Commission the County Board of Supervisors undertook to employ the plaintiff and his assistant as special assistants to the district attorney and to pay them the sum of $1,500, provided the legality of such employment could be established. And the only question presented on this appeal is whether the supervisors acted within the law when they authorized such employment.

In support of his contention that the services to be rendered were of a public nature appellant relies on a number of cases chiefly concerned with the powers of a municipality under the "municipal affairs" powers contained in their charters. It is well known that many city charters grant the cities power to expend municipal funds for what appear to be semi-private purposes such as the advertisement and exploitation of the city's resources and attractions. But where such activities have been confirmed the courts have uniformly relied on the "municipal affairs" clause of art. XI, section 6 of the Constitution.

* Subsequent opinion 246 P.2d 671.

[1] But, when we come to the question of the powers of a County Board of Supervisors another question arises. It has been uniformly held that a county, as distinguished from an incorporated city, is but an agency of the state, that its powers are those delegated by the Constitution and by the legislature, and that they do not extend by implication beyond such delegation. In Irwin v. County of Yuba, 119 Cal. 686, 690, 52 P. 35, 37, it is said: "It may be safely stated as a rule that one who demands payment of a claim against a county must show some statute authorizing it, or that it arises from some contract, express or implied, which itself finds authority of law. It is not sufficient that the services performed, for which payment is claimed, were beneficial."

[2] No contention is made that any statewide legislation exists authorizing the supervisors to employ special counsel for the purpose of resisting increases in public utility rates. The district attorney, as an officer of the county, is in a sense a state agent deriving his powers and duties from the legislature. The number and the duties of his deputies are fixed by the legislature unless the charter prescribes otherwise. On the ancient doctrine of Zottman v. City and County of San Francisco, 20 Cal. 96, 102 that "The mode * * * constitutes the measure of the power" it is incumbent on the appellant to follow the "mode" before he can ask the supervisors to exercise the power of employing special deputies or assistants to aid the district attorney. Since there is no general statute authorizing the supervisors to make the employment the status of the appellant must be determined by an examination of the county charter.

The powers of the board of supervisors under the San Mateo county charter, St. 1933, p. 2953 and Stats. 1943, p. 3146, in so far as they relate to the employment of deputies and assistants for county elective officers, are specified in Artile III section 2, subds. (a), (b), (d), (f) and (j). Under subd. (a) the supervisors are authorized "To appoint, remove or suspend from office, in the manner and method herein provided, all appointive county officers, boards and commissions". Under subd. (d) they are authorized "To provide, by ordinance, and therein to fix and regulate, the appointment and number of assistants, deputies, clerks, attaches, and other persons to be employed, from time to time, in the several offices of the county, and therein to prescribe and regulate the powers, duties, qualifications and compensation of such persons, the times at which, and the terms for which, they shall be appointed, and the manner of their appointment and removal". Subd. (f) provides: "To provide, by ordinance, upon the recommendation of the county executive, for the creation of offices other than those required by the Constitution and laws of the state, and, upon the like recommendation, for the election or appointment of persons to fill the same, for the manner of such appointment, for the times at which and the terms for which such persons shall be so elected or appointed, and to prescribe their duties, and to fix their compensations." St.1938, Ex.Sess., p. 125.

Article V, section 2, subd. (f) relating to the powers of the county executive, reads: "To employ, by and with the approval of the board of supervisors, experts and consultants to perform work and advise, in connection with any of the functions of the county, when economically advantageous." St.1933, p. 2962.

Sec. 2 of Article VII reads in part: "Every elective county or township officer (i. e. District Attorney) shall have plenary power to appoint or remove his or their deputies, clerks, attaches or employees." St.1933, p. 2967. Section 3 of the same article provides: "The district attorney shall advise the board of supervisors and all county, township and district officers in all matters and questions of law pertaining to their respective functions, powers and duties, and, subject to the provisions of the general law empowering the board of supervisors to employ special counsel, shall have exclusive charge and control of all civil actions and proceedings in which the county, or an officer, board or commission of said county is a party, or is officially concerned or interested." St. 1933, p. 2967.

[3] That the procedure followed here did not comply with these provisions of the charter must be conceded. The employment was made by a resolution of the board appointing plaintiff and his assistant as "special assistants to the District Attorney." If additional assistants to the District Attorney were necessary or proper they should have been employed by the District Attorney under an authorization by ordinance of the board of supervisors. The resolution of employment does not comply with any of the terms of the county charter and hence it did not fix any legal liability on the county. Such being the case the controller properly rejected the claim.

[4] In view of our holding on this phase of the case it is plain obiter dictum to rule on the power of the county to expend county funds in resisting increases in private passenger fares to those of its citizens who used the railway mode of transportation to their homes and we express our views on that subject solely because it is the point so fully argued in the briefs. Concededly no express provision of the statutes or the county charter authorizes such expenditures. Proceedings before the Public Utilities Commission for increases in rates of fare for transportation, communication, and public services are frequent and have continued for a great many years. It is not unreasonable to assume that if the legislature desired to authorize the use of public funds to contest such increases it would have used some language expressing that purpose. But there is nothing in the general law or in the San Mateo County Charter which indirectly hints at such a purpose. It is the duty of the county controller to approve claims which are legal charges against the county and not others. It is not his function to determine whether the proposed expenditure might relate to some public welfare. If the law does not authorize it he cannot be compelled to approve it.

We have not been given any reference to any law authorizing the expenditure of public funds for these purposes and must conclude that the controller performed his duty in rejecting the claim.

Judgment affirmed.

GOODELL, J., and PATTERSON, J. pro tem., concur.



109 Cal.App.2d 189

PEOPLE v. HOBBS.

Cr. 2787.

District Court of Appeal, First District, Division 2, California.

Feb. 11, 1952.

Roy Hobbs was convicted in the Superior Court of the State of California for the County of Contra Costa, Harold Jacoby, J., for violation of Penal Code, § 288, and he appealed from the judgment and order denying new trial motion. The District Court of Appeal, Jones, J., pro tem., held that the evidence was sufficient to sustain the conviction.

Judgment and order affirmed.

1. Infants ⇐13

Section 288 of the Penal Code was enacted to protect children from lustful advances and tamperings of callous and unscrupulous persons as well as from the assaults of depraved unfortunates. Pen. Code, § 288.

2. Infants ⇐13

In all cases arising under section 288 of the Penal Code, the purpose of the perpetrator in touching the child is the controlling factor and each case is to be examined in the light of the intent with which the act was done. Pen.Code, § 288.

3. Infants ⇐13

If intent of the act, although it may have the outward appearance of innocence, is to arouse or appeal to or gratify the lust and the passion or the sexual desire of the perpetrator it stands condemned by section

288 of the Penal Code, or if it is intended to arouse feelings of passion or sexual desire in the child it likewise stands condemned, and the intent with which the act is done is manifested by the circumstances under which it was committed. Pen.Code, §§ 21, 288.

4. Infants ⇐13

Each case involving a lustful advance upon a child must be decided by the evidence introduced and is not necessarily controlled by a previous decision. Pen. Code, § 288.

5. Infants ⇐20

Evidence warranted conviction for violation of section 288 of the Penal Code. Pen.Code, § 288.

Marcollo, Cannelora & Marcollo and Calfee, Gregg, Moses & Calfee, Richmond, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

JONES, Justice pro tem.

The defendant in this action stands charged by an amended information with a violation of section 288 of the Penal Code committed against a twelve year old school child. He is also charged with prior convictions of grand theft in Missouri and burglary in Idaho. Both prior convictions were admitted but a plea of not guilty was entered to the principal charge. The jury returned a verdict of guilty, and defendant has appealed from the judgment and from the order denying his motion for a new trial.

The only ground urged for a reversal of the judgment is that the evidence is insufficient to sustain the verdict. Appellant contends that the acts committed by him do not come within the purview of said section 288 and that no offense was committed.

Section 288 provides that: "Any person who shall wilfully and lewdly commit any *lewd* or *lascivious* act including any of the acts constituting other crimes provided for in part one of this code *upon* or *with* the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of *such person* or of *such child,* shall be guilty of a felony * * *." (Italics added.)

The act is alleged to have been committed on the 8th day of June, 1951. The defendant contends that his actions as disclosed by the record were neither lewd nor lascivious, his contention being that at all times he conducted himself only in a fatherly manner toward the child.

On June 8, he met the girl by appointment in front of a cafe about one and one-half blocks from her home. According to his version his object was to take her to school. He was driving a yellow pick-up truck at the time. Upon meeting him the girl climbed into the cab of the pick-up and they drove to a spot about a block from the school where he stopped and parked. He then changed places with her on the seat of the truck. The child testified:

"Q. And when the truck was stopped, what happened if anything? A. Well, he started kissing me.

"Q. And by 'he' who do you mean? A. Roy Hobbs.

"Q. Go ahead. What else happened there? A. Well he just started kissing me and this truck driver came by and he yelled something in the window, and at that time we were laying in the seat.

"Q. Pardon? A. We were laying in the seat at that time.

"Q. You say you were laying down in the seat. Do you mean both of you? A. Yes sir.

"Q. You say some truck driver came by, is that right? A. Yes sir.

"Q. And what were you doing during this time? A. I was kissing him back. * * *

"Q. Do you remember him saying anything to you about loving you or going away with you, while you were on the truck? A. Yes sir, I do.

"Q. What did he say, if anything? A. He just told me he loved me, but he didn't mention anything about running away.

"Q. He didn't say anything about that at that time? A. Not that morning. * * *

"Q. When you were laying down on the seat, what happened if anything besides him kissing you and you kissing him? A. He put his hand on my leg.

"The Court: Will you show us where he put it?

"The Witness: About here.

"The Court: On top of your clothing or underneath?

"The Witness: Underneath.

"The Court: Underneath?

"The Witness: Yes sir.

"The Court: Did you have a dress on?

"The Witness: A skirt.

"The Court: A skirt. Did you have any panties on?

"The Witness: Yes sir.

"The Court: He put his hand underneath your skirt on top of your panties or under your panties?

"The Witness: No, he didn't have it that far up. He just had it there.

"The Court: Had it right there. All right.

"Q. What prevented him if anything from putting his hand on your privates? A. I did.

"Q. How did you stop him from doing it? A. I just pushed his hand away.

"Q. And this all occurred while you were laying down? A. Yes sir.

"Q. And while he was kissing you at that time? A. Yes sir."

The witness Thompson testified:

"Q. About how long was the car there, that you know of? A. Well, from about fifteen minutes to 8 to at least fifteen after 8. * * *

"Q. You said they were embracing and loving each other. Could you tell the jury what they were doing, what you saw, what you meant by that? A. Well, she had her arms around his neck, and he had his arms around her, and they were embracing there, very—well, I wouldn't say—they looked like they were very much in earnest with what they were doing. * * *

"Q. You said you could see them in the back of the truck there in the seat, and they would fall over, I believe that is what you said, is that right? A. Yes, * * *

"Q. And when you were watching them when they disappeared from view, was the girl like on top or the bottom, or could you tell? A. She was on the bottom."

William Kameyer, a carpenter for the Richmond School Department, testified that

"Q. And with reference to the truck, did you see anything? A. I seen two people in there kissing.

"Q. What else did you see, if anything? A. That is all. They were just up and down all the time.

"Q. Will you tell the jury what you meant by 'up and down'? A. Well, you could see them once in awhile sitting up, and next time they would be laying down on the seat.

"Q. And did you ride by that yellow truck? A. Yes sir, I did.

"Q. And what did you do when you rode by there? A. I yelled and asked him what he thought he was doing."

Henry Coate, another employee of the school district, testified that he too saw a man and a lady embracing in a very passionate manner in the truck. The defendant had driven the child to school on other occasions and on three separate occasions met her in a theatre where on each occasion he kissed her. These clandestine meetings continued over a period of about three weeks.

Counsel for appellant in support of the argument that the act of the defendant in lying on top of the girl on the seat of the truck embracing and kissing her passionately, and placing his hand on her leg beneath her clothing and reaching for her private parts does not come within the purview of the statute has assembled and presented a voluminous list of cases in which acts of degradation were involved.

It is urged that these cases in which a degraded act was made the basis of the charge establish the standard by which it is to be determined whether an act is lewd or lascivious. It is contended that if the act is not obscene it is neither lewd nor lascivious. This is not the rule.

[1–4] Section 288 of the Penal Code was enacted to protect children from the lustful advances and tamperings of callous and unscrupulous persons as well as from the assaults of depraved unfortunates. In all cases arising under this statute the purpose of the perpetrator in touching the child is the controlling factor and each case is to be examined in the light of the intent with which the act was done. In People v. Owen, 68 Cal.App.2d 617, 620, 157 P.2d 432, 433, it is said that "It is not the accomplishment but the intent of the party that is the basis of the commission of the acts condemned in Penal Code, section 288." If intent of the act, although it may have the outward appearance of innocence, is to arouse, or appeal to, or gratify the lust, the passion or the sexual desire of the *perpetrator* it stands condemned by the statute, or, if it is intended to arouse feelings of passion or sexual desire in the *child,* it likewise stands condemned. The intent with which the act is done is manifested by the circumstances under which it was committed. (Pen.Code sec. 21.) As is said in People v. Owen, supra, each case involving a lustful advance upon a child "must be decided by the evidence introduced and is not necessarily controlled by a previous decision".

[5] The probative force of the evidence in this case is so strong that it obviates any inference that the defendant had any other object than to arouse passion and sexual desire in the child and to gratify his own lust. Not only is the evidence amply sufficient to sustain the verdict but it negates appellant's further contention that it is insufficient to establish his guilt beyond a reasonable doubt.

The judgment and the order denying the motion for a new trial are each affirmed.

NOURSE, P. J., and GOODELL, J., concur.

109 Cal.App.2d 90

FOUNTAIN et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 8011.

District Court of Appeal, Third District, California.

Feb. 1, 1952.

Hearing Denied March 31, 1952.

Vera F. Fountain and others sued the Bank of America National Trust and Savings Association, individually and as executor of the will of Thomas J. Cartner, deceased, testator's estate, the estate of Margaret Meyers, deceased, and the administrator thereof, for personal injuries and property damage suffered in a collision between plaintiffs' automobile and an automobile operated by Margaret Meyers, to whom it was bequeathed by the will. From a judgment of the Superior Court, Solano County, Joseph M. Raines, J., for plaintiffs, defendant Bank, individually, appealed. The District Court of Appeal, Van Dyke, J., held that the Bank's right, as testator's personal representative, to possess the bequeathed automobile for administrative purposes, did not make the Bank the owner thereof within the ownership liability section of the Vehicle Code, and that the question as to whether legatee's use of such automobile at the time of the accident was within the limits of permission given her by the Bank was a fact issue for the jury.

Judgment reversed.

1. Automobiles ⇐242(6)

Where issue of use of automobile by driver with owner's permission at time of collision with another automobile is raised by pleadings in action under Vehicle Code for resulting injuries to occupants of other automobile, burden is on plaintiffs to prove that defendant was owner of automobile being driven by such user and that it was being used with defendant's express or implied permission at time of collision. Vehicle Code, §§ 66, 402.

2. Descent and Distribution ⇐75, 76
Wills ⇐722, 723

Title to real and personal property passes on owner's death to devisee or legatee under his will, or, in absence thereof, to persons succeeding to his estate under statute of descents. Probate Code, § 300.

3. Executors and Administrators ⇐315(5)

Heirs' title to deceased ancestor's property does not originate in distribution decree, which only releases property from administration.

4. Descent and Distribution ⇐75, 76
Wills ⇐722, 723

Under statute of descent and decedent's will, if any, his entire estate, both real and personal, with all accretions, vests in his heirs and devisees immediately on his death, if not otherwise provided, subject only to executor's or administrator's lien for administration purposes with right in administrator to possession of property until estate is settled or delivered to parties entitled thereto by probate court order. Probate Code, § 300.

5. Execution ⇐44, 45
Judgment ⇐780(7)

A creditor may obtain a judgment lien and execute on his debtor's interest in a decedent's estate as heir or devisee and legatee before distribution thereof.

6. Executors and Administrators ⇐154

A decedent's personal representative is generally entitled to exclusive possession of personalty of decedent's estate for purposes and during course of administration thereof, and his possession is deemed that of court. Probate Code, § 300.

7. Automobiles ⇐192(1)

A decedent's personal representative, either in or out of possession of real or personal property of decedent's estate, is not "owner" thereof within ordinary meaning of such word or scope thereof as defined in Vehicle Code. Vehicle Code, § 66.

See publication Words and Phrases, for other judicial constructions and definitions of "Owner".

8. Executors and Administrators ⇐154

A decedent's personal representative in possession of automobile specifically bequeathed by decedent's will has no right to general use thereof for general benefit of decedent's whole estate or at all.

9. Automobiles ⇐192(1)

An executor's right, as testator's personal representative, to possess, for administrative purposes, an automobile specifically bequeathed by will, did not make executor "owner" thereof within statute declaring owner of motor vehicle liable for death of or injury to person or property damage resulting from negligent operation thereof by another with owner's express or implied permission. Probate Code, § 300; Vehicle Code, §§ 66, 402.

10. Executors and Administrators ⇐429

The section of Vehicle Code, declaring motor vehicle owner liable for death of or injury to person or property damage resulting from negligent operation of vehicle by another with owner's express or implied permission, does not authorize action against administrator or executor of deceased owner's estate by injured persons on theory that purpose of section is to provide some one to whom injured parties can look for redress, so as to render administrator or executor most logical party defendant in case of decedent's estate; section being addressed exclusively to subject of ownership liability, not liability of person having nothing but limited right or possession. Vehicle Code, § 402.

11. Executors and Administrators ⇐429

Failure of statute, declaring motor vehicle owner liable for death of or injury to person or property damage resulting from negligent operation of vehicle by another with owner's express or implied permission, to provide for liability of persons possessing automobiles, without having any ownership interests therein, in permitting use thereof by others, cannot be covered by construction, so as to render executor liable for injuries caused by negligent operation of testator's automobile by legatee thereof with executor's permission, though term "owner" has many meanings depending on circumstances of its use. Vehicle Code, § 402.

12. Automobiles ⇐245(26)

Whether use of automobile by legatee thereof was within limits of permission, given her by executor of will, to use

automobile in caring for rental properties of testator's estate and collecting rentals, at time of collision with another automobile 60 miles from such properties, was fact issue for jury in action against executor for resulting injuries to occupants of other automobile. Vehicle Code, § 402.

13. Automobiles ⇐192(1)

A substantial violation of limitations, imposed by owner of automobile, as to time, purpose or place of use thereof by another with owner's permission, terminates his original express consent to such use, so that permittee's subsequent use of automobile is without owner's permission required to render owner liable for personal injuries or property damage resulting from permittee's negligent operation of automobile. Vehicle Code, § 402.

14. Appeal and Error ⇐1067
Automobiles ⇐246(42)

In action against executor for injuries suffered in collision between plaintiffs' automobile and testator's automobile operated by legatee thereof, trial court's refusal of executor's requested instruction to find that legatee exceeded authority given her by executor, to use automobile, and that such authority was terminated, so as to require verdict for executor, if jury found from evidence that authority was limited to place where testator's rooming house business was to be conducted by legatee and that she was not operating automobile in such a place at time of collision, was prejudicial error, requiring reversal of judgment on verdicts for plaintiffs, in view of evidence and other instructions withdrawing from jury issue of legatee's violation of use limitation. Vehicle Code, § 402.

O'Hara, Randall, Castagnetto & Kilpatrick, Vallejo, Johnson & Davies, Sacramento, for appellants.

Belli, Ashe & Pinney, San Francisco, Taft, Wright & Hopkins, Vallejo, for respondents.

VAN DYKE, Justice.

Plaintiffs-respondents brought this action for personal injuries and property damage, suffered in an automobile collision between a Packard automobile operated by the plaintiffs and a Plymouth automobile operated by Margaret Meyers, who was killed in the collision. The Plymouth had been owned by Thomas J. Cartner until his death on December 11, 1946. By his will it was specifically bequeathed to Margaret Meyers. Appellant Bank of America National Trust and Savings Association was named executor of his will, was appointed and qualified as such and entered upon the performance of its duties. Margaret Meyers was a residuary legatee of a one-fourth interest in the estate and in part at least the estate consisted of certain rental properties which required attention. An assistant trust officer of the bank on receiving notice of the death of Cartner, on December 12, 1946 contacted Margaret Meyers and told her of the legacies. He testified as follows: That he met her after the first conversation and asked about the automobile; that Mrs. Meyers pointed to where the car sat at the curb on the street and stated that it had been Cartner's car; that he then discussed with her the matter of taking care of the rental properties and suggested that since she was a devisee in respect of this property that for the present it would be to her advantage to look after the same for the bank until a permanent and final arrangement could be worked out; that he pointed out she would be helping to protect her own property; that she had suffered an injury which made it difficult for her to get about and she spoke of using the automobile for that purpose; that she was told that, generally speaking, the bank, as an executor, impounded automobiles that had belonged to a decedent, but that if it was necessary for her to use the car involved here she would be permitted to do so for the purpose of enabling her to look after the estate property but for no other purpose, and that she was permitted to use the automobile in the immediate vicinity of the houses, which were in Oakland, for the purpose of performing the duty of looking after the same and for no other purpose; that she began using the car and during her use of it asked if she could take it to Oregon on a pleasure trip, which the bank refused to permit; that who should pay for gas, oil and garag-

ing was not discussed and no checkup on this was made by the bank; that the services Margaret Meyers performed in respect of the estate property were gratuitous and consisted mainly in collecting assets and rents of the estate and depositing them with the bank; that she was told she could not use the car for pleasure; that nothing was said expressly restricting the use to any specific geographical area. It was undisputed that at the time of the accident out of which this action arose both the white and the pink slips for the car were in the name of decedent and the pink slip was in the custody of the bank as executor. Subsequent to the accident the license plates and the white slip, still in the name of Cartner, were received by the bank. After the accident the car was sold for salvage and the money received by the bank, the balance of the property loss involved was paid to the bank through an insurance carrier. The bank never applied to the court for permission to let Margaret Meyers use the automobile nor had it ever applied for permission to carry on the business of the estate.

On February 4, 1947, in Solano County, about 60 miles distant from Oakland, a collision occurred between the Plymouth car and the automobile of respondents and there is no contention but that this collision was due to the negligent operation of the Plymouth car. In that car at the time of the accident were Margaret Meyers as driver, and her brother and her nephew. All were killed in the collision. They were driving north away from Oakland when the collision occurred. Traffic officers testified that the Plymouth car contained luggage, clothing, packages, canned fruits, preserves and personal belongings.

Respondents brought the action against the appellant bank as executor, and also against it in its individual capacity. The action was based upon two theories of liability. The first theory was that of agency (respondeat superior) and the second was that the bank was the "owner" of the car under Vehicle Code, Section 402, the ownership liability statute. At the close of respondents' case the trial court granted a motion for nonsuit in favor of the appellant bank as executor and later instructed the jury that there was no evidence of agency and hence that the sole ground of liability was under the ownership liability statute. The motion of appellant at the close of evidence for a directed verdict as to the claim of liability in its individual capacity under the statute was denied. The jury returned verdicts aggregating $11,000. Appellant's motion for a new trial was denied and this appeal followed.

The questions presented by this appeal are the following: Was the appellant bank the owner of the Plymouth car within the meaning of Vehicle Code, Section 402? If so, was the permission given by appellant to Margaret Meyers to use the car a limited permission and were these limitations violated as a matter of law so as to render the permission inoperative at the time of the accident? Did the trial court err in refusing an instruction requested by appellant?

Vehicle Code, Section 402, reads in part as follows: (a) Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

[1] Where the issue of permissive use is raised by the pleadings the burden is upon the plaintiff who seeks to recover under the statute to prove that the defendant was the "owner" of the vehicle involved and that at the time the injury was inflicted the vehicle was being used with the permission, express or implied, of such owner. The definition of the word "owner" which appears in the Vehicle Code is as follows: "'Owner' is a person having all the incidents of ownership, including the legal title of a vehicle whether or not such person lends, rents or pledges such vehicle; the person entitled to the possession of a vehicle as the purchaser under a conditional sale contract; the mortgagor of a vehicle; or the State, or any county, city, district or political subdivision of the State, when

entitled to the possession and use of a vehicle under a lease, lease-sale, or rental-purchase agreement for a period of twelve months or more." Vehicle Code, Sec. 66.

[2–6] Probate Code, Section 300 provides: "When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as provided in Division II of this code; but all of his property shall be subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, sale or other disposition under the provisions of Division III of this code, and shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family, except as otherwise provided in this code."

That the title to property, both real and personal, passes upon death to the persons entitled thereto as declared by the foregoing code section has been the law of this State for a long time. Noble v. Beach, 21 Cal. 2d 91, 130 P.2d 426. "The title of heirs does not originate in the decree of distribution," the decree serves only to release the property from administration to which it was subject. Bates v. Howard, 105 Cal. 173, 183, 38 P. 715, 718. "Under the Statute of Descents and under the will, if there is one, if not otherwise provided, the entire estate, both real and personal, with all accretions, vests in the heirs and devisees immediately on the death of the testator or intestate, subject only to the lien of the executor or administrator for the purposes of administration * * * with the right in the administrator of present possession, which continues till the estate is settled or delivered over to the parties entitled by the order of the Probate Court. * * * The executor has no more right to sell personal than real estate, unless necessary for its preservation, or to pay charges upon it. * * * He no more owns it, as he did at common law, than he does the real estate." Matter of Estate of Woodworth, 31 Cal. 595, 604, 605, 618. Further as to the nature of the title cast by the death of the owner we find in Noble v. Beach, supra [21 Cal.2d 91, 130 P.2d 429], the Supreme Court declaring: "Before distribution, a creditor may obtain a judgment lien on the interest of his debtor as heir or devisee and legatee of an estate * * *, and he may execute upon the debtor's interest at that time." "The personal representative is generally entitled to the exclusive possession of the personalty of the estate for the purposes, and during the course, of administration. His possession is deemed that of the court." 33 C.J.S., Executors and Administrators, § 300.

[7–9] It is obvious that a personal representative, either in or out of possession of estate property, real or personal, is not the owner thereof within the scope of the ordinary meaning of that word nor does the personal representative come within the scope of the word "owner" as that term is defined in Vehicle Code, Section 66, supra. If, then, we are to declare that the appellant was such owner in this case it must be because Section 402 can, in consideration of its purposes, be so construed as to permit that declaration. We think such a construction of the code section would do violence to its language and would amount to judicial legislation. Neither in Section 402 nor in the definition contained in Section 66 is there any hint that the word "owner" is to be taken as including one entitled only to possession; and even if there was we would still have to find that the limited sort of possession permitted to a personal representative, which is possession not for use but for purposes of administration, was intended to be included within the meaning of the word "owner" as used in the code. A personal representative in possession of a specifically-devised automobile would have no right to the general use of it either for the general benefit of the whole estate or at all, for that would be to consume the property of the legatee for the benefit of others. We think in this case that the right of the appellant as personal representative to possess, for administrative purposes, the Plymouth car specifically devised to Margaret Meyers falls entirely without the

meaning of the word "owner" as used in the legislation in question.

In Logan v. Serpa, 91 Cal.App.2d 818, 206 P.2d 70, 72, the court was concerned with the ownership of a car within the meaning of Section 402 of the Vehicle Code, which had been community property of the husband, then deceased, and his surviving wife. There had been no steps taken to administer the property in probate. The surviving wife was operating the car and had given permission to another to use it. An accident occurred and when the surviving wife was sued under the theory of ownership liability she denied ownership, claiming that possession and right of control of the automobile must be considered as being in the administrator to be appointed and in the probate court. Her contentions were rejected and she was held to liability as owner. ' Said the court: "Ownership, for the purpose of establishing liability under sec. 402 of the Vehicle Code must have been in someone, otherwise the real purpose of the act in protecting other people on the highway could be legally defeated by allowing cars to remain in the names of deceased persons. It appears to us, therefore, that since it was established that the car was community property, the argument of plaintiff is tenable, i. e., that under section 201 and 201.5 of the Probate Code 'upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse, and that in the absence of testamentary disposition by the decedent the other one-half goes to the surviving spouse.' "

We have not here the exact counterpart of the situation presented in Logan v. Serpa, supra, for in the case before us the appellant had been appointed as executor of the will of the decedent; and if it had not taken physical possession of the automobile before its negotiations with Margaret Meyers occurred, nevertheless it had the right to that possession and we think on appeal it must be considered that it had the actual possession. But its possession was not that of an owner, and even its right of possession was a limited one. This limited right does not authorize a personal representative to permit use by others. We are not here concerned with liability based upon the doctrine of respondeat superior. It may be that, construed as we think it must be construed, a personal representative in possession of an automobile who wrongfully permits its use by another creates a situation demonstrating a lack of the statute to cover that particular permissive use. But this affords no justification for a construction which is clearly without the meaning of the language used by the Legislature.

[10, 11] Respondents argue that the purpose of Section 402 "is to provide to injured parties someone to whom they can look for redress, the most logical party defendant in the case of an estate is the administrator or executor thereof". We think, however, the answer to this argument is that the Legislature has said nothing about liability of persons who have nothing but a limited right of possession. The Legislature has addressed itself exclusively to the subject of ownership liability. Respondent further argues that the term "owner" is one which has many meanings, depending upon the circumstances of its use. This is true, of course, but the Legislature was well aware that many people possess automobiles who have no ownership interest therein and yet no provision was made with respect to the liability of these in permitting the use by others of automobiles so possessed by them. The statutory omission is too broad to be covered by construction where the Legislature has elected to remain silent.

[12] Appellant next contends that even if the executor could be considered as individually liable as an "owner" under the Vehicle Code, yet Margaret Meyers must be held as a matter of law to have been driving at the time of the accident without the express or implied consent of the bank. This appellant says is so because if permission was given it was limited and the car at the time of the accident was being operated in violation of the limits of permitted use. That at least a limited use was permitted in so far as appellant executor could give permission was clearly shown. The car was left in the possession

of Margaret Meyers and it was arranged between her and the executor that she should perform certain services in connection with estate property and should use the car for that purpose. The trust officer testified, as has been noted, that he laid down specific limitations governing the car's use and no witness appeared who testified to the contrary. There was no express geographical limitation. The limitation expressed was that the car could not be used for pleasure purposes and could be used only in connection with caring for the rental properties of the estate and collecting the rentals therefor. But the car was left in the possession of Margaret Meyers and was garaged by her. Nothing was said about gasoline and oil or needed repairs and no checkup was ever made by the executor as to these items, thus indicating the executor's lack of concern as to such matters. In addition to all this there was no conclusive proof that the car was not being used within the limits of permission when the accident occurred. To be sure, it is difficult to see how the car could be used within the limits of permission as testified to by the trust officer up in Solano County 60 miles from the estate properties; and the car did contain luggage and the like, indicating that the driver and the occupants were on a trip not connected with the estate properties. But we think nothing more than an issue of fact as to limitations having been violated is presented by the record here. From the facts we have related, including the principal purpose of use, that is the care of estate property and the furthering of estate interests generally, it could be inferred that the use made was within the limits of the permission given.

[13, 14] Appellant further contends that the trial court committed prejudicial error in refusing to give the following instruction requested by it: "If you find from the evidence that the permission given Margaret Meyers to use the Plymouth automobile was restricted and limited to the place where the rooming house business of the Estate of Thomas J. Cartner, deceased, was to be conducted, and if you find further that at the time of the accident Margaret Meyers was not operating said automobile in a locality wherein the business of the rooming house was conducted, then and in that event you will find that Margaret Meyers did exceed her authority and the permission to operate the car was therein terminated, and in these events you must find for the defendant."

While we have said an issue of fact was presented as to whether or not use limitations were being violated at the time of the accident, yet that is but to say that an issue of fact in respect to such claimed violation was to be decided by the jury, for where permission is granted to operate a car for a limited time or for a limited purpose or within limitations as to place of use a substantial violation of any of such limitations terminates the original express consent and makes the subsequent use without permission. Henrietta v. Evans, 10 Cal.2d 526, 528, 75 P.2d 1051. In view of the evidence that had been given, as we have hereinbefore stated it, we think it clear that the instruction requested ought to have been given. Not only was it refused but the jury were told affirmatively that owners of motor vehicles were liable for negligent use by permittees and that whether such implied or express permission had been given was a question of fact for the jury to decide. The jury were then further instructed that if they should find that appellant "did in fact authorize and permit Margaret G. Myers, deceased, to operate their automobile, and that said Margaret G. Myers was negligent in the operation thereof, and that said negligence was the sole and proximate cause of the injuries herein" then their verdict should be for the plaintiffs and against the defendant. Thus the court effectively withdrew from the jury the issue of violations of use limitations and consequent unauthorized use in a case where the record would have supported a finding of the jury that for those reasons the use, although originally permitted, had become a use without permission.

We think it unnecessary to treat other contentions advanced by appellant since,

for the reasons hereinbefore given, the judgment appealed from must be and it is hereby reversed.

ADAMS, P. J., and SCHOTTKY, J., pro tem., concur.

Hearing denied; GIBSON, C. J., and SHENK and CARTER, JJ., dissenting.



109 Cal.App.2d 166

FINDLEY et al. v. GARRETT et al.

Civ. 18172.

District Court of Appeal, Second District, Division 3, California.

Feb. 8, 1952.

Rehearing Denied Feb. 29, 1952.

Hearing Denied April 3, 1952.

Kenneth H. Findley, and another, suing on their own behalf and on behalf of all other stockholders of Douglas Aircraft Company, Inc., brought a stockholders' derivative action against J. C. Garrett, and others. The Superior Court of Los Angeles County, Arnold Praeger, J., entered a judgment of dismissal on an order sustaining a demurrer to the complaint, and the plaintiffs appealed. The District Court of Appeal, Parker Wood, J., held that general charges of fraud, conspiracy and bad faith on part of majority of directors, without alleging facts, was insufficient to overcome presumption that the board of directors acted independently and honestly in declining to prosecute claims against minority group of directors.

Judgment affirmed.

1. Corporations ⇐296

Power to manage affairs of a corporation is vested in board of directors.

2. Corporations ⇐206(1)

Where board of directors, in refusing to commence action to redress alleged wrong against corporation, acts in good faith within scope of discretionary power and reasonably believes refusal to commence action is good business judgment in best interest of corporation, stockholder is not authorized to interfere by commencing derivative action.

3. Corporations ⇐320(8)

General charges in complaint in stockholders' derivative action of fraud, conspiracy and bad faith on part of majority of directors, without allegation of facts, were insufficient to overcome presumption that board of directors upon whom demand to bring action against minority of directors had been made, acted independently and honestly in declining to prosecute claims for fraud against minority of directors.

4. Corporations ⇐310(1)

Directors have same discretion with respect to prosecution of claims on behalf of corporation as they have in other business matters, and refusal to sue on fraud claim is not a ratification of the fraud, and mere fact that recovery for corporation would probably result does not require that action be commenced by the directors.

5. Corporations ⇐310(2), 320(11)

Where stockholders charged that minority group of directors had defrauded the corporation in transactions over a twelve-year period with another corporation of which the minority directors were majority stockholders, and majority of the board of directors was independent, decision as to whether the transactions should be investigated and prosecuted was a question of business and within board's discretion, and hence refusal to prosecute action could not be basis for stockholder's derivative action, in absence of showing that refusal was clearly against interest of corporation so that decision did not represent directors' honest and independent judgment.

6. Pleading ⇐225(2)

Where demurrer to original complaint was based upon defects and pleadings which were similar to defects in amended complaint, refusal to allow plaintiffs to amend after demurrer was sustained to amended complaint was not abuse of discretion.

Kenneth N. Dellamater and Ivan G. McDaniel, Los Angeles, for appellants.

Gibson, Dunn & Crutcher, Homer D. Crotty, Herbert F. Sturdy, Samuel O.

Pruitt, Jr., O'Melveny & Myers, Jackson W. Chance, Graham L. Sterling, Jr. and Philip F. Westbrook, Jr., all of Los Angeles, Frederick E. Hines, John A. Dundas and Louis Lieber, Jr., all of Santa Monica, Guthrie, Darling & Shattuck, Milo V. Olson, Morrow & Morrow, Hubert T. Morrow, and Leonard M. Comegys, all of Los Angeles, for respondents.

PARKER WOOD, Justice.

In this stockholders' derivative action, plaintiffs appeal from a judgment of dismissal which was entered upon an order sustaining a demurrer to the first amended complaint without leave to amend.

All the allegations of that complaint are upon information and belief, except the allegations in three of the paragraphs hereinafter set forth wherein it is stated that the allegations are not upon information and belief.

It is alleged in said amended complaint as follows:

Douglas Aircraft Company was incorporated in 1928, under the laws of Delaware, for the purposes of manufacturing and dealing in airplanes; acting as agent in dealing in aircraft manufactured by others; and obtaining and granting licenses with respect to manufacturing under and selling inventions, patents and trademarks. The Garrett Corporation, formerly known under other names, was incorporated in May, 1936, under the laws of California, for the purposes of manufacturing and acquiring aircraft parts, inventions, patents, licenses, and reselling and leasing same to Douglas Aircraft and other aircraft companies; acting as selling agent and distributor for various manufacturers in the sale or lease of aircraft parts, inventions and patents to Douglas Aircraft and other aircraft companies; and inventing, patenting and producing aircraft parts, and reselling and leasing same to Douglas Aircraft and other aircraft companies.

(Allegations of this paragraph are not upon information and belief.) Plaintiff Findley is, and has been since April 13, 1948, a stockholder in Douglas Aircraft Company (referred to as Douglas); and plaintiff Cohen is, and has been since July 12, 1935, a stockholder in said company.

From May, 1936, to October, 1939, the Garrett Corporation (referred to as Garrett) was promoted and organized in furtherance of a fraudulent scheme and conspiracy entered into by defendants J. C. Garrett, Northrop, Jay, Elliott, Bertrandias, Raymond, Doak, Larner and Conant, and by Mr. Wetzel and Mr. Cover, all of whom were officers, directors or executives of Douglas and of its subsidiary, Northrop Corporation. Defendants Leigh, Smith and Barlow, who were friends of some of said last-mentioned defendants, were associated with them in promoting Garrett and they had knowledge, from 1936 to the date of filing the amended complaint, of the fiduciary obligations of all said directors or executives of Douglas. Said conspiracy was made effective in the following manner: defendant organizers of Garrett have had control of Garrett from 1936 to date by reason of their ownership of a majority of its stock; seven of said defendants (organizers) continued as directors of Douglas, four of said defendants (organizers) discontinued as directors of Douglas and became directors of Garrett; and all those eleven defendants (organizers) joined with three other defendants (not directors of Douglas) who became directors of Garrett. The net total profits received by said individual defendants as dividends and by increase in value of Garrett stock is in excess of $7,500,000. The purpose of the conspiracy was to profit at the expense of Douglas through the medium of Garrett. Each person who became a director of Douglas after 1936 did so with full knowledge of the conspiracy and participated in the acts committed pursuant thereto.

From May, 1936, to date Garrett committed acts as follows: purchased, invented, and acquired aircraft parts, inventions, patents, and licenses, and resold them to Douglas; acted as selling agent and distributor for various manufacturers in the sale of aircraft parts, inventions, patents, and licenses to Douglas and other aircraft companies; obtained numerous patents on aircraft parts and many of those patents

were developed by Douglas at considerable cost; utilized the good will and credit rating of Douglas to establish the source of supply of aircraft equipment in which Garrett dealt; obtained large purchase orders from Douglas for future delivery and obtained large cash advances thereon; used said large orders to obtain credit and financing for Garrett; competed with Douglas for the purchase and sale of aircraft parts (1) by entering into exclusive contracts with third parties whereby those parties discontinued direct sales to Douglas, (2) by using their influence as directors of Douglas to prevent Douglas from buying supplies and entering into business in competition with Garrett, (3) by using their influence to obtain confidential plans and research information of Douglas, (4) by so controlling the supply of aircraft parts as to make Douglas dependent upon Garrett, (5) by establishing large research facilities, pertaining to inventions and patents, similar to those of Douglas, and (6) by inducing research employees of Douglas to accept employment with Garrett.

The said acts constituted a violation of defendants' fiduciary duties to Douglas because Garrett's profits were derived by interfering with Douglas transactions, selling products to Douglas at secret and unconscionable profits, exploiting the normal business and the experimental research and inventions of Douglas. The secret profits which were distributed through Garrett to directors of Douglas and other aircraft companies destroy competition, violate the Fair Trades Practices Act, and are fraudulent as to Douglas and its stockholders.

The total sales by Garrett to Douglas from 1936 through 1948 amounted to approximately $25,000,000, and Garrett received substantial commissions thereon.

Plaintiffs and the other stockholders of Douglas did not learn of said acts until 1948 because the acts were of a self-concealing nature in that: the information disclosing the organization of Garrett, and disclosing the names of its promoters and directors, was recorded in the books of Garrett which were not available to Douglas or its stockholders; the facts causing suspicion with respect to said acts are not disclosed in the books of account or the minutes of the board of directors of Douglas.

The plaintiffs or the stockholders of Douglas or Douglas had no knowledge, and are not chargeable with knowledge, of said acts prior to plaintiff Findley's discovery thereof in 1948 for the following reasons: (1) that from 1936 continuously to the date hereof all the directors of Douglas consented to, acquiesced in, and became active participants in all of said acts (alleged acts of conspiracy) of said defendants, and throughout said years to the date hereof said directors knowingly shielded and actively concealed said acts from the stockholders of Douglas by means of affirmative representations which purported to be full disclosures of material facts relating to the affairs of Douglas, but said representations were in fact fraudulent concealments of material facts accomplished by omissions and by statements of partial truths which indicated that the affairs of Douglas were being conducted with normal prudence and due regard to the obligations of the directors; (2) said directors also concealed from all the stockholders of Douglas (a) that in April, 1941, in connection with government contracts, the War Department admonished defendant Donald W. Douglas, the president of Douglas Aircraft, to fulfill his responsibilities regarding the ownership of Garrett stock by the defendant directors of Douglas Aircraft; and (b) that in March, 1941, the defendant directors of Douglas who organized Garrett were offered more than nine times the consideration they paid for their Garrett stock but they refused to dispose of said stock; (3) from 1936 to April, 1943, in annual proxy statements and in annual reports to the stockholders of Douglas, the directors of Douglas concealed that any of the directors or executives of Douglas had any financial interest in Garrett; (4) from April, 1943, to March, 1947, said directors, by statements of partial truths in proxy statements and annual reports to the stockholders of Douglas, represented that no director

of Douglas had any financial interest in Garrett prior to "fiscal year" 1942; (5) in April, 1941, defendant Donald W. Douglas, as president of Douglas Aircraft, by omissions and statements in a letter to the War Department, concealed the facts which were alleged in the amended complaint as acts of conspiracy; (6) the said concealments diverted any suspicions of fraud, prevented investigation by the stockholders and lulled them into a false sense of security; (7) the defendant directors of Douglas occupied a fiduciary relationship toward Douglas and its stockholders, and plaintiffs imposed confidence in said directors and relied upon their integrity and had no cause to suspect the violation of said relationship or to suspect the activities of the other defendants who acted jointly with the directors; (8) the said directors of Douglas by actively concealing said facts did thereby, from 1936 to the date hereof, continuously violate their fiduciary obligations to make full disclosures of all material facts to the stockholders, and by said violation the directors have become participants in all the fraudulent acts alleged in the amended complaint; (9) the defendants committed said acts secretly in order to avoid redress; (10) the said acts of which plaintiffs complain were a part of a fraudulent plan and conspiracy which consisted of a continuous series of acts beginning in 1936 and continuing to the date hereof.

(Allegations of this paragraph are not upon information and belief.) Prior to April 13, 1948, when plaintiff Findley became a stockholder of Douglas, he had no interest in Douglas and he did not make any inquiry concerning Douglas; he discovered the wrongs, alleged in the amended complaint, about May, 1948, as the result of a casual conversation with a friend who informed him that Garrett was organized and owned by directors of Douglas and their associates; and he caused investigation to be made by an attorney who obtained information from the corporation commissioner, the patent office, and financial records.

Plaintiff Cohen first learned of the alleged acts of defendants in September, 1948, when he read, in the Wall Street Journal of September 25, 1948, an article summarizing the Findley suit. (In the original complaint, Findley alone was suing on behalf of the stockholders.) Prior thereto plaintiff Cohen imposed confidence in the directors of Douglas and relied upon their integrity, and he had no cause to suspect the violations of the fiduciary obligations of defendant directors of Douglas or to suspect the activities of the other defendants in conspiring with said directors. Plaintiffs and the other stockholders of Douglas could not have discovered the said acts prior to May, 1948, because the acts were of a self-concealing nature and were actively concealed by the individual defendants.

(Allegations of this paragraph are not upon information and belief.) About June 3, 1948, plaintiff Findley sent a letter to the board of directors of Douglas stating "the substance of his discovery," and in that letter he demanded that appropriate legal action be taken to recover on behalf of Douglas all the profits which the participants in the acts had acquired in violation of the rights of Douglas and its stockholders. About August 19, 1948, plaintiff Findley was advised by letter from Douglas that its board of directors declined to take action in the matter.

Each of the present directors of Douglas "has long had" full knowledge of the wrongs alleged in the amended complaint and has refused in bad faith to seek redress. All the present directors of Douglas have from time to time participated in, acquiesced in and consented to some or all the wrongs alleged in the amended complaint, and by reason thereof have furthered the business of Garrett. Demand upon the stockholders of Douglas would be futile because the management of Douglas is in its board of directors; the stock of Douglas is dispersed among more than 9,000 holders throughout the United States and in foreign countries; and many shares of the stock are traded every day on several stock exchanges.

In the prayer the plaintiffs asked that said defendants account to Douglas Aircraft for the profits derived through the

wrongs alleged; that a trust be impressed in favor of Douglas Aircraft upon the Garrett stock owned by the individual defendants.

(Exhibits attached to the amended complaint show the names of the persons who were directors and officers of Douglas from 1936 to date, the period of time each person was such director or officer and the position which each one held. Those exhibits also show the names of the organizers of Garrett, the positions each organizer held in Douglas and Garrett, the number of shares each one held in Garrett in 1939, and the amount of dividends he probably received from 1937 to 1949; and that in 1939 said organizers owned 85 per cent of the stock of Garrett. Those exhibits also show the names of the officers and directors of Douglas who were also officers and directors of Garrett, the period of time each person was such officer or director of Garrett and the position which each one held. The exhibits show that defendant Elliott was a director and the general counsel of Douglas from 1936 to 1947, and he was secretary of Garrett from 1936 to 1940, and general counsel of Garrett from 1936 to 1948; defendant Raymond was a vice-president and director of Douglas from 1936 to date, and he was a director of Garrett in 1939 and 1940; defendant Northrop was a director of Douglas in 1936 and 1937, and he was treasurer of Garrett in 1939 and 1940; that Mr. Wetzel (not a defendant) was senior vice-president, general manager, and director of Douglas from 1936 to 1938, and he was director of Garrett from 1936 to 1938; defendant Garrett was the purchasing agent of Northrop Corporation (subsidiary of Douglas) in 1936, and he was president of Garrett from 1936 to date; Mr. Cover (not a defendant) was executive vice-president and director of Douglas from 1936 to 1943 but was not a director of Garrett; defendant Conant was a director of Douglas from 1940 to date but was not a director of Garrett; defendant Bertrandias was vice-president of Douglas in 1939 and 1940 and from 1945 to date, but was not a director of Garrett.)

Defendants demurred to the amended complaint upon the grounds: (1) It does not state facts sufficient to constitute a cause of action; (2) it is barred by the provisions of section 338, subdivision 4, of the Code of Civil Procedure; (3) that plaintiff Findley has no legal capacity to sue in that the said alleged transactions purportedly occurred prior to the date he acquired Douglas stock; (4) that the amended complaint is uncertain. (Several specifications of uncertainty were set forth in the demurrer.)

It appears that, from 1936 to the commencement of the action, the number of members of the board of directors of Douglas varied from 13 to 17. The amended complaint shows that 11 persons who were officers, directors or executives of Douglas and 3 other persons (not officers of Douglas) promoted and organized Garrett in 1936. Six of those organizers were, at times during said period from 1936 to commencement of the action, directors of Douglas, and during said period no more than 5 of said organizers of Garrett were directors of Douglas at any one time. Four of said organizers were directors of Douglas from 1940 to June, 1943. Three of them were such directors from June, 1943, to 1946. Two of them were such directors after 1946. None of the directors of Douglas, other than those who were organizers of Garrett, owned stock or held any position in Garrett. It thus appears that the directors of Douglas who owned stock in Garrett and who allegedly profited from the alleged wrongs did not at any time constitute a majority of the board of directors of Douglas. In other words, at all times from 1936, the majority of the members of the board of directors of Douglas did not own stock in Garrett.

[1, 2] According to the amended complaint, the directors of Douglas who did not own stock in Garrett, and who always constituted a majority of the board of directors of Douglas, had knowledge that, beginning in 1936, the organizers of Garrett had committed alleged wrongful acts against the Douglas Corporation. Although there were several changes in the personnel

of the board of directors of Douglas after 1936, and although the board of directors, as variously constituted after 1936 had knowledge of the alleged wrongs, the board did not seek redress. The power to manage the affairs of a corporation is vested in the board of directors. Scott v. Los Angeles Mountain Park Co., 92 Cal. App. 258, 264, 267 P. 914. Where a board of directors, in refusing to commence an action to redress an alleged wrong against a corporation, acts in good faith within the scope of its discretionary power and reasonably believes its refusal to commence the action is good business judgment in the best interest of the corporation, a stockholder is not authorized to interfere with such discretion by commencing the action. See Fornaseri v. Cosmosart Realty & Bldg. Corp., 96 Cal.App. 549, 557, 274 P. 597. In the case last cited it was said at page 557 of 96 Cal.App. at page 600 of 274 P.: "[C]onduct of directors in the management of the affairs of a corporation is not subject to attack by minority stockholders * * * where such acts are discretionary and are performed in good faith, reasonably believing them to be for the best interest of the corporation." Also, on said page, it was said: "Good business judgment would seem to recommend the safe and sure plan which was adopted by the directors * *. At least the transaction appears to be a discretionary matter, and, if so, affords a stockholder no authority to challenge it in this equitable action. Every presumption is in favor of the good faith of the directors. Interference with such discretion is not warranted in doubtful cases." In McCloskey v. Snowden, 212 Pa. 249, 61 A. 796, 797, which was an action by stockholders to recover promoters' profits, there were 9 members of the board of directors, and one of them was a defendant charged with taking wrongful profits and 3 of them allegedly had business connections with some of the promoters. The court therein said at page 253 of 212 Pa., at page 797 of 61 A.: "'* * * the refusal by the corporate management must appear affirmatively to be a disregard of duty and not an error of judgment; a nonperformance of a manifest official obligation amounting to a breach of trust.'" In Wallace v. Lincoln Savings Bank, 89 Tenn. 630, at page 636, 15 S.W. 448, 449, 450, at page 449 which was an action by stockholders against former directors for breach of trust, the court said: "A very wide discretion is necessarily reposed in the directors of a corporation. It is not the duty of the managers of such association to bring suit upon every supposed wrong or injury to the corporation. If it were so, strangers could never know when a settlement, compromise, or adjustment was a finality * * *. So a suit might appear so desperate, or be so expensive, or, for good reasons, impolitic, that creditors might, in the exercise of a sound discretion, deem it unwise to engage in litigation. In such case, if the refusal be in good faith, the courts will rarely suffer a shareholder to overturn such decision by entertaining his suit for the same cause of action. To authorize his suit, the refusal of the corporation to sue must appear to have been wrongful."

Appellants (plaintiffs) contend, however, that the directors of Douglas in refusing to sue did not act in good faith, that the transactions complained of involved divided loyalty, breach of trust, fraud, and fraudulent concealment by corporation fiduciaries; that such matters are not within the discretionary powers of the board of directors; and that the board may not ratify a fraud. The allegations of the amended complaint, with respect to the directors or officers of Douglas who did not own stock in Garrett, are that each person who became a director or officer of Douglas after 1936 did so with full knowledge of the conspiracy and thereafter participated in the acts committed pursuant thereto; that continuously from 1936 to date all the directors of Douglas "became active participants" in said alleged acts of conspiracy of said organizers of Garrett and "knowingly shielded" and "actively concealed" said acts from the stockholders of Douglas by "affirmative representations" which were "fraudulent concealments" of material facts accomplished by omissions and by statements of partial truths; and that the present directors refused in bad faith to seek redress.

[3–5] In the original complaint, stockholder Findley was the only plaintiff, and the only directors of Douglas who were defendants were those who were organizers and stockholders of Garrett. In that complaint it was alleged that the acts complained of "were concealed and kept secret from all persons and corporations, including defendant Douglas Aircraft, its directors and stockholders, and said facts are still concealed and kept secret." In other words, in that complaint directors of Douglas who had no financial interest in Garrett were not implicated in any alleged wrongful acts. A demurrer to that complaint was sustained. One of defendants' arguments in support of that demurrer was that under that complaint an independent majority of the Douglas board, being unassociated with the alleged wrong, had refused to commence the action. In the amended complaint, under consideration here, 9 other persons, who had been at some time after 1936 directors of Douglas, were included as defendants. The exhibits attached to the amended complaint show that those additional defendants never owned any stock or held any position in Garrett. If the 9 additional directors of Douglas were implicated in the wrongs allegedly committed by the organizers of Garrett, then it could not be said that a majority of the Douglas board, independent and disinterested in Garrett, had refused to commence the action. In other words, under those circumstances, it might be argued, as it is argued here, that a majority of the Douglas board was under disability and powerless to act with respect to the alleged wrongs because a majority of the board was "accused of participation in the fraud." The above-mentioned allegations to the effect that the said 9 additional directors of Douglas became directors of Douglas with full knowledge of the conspiracy of the organizers of Garrett and "participated" in the acts committed pursuant to the conspiracy, "became active participants" in the acts of conspiracy, and "knowingly shielded" and "actively concealed" said acts of conspiracy by "affirmative representations" which were "fraudulent concealments" of material facts, and that the directors refused "in bad faith" to seek redress, are general statements which are not supported by allegations of specific facts. Those general allegations are made upon information and belief and are intended to implicate the said additional 9 directors in an alleged fraud and conspiracy, which fraud and conspiracy are also alleged upon information and belief. In other words, it appears that plaintiffs have attempted to charge the said additional directors with fraud and conspiracy upon information and belief and have not alleged any fact upon which the charge of fraud or conspiracy is based or upon which the belief is based. In Dowling v. Spring Valley Water Co., 174 Cal. 218, at page 221, 162 P. 894, at page 896, it was said: "[I]t is not sufficient to allege fraud or its elements upon information and belief unless the facts upon which the belief is founded are stated in the pleading." The general charges of fraud, conspiracy and bad faith are insufficient to overcome the presumption that the 1948 board of directors (upon whom the demand was made) acted independently and honestly in declining to prosecute the claims in question against the defendants. Those general statements regarding participation, shielding, concealment, and bad faith by the additional 9 directors, who had no stock in Garrett, are not sufficient to implicate said additional directors in the wrong allegedly committed by the organizers of Garrett. It appears, therefore, under the allegations of the amended complaint, that at all times after 1936 a majority of the board of directors of Douglas was independent and was not under disability or powerless to act with respect to the alleged wrong. There were 13 members of the Douglas board when plaintiff Findley made his demand that legal action be taken, and 11 of them were independent of Garrett and 2 were Garrett organizers and stockholders. The matter was within the discretionary power of the board. An independent majority of the board, in the determination of a discretionary matter, declined to commence an action. Notwithstanding the insufficiency of the allegations of fraud and

bad faith, it was necessary for the court to consider whether, on the facts alleged, the refusal of the directors to prosecute the claims was so clearly against the interests of the corporation that it must be concluded that the decision of the directors did not represent their honest and independent judgment. The facts alleged would not have justified such a conclusion. It was a question of business whether the transactions over a twelve-year period should be investigated and prosecuted. Directors have the same discretion with respect to the prosecution of claims on behalf of the corporation as they have in other business matters. In this respect the fact that a claim may be founded in fraud does not differentiate it from other claims. Refusal to sue on a fraud claim is not, as plaintiffs contend, a ratification of fraud. The mere fact that a recovery for the corporation would probably result from litigation does not require that an action be commenced to enforce the claim. Even if it appeared to the directors of Douglas that at the end of protracted litigation substantial sums could be recovered from some or all of the defendants, that fact alone would not have made it the duty of the directors to authorize the commencement of an action. It would have made it their duty to weigh the advantages of a probable recovery against the cost in money, time and disruption of the business of the company which litigation would entail. It appears from the nature of the litigation, the variety and complexity of the issues, the period of time during which the asserted frauds allegedly were committed, the multitude of transactions between the two corporations, the many individuals involved, and the questions of accounting, that the directors were confronted with litigation of formidable proportions. Many directors, other than those named as defendants herein, were also accused in general terms of conspiracy and fraud. A mistake of judgment on the part of a board of directors does not justify taking the control of corporate affairs from the board of directors and placing it with the stockholders. The board of directors may make incorrect decisions, as well as correct ones, so long as it is faithful to the corporation and uses its best business judgment.

It appears from letters sent by the 1948 board of directors to Findley regarding his demand, and from minutes of the directors' meeting, that the 1948 board of directors gave consideration to Findley's demand, and that the board acted under legal advice. Copies of several documents were attached to the demurrer, and it was stipulated that the trial court might consider them. Those copies included the demand made by Findley,[1] the letter from the di-

1. Demand of June 3, 1948, by Findley:
"Board of Directors Douglas Aircraft Co. Inc.
3000 Ocean Park Boulevard Santa Monica, California
"Gentlemen:
"Pursuant to instructions from my client, Kenneth H. Findley, an owner of capital stock in your corporation, I have investigated the facts and circumstances whereby certain officers, directors and associates (hereinafter referred to as 'said officers') of your corporation, and other persons not associated with your corporation, have jointly and secretly conceived and executed a fraudulent plan, scheme and conspiracy (hereinafter referred to as 'said fraudulent plan') in breach and violation of the inherent fiduciary duties and obligations of said officers to your corporation.
"The investigation reveals that some of said officers who (together with certain members of their families) conceived and/or participated in said fraudulent plan are as follows: J. C. Garrett, Harry H. Wetzel, deceased, Frederick W. Conant, John K. Northrop, Charles T. Leigh, Harry W. Elliott, Carl A. Cover, deceased, Philip G. Larner, Victor E. Bertrandias, A. E. Raymond, Henry E. Guerin, Edmund R. Doak, and Don P. Smith. Additional details concerning the inception and execution of said fraudulent plan and the extent of the individual benefits therefrom can be made available to you by the officers named above. The officers and directors of your corporation who did not actively participate in said fraudulent plan may or may not be jointly liable, depending on whether or not said fraudulent plan was secret as to

them. If they did in fact know of the inception and operation of said fraudulent plan, and failed to take appropriate action, they would be liable for allowing the others to carry out said fraudulent plan without official opposition, unless they did in fact oppose it without avail.

"The plan as executed by said officers, who through their corporate duties had acquired knowledge of the indispensable requirements of your corporation, consists of the secret formation of The Garrett Corporation (formerly known as Aircraft Tool and Supply Company, and later as Garrett Supply Company) (hereinafter referred to as 'Garrett'), for the purpose of performing an integral part of the essential authorized, existing and normal business of your corporation, and in addition, selling services, supplies and products of other manufacturers to your corporation at a profit, which profit they secretly distributed among themselves. Your corporation had the facilities, fundamental knowledge, practical experience and ability to pursue such essential authorized, existing and normal business, and was in fact pursuing such business, namely, the designing, developing and constructing of products essential to the manufacture of aircraft, and extensive experimental research necessarily connected with the manufacture of aircraft. The entire potential of Garrett was based upon the absolute and indispensable needs of your corporation and in the direct line of the business of your corporation.

"In furtherance of said fraudulent plan said officers caused impositions upon your corporation, and took advantage of their positions in that they exercised improper influence causing purchases to be made from Garrett, and hindered and obstructed the normal development of the legitimate business of your corporation, thus advancing their individual interests as distinguished from the interests of your corporation and its stockholders.

"The above operations of Garrett have been functioning from May 21, 1936 (date of incorporation of Aircraft Tool and Supply Company) to the present. During said period Garrett and said officers have made net profits of approximately $6,000,000.00, plus the waste of approximately $50,000,000.00 in improper selling and administrative expenses caused by unnecessary duplication of the existing adequate plants, personnel and facilities of your corporation.

"In addition, Garrett has acquired numerous patents which are indispensable to your corporation. Some of the inventions covered by said patents were obtained by Garrett through the means and knowledge of said officers as a result of their duties of trust with your corporation, and some of said inventions were the subject of experimental and development efforts by your corporation prior to or simultaneous with Garrett's similar endeavors. All of said patents were obtained by Garrett in direct competition with your corporation and to the injury of your corporation. There are in excess of 20 Garrett patents which include, among others, the following: oil cooler with protective and control means; electrical flap control; exhaust heat exchanges; thermostatic oil cooler control; temperature and pressure control; and an air-conditioner for aircraft cabins. Said patents have an aggregate commercial value of many millions of dollars, and in equity belong to your corporation, whose said officers conceived and executed said fraudulent plan for their individual advantage, without procuring any benefit or advantage whatsoever for your corporation or its stockholders.

"All the earnings, patents and other assets of said Garrett should have become the property of your corporation. All the benefits therefrom should be returned to your corporation. Past avails of said benefits should be accounted for to your corporation, and all future benefits made payable to your corporation. My client, therefore, demands that your corporation confirm the facts stated above, and for the purpose of recovering all properties and benefits belonging to it, investigate such additional details and other factors as may be appropriate in connection with the foregoing, and institute appropriate legal action to compel recovery against all persons and corporations who have improperly benefitted at the expense of your corporation and its stockholders.

"It is the firm intention of my client to pursue all legal steps necessary to recover for your corporation and its stockholders all properties, monies, and other benefits whatsoever, which in equity belong to them.

"Will you please give this demand your immediate attention and advise me of the action which your corporation proposes to take in the premises, so that my client may be properly guided in the action which should be taken by him?

"Yours very truly,
"Kenneth N. Dellamater"

rectors in reply thereto,[2] another letter from the directors to Findley's counsel,[3] minutes of the directors' meeting,[4] and another letter form the directors to Findley's counsel.[5] As above indicated, the great majority of the 1948 board of directors

2. Letter of June 17, 1948, to counsel for Findley:

"Your letter of June 3, 1948, addressed to the Board of Directors of this company, is acknowledged. Copies have been sent to the individual members of our Board.

"Your letter makes very serious charges. Doubtless you are aware of the very large volume of transactions in which this company has been engaged since the year 1936. Our files are voluminous and substantial parts of them are in storage. Thus a thorough investigation of them will be not only time consuming but very costly.

"In view of these facts, we ask that you furnish to this company all of the information at your disposal in order to enable the company to arrive at a conclusion as to what action it should take in the premises. In giving this information will you please be as specific as possible, giving names, dates, contracts and other information which may be available to you. Will you please list all of the patents that you claim should have been acquired by this company? Will you please also elaborate in detail on the charge that you have made with respect to improper selling and administrative expenses?

"We would appreciate receiving this from you at your early convenience."

3. Letter of June 28, 1948:

"Your letter of June 18, 1948 in reply to ours of June 17 reflects a misunderstanding of our letter and fails to respond to our request for information upon which further action by this company might be based. Our purpose in stressing the time and cost involved in investigating broad and general charges of the sort made in your letter of June 3 covering activities over a period of twelve years was not, as you seem to understand, to alarm you. Rather, the company does not desire to undertake such a task if it can be avoided or made unnecessary by disclosure of more detailed pertinent information which you claim to have in your possession. Again a company investigation might not, even after several months of intensive effort and at great cost to the company, reveal for the company's consideration the precise information which you claim you have and upon which you base your charges.

"It therefore appears essential, in order for the Board of Directors to arrive at a conclusion, that you comply with the request for information made in our letter of June 17. Upon such compliance, we shall make such further investigation as may appear necessary in order for the Board to reach a decision on the matter."

4. Excerpt from Minutes of Directors' Meeting of August 18, 1948:

"Mr. Douglas then opened the discussion with respect to a stockholder's suit which is threatened by Mr. Kenneth Dellamater, attorney acting for Mr. Kenneth Findley, a stockholder of record who purchased two shares of stock on April 13, 1948. Mr. Douglas also informed the Board that Gibson, Dunn and Crutcher, attorneys in Los Angeles, will serve as consultants to our Legal Department. Mr. Hines pointed out that suit was to be brought with respect to the Garrett Corporation and the interest which certain directors and officers at Douglas had in such corporation from time to time in the past, as set forth in Mr. Dellamater's letter of June 3, 1948 and in subsequent correspondence. Copies of this letter had previously been sent to all members of the Board prior to this meeting. Mr. Hines then presented to the Board a proposed letter to be sent to Mr. Dellamater on behalf of the Board. After some discussion the following resolution was proposed by Geoffrey Mayo, seconded by Milo Bekins, and upon being put to a vote was unanimously passed:

"Resolved, That the proposed letter to Mr. Delamater in the form submitted be approved and that the President be authorized to execute such letter.

"Be it further resolved, That a copy of the proposed letter be marked by the Secretary for identification and retained in the corporate records."

5. Letter of August 18, 1948:

"Reference is made to your letter of June 3, 1948 addressed to the Board of Directors of this company, to the company's letter to you dated June 17, 1948, to your reply dated June 18, 1948 and to the company's reply thereto dated June 28, 1948. Your letter of June 3 makes charges of fraud on the part of certain individuals named therein. It demands that this company confirm the allegations made by you, that this company make further investigation and that it bring suit against 'all persons and corporations which have improperly benefited at the

had no interest in Garrett. The board was aware of the dual position and conflicting duties of those individuals who were or had been directors of both corporations, and it was aware of the magnitude of the purchases made by Douglas from Garrett over a period of twelve years. There was no manifest breach of duty in its decision not to commence an action. The board exercised its business judgment. Under such circumstances, a stockholder may not usurp the discretionary powers of the managers of the corporation by commencing a derivative action. If, under such circumstances, the court should entertain such an action it would be substituting its own business judgment for that of the directors. The determination of the matter by the board of directors is a bar to the action herein.

Respondents contend also (1) that the purported cause of action is barred by the statue of limitations; (2) that plaintiffs do not have standing to commence or maintain the action; (3) that plaintiffs did not make a genuine demand upon the board of directors. By reason of the above conclusion herein, it is not necessary to discuss these contentions.

[6] The trial court did not abuse its discretion in not granting leave to amend. In the original complaint it was alleged upon information and belief that in furtherance of the fraudulent plan and conspiracy the organizers of Garrett acted secretly as to Douglas, its directors and stockholders. In the amended complaint it is alleged upon information and belief that each person who became a director of Douglas after 1936 did so with knowledge of the conspiracy. It thus appears that the allegations of the amended complaint directly contradict the allegations of the original complaint with respect to whether the directors of Douglas, other than those who were organizers of Garrett, had knowledge of the alleged conspiracy. No explanation, or purported explanation, is given in the amended complaint for the contradiction or complete change of theory with respect to the independent or non-profiting directors. Plain-

expense of' this company and its stockholders.

"This company has investigated, to the extent it has been able to do so in the time elapsed, the very broad charges made in your letter. The Board of Directors of the company has considered the matter and has directed that this reply be made.

"We are unable to confirm your allegations. The organization of Aircraft Tool and Supply Company (later the Garrett Corporation) in 1936 was not secret or concealed in any manner. So far as we are informed that company was not 'organized for the purpose of performing an integral part of the essential authorized existing and normal business'. The Garrett Corporation acted as a manufacturer's agent and jobber for various materials and supplies, chiefly for the aircraft industry. This was a business which Douglas did not carry on and could not carry on. We know of no instance where improper influence was exercised to cause purchases to be made from Garrett or where the existence or operation of Garrett was of disadvantage to this company. On the whole it is our belief that substantial savings resulted to this company on account of its dealings with Garrett. We know of no instance where Garrett obtained inventions or patents through the means of or the knowledge of any officers or directors of this company. We have known that some of the individuals named in your letter of June 3 have owned stock in the Garrett Corporation. Such individuals were at no time in control of this company either through stock interest or by controlling the Board of Directors.

"Our letters of June 17 and June 28 requested that you furnish to this company any evidence you may have tending to prove the existence of fraud or wrongdoing. This you have failed and refused to do. In the event any fraud or wrong-exist and this company has a cause of action against any individual or corporation, this company will consider it its duty to take appropriate action to recover any amounts of money or property to which the company may be legally entitled, and will do so. In the absence of evidence of such fraud or wrongdoing, the Board of Directors finds it impossible at the present time to make any further determination in the matter. The Board again demands that you produce any such evidence you may have so that if any cause of action exists, the company may prosecute it."

tiff Findley, who owns 2 shares of stock, purchased them about two months before he made his alleged demand upon the board, and about four months before he filed the action. Plaintiff Cohen, who apparently has owned 25 shares of stock since 1935, joined Findley as a plaintiff in the amended complaint and, as above stated, he alleged upon information and belief when and how he discovered the alleged wrong. The demurrer to the original complaint was based upon defects in pleading which were similar to the defects in pleading in the amended complaint. Plaintiffs did not avail themselves of the opportunity to correct such defects after the first demurrer was sustained.

It clearly appears that plaintiffs stated the facts upon which they rely as favorably to their contentions as was possible.

The trial court also granted defendants' motion to dismiss the action upon the ground that the purported cause of action in the amended complaint is a sham. By reason of the above conclusion in the matter of sustaining the demurrer without leave to amend, it is not necessary to discuss this further ruling of the trial court.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; CARTER, J., dissenting.



109 Cal.App.2d 141

PEOPLE v. MONGE.

Cr. 4737.

District Court of Appeal, Second District, Division 3, California.

Feb. 7, 1952.

William Barrios Monge was convicted in the Superior Court, Los Angeles County, Charles W. Fricke, J., of possession of narcotics and he appealed. The District Court of Appeal, Shinn, P. J., held that the evidence was sufficient to sustain the conviction.

Affirmed.

1. Poisons ⇐9

Evidence was sufficient to sustain conviction for possession of narcotics. Health and Safety Code, § 11500.

2. Criminal Law ⇐385

It is proper for defendant to elicit facts concerning his status in so far as it might tend to show responsibilities and relationships which in common experience would operate as deterrent from commission of crime.

3. Poisons ⇐9

In prosecution for possession of narcotics, defendant should have been permitted to show his marital and family status as circumstance which might have some bearing with jury as to likelihood whether defendant would violate law. Health and Safety Code, § 11500.

4. Criminal Law ⇐814(17)

In prosecution for possession of narcotics, testimony of officers that defendant dropped package, which he denied, was direct evidence and did not call for instruction on circumstantial evidence. Health and Safety Code, § 11500.

5. Criminal Law ⇐814(17)

Instruction to effect that of two equally reasonable constructions or interpretations of evidence, one pointing to guilt and other to innocence, latter should be accepted, is proper only when prosecution relies in whole or in substantial part upon circumstantial evidence.

6. Criminal Law ⇐982

Where defendant was convicted of possession of considerable quantity of heroin and offered no explanation as to how he acquired it or what he proposed to do with it, denial of probation was not abuse of discretion. Health and Safety Code, § 11500.

7. Criminal Law ⇐982

Probation is matter of clemency, not of right.

F. Fernandez Solis and Alfred H. Song, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant was convicted in a jury trial of possession of heroin, in violation of section 11500 of the Health and Safety Code. He filed an application for probation which was denied and was sentenced to state prison. He appeals from the judgment.

The grounds of appeal are: (1) Insufficiency of the evidence; (2) refusal of instructions on circumstantial evidence; and (3) error in denying the application for probation.

The evidence in chief of the People consisted of the testimony of Edward Vega, a deputy sheriff of Los Angeles County, and a capsule, discovery of which was described by the witness Vega, the contents of which were identified as heroin by the People's witness, Lacy, a chemist of the sheriff's office. Officer Vega testified that he and officer Grimes arrested defendant near the corner of Fourth and Bonnie Beach Streets in East Los Angeles. While parked in the neighborhood they saw defendant walking south on Bonnie Beach Street, followed him, arrested him, and ordered him to raise his hands over his head, telling him that he was under arrest. As he raised his hands defendant dropped on object to the sidewalk. He was taken to the officers' car nearby and thoroughly searched, without any significant discovery. Grimes went to the spot where defendant had been arrested, found an object on the ground near a fence, where Vega picked up a package containing 24 capsules wrapped in cellophane and scotch tape. These were placed in an envelope with identification written thereon. All the capsules were delivered to Lacy and all contained heroin, although but one of them was introduced in evidence. The officer testified that defendant was ordered to raise his hands while both officers were still in the police car and that the package was found in low weeds between the cement sidewalk and the fence at the point where he had seen defendant drop a package. Defendant denied that the object was his own and denied that he had dropped it. At the conclusion of the testimony of officer Vega, the People rested. Defendant was called and testified in his own behalf. After defendant had concluded his testimony the People called officer Harold Grimes. It is stated in the reporter's transcript that "he testified in rebuttal." He testified to the circumstances of the arrest, including the finding of the heroin, and his testimony corroborated that given by officer Vega. His testimony was a part of the People's case in chief, and in no sense rebuttal. No request was made by the People to reopen their case. No objection was made by defendant to this irregular procedure.

[1] It is manifest from this brief recital of the evidence that it was sufficient to justify the verdict.

[2, 3] We note that defendant testified that he was married and had one child, which evidence was stricken out, the court stating, in part: "I can see no difference between a man who is unmarried or a man who is married having narcotics in his possession. The fact a man is married or unmarried is no indication he had not narcotics in his possession." As shown by the record, the evidence was not offered as a defense to the charge of possession, but merely as a circumstance which might have some bearing with the jury as to the likelihood that defendant would violate the law. We think it has always been proper for a defendant to elicit facts concerning his status insofar as it might tend to show responsibilities and relationships which in common experience would operate as a deterrent from the commission of crime. The fact that a defendant is a man of family might under some circumstances avail him nothing, and under other circumstances operate appreciably in his favor. However slight the benefit might be, we think the defendant should not be deprived of it. But in the present case there was no objection to the ruling, and it is not relied on as error.

[4, 5] Defendant requested two instructions on circumstantial evidence, which were refused. The first was that defendant could not be convicted on circumstantial evidence alone unless the circumstances were irreconcilable with his innocence. The testimony of the officers that defend-

ant dropped the package, which he denied, was direct evidence and did not call for an instruction on circumstantial evidence. People v. Lapara, 181 Cal. 66, 183 P. 545. The other instruction was to the effect that of two equally reasonable constructions or interpretations of the evidence, one pointing to guilt and the other to innocence, the latter should be accepted. The instruction is proper only when the People rely in whole or in substantial part upon circumstantial evidence. People v. De Voe, 123 Cal.App. 233, 238, 11 P.2d 26; People v. Marvich, 44 Cal.App.2d 858, 861, 113 P.2d 223; People v. Agajanian, 97 Cal. App.2d 399, 403, 218 P.2d 114.

[6, 7] The final contention that it was an abuse of discretion to deny probation is without merit. A sufficient answer to defendant's argument is that he stood convicted of possession of a considerable quantity of heroin and offered no explanation as to how he acquired it or what he proposed to do with it. Probation is a matter of clemency, not of right. People v. Payne, 106 Cal.App. 609, 289 P. 509.

The judgment is affirmed.

PARKER, WOOD and VALLÉE, JJ., concur.



109 Cal.App.2d 224

HUCKE et ux. v. KADER et ux.

KADER et ux. v. CITY OF OAKLAND et al.

No. 14927.

District Court of Appeal, First District, Division 1, California.

Feb. 14, 1952.

Rehearing Denied March 15, 1952.

Hearing Denied April 3, 1952.

Suit by Don Hucke and his wife against Dan Kader and his wife to restrain interference with plaintiffs' use of a certain road. The defendants filed a cross-complaint against the city of Oakland and others to enjoin them from interfering with defendants' use of road. The Superior Court, Alemenda County, A. T. Shine, J., entered a judgment against defendants and defendants appealed. The District Court of Appeal, Bray, J., held that a street sign and a private roadway sign could be maintained at the entrance to the private road.

Amended and affirmed.

1. Easements ⇐61(8)

In suit by property owners against other property owners to enjoin obstruction of road and interference with its use, complaint, which stated facts upon which conclusions of irreparable damage and absence of plain, speedy and adequate remedy at law were based, stated cause of action.

2. Easements ⇐61(8)

Where complaint for injunction alleged that defendants had obstructed right of way by parking automobile so as to interfere with free use of roadway, that defendants deliberately diverted authorized visitors, that defendants erected private road sign to divert visitors, that defendants had threatened to install curb bisecting right of way and that defendants claimed road for their exclusive use, complaint was not defective as seeking to enjoin mere ordinary or naked trespass.

3. Judgment ⇐21

In suit by property owners against other property owners to enjoin obstruction of road and interference with its use, where judgment provided that "plaintiff have judgment as prayed for in his complaint" and thereafter detailed specific acts enjoined, quoted words were uncertain and indefinite and should be deleted from judgment.

4. Judgment ⇐21

In suit by property owners against other property owners to enjoin obstruction of road and interference with its use, provision of judgment that enjoined defendant from in any manner interfering with plaintiff's use of road by so parking their automobile as to obstruct plaintiff's free use of road, was not too broad.

5. Judgment ⇐21

In suit by property owners against other property owners to enjoin obstruction of road and interference with its use, provi-

sion of judgment that enjoined defendants from doing acts calculated to prevent plaintiffs' free enjoyment of road was not too indefinite. Code Civ.Proc. § 525.

6. Injunction ⇐204

It is unnecessary in judgment enjoining certain persons to set forth in minute detail all acts which defendants have performed or threatened to perform which interfere with plaintiff's rights.

7. Easements ⇐61(12)

Where all parties involved in suit to enjoin obstruction of roadway and interference with its use, owned nonexclusive permanent easements to use road, judgment enjoining interference had to be interpreted reasonably.

8. Easements ⇐61(9½)

In suit by property owners against other property owners to enjoin obstruction of road and interference with its use, inasmuch as easements and their permanency were never questioned, finding that it was expressly agreed and understood between appurtenant property owners that each owner had and would have, in accordance with his respective deed, an easement, was sufficient.

9. Easements ⇐61(9½)

In suit by property owners against other property owners to enjoin obstruction of road and interference with its use, trial court should have made finding on plaintiffs' contention that private road sign erected by defendants diverted visitors to area.

10. Appeal and Error ⇐1149

District Court of Appeal has power to amend findings and judgment. Code Civ. Proc. § 956a.

11. Easements ⇐53

Where property owner had easement over private road, property owner was entitled to install and maintain at entrance of road a street name sign and another property owner, who had similar easement, could maintain at same location a private road sign, as creation and maintenance of both signs would be consistent with rights of parties under respective easements.

Hamilton Wright, Oakland, Alfred Nelson, Piedmont, of counsel, for appellants.

Gilbert D. Calden, Oakland, for respondents.

BRAY, Justice.

Defendants appeal from a judgment restraining them from interfering with plaintiffs' use of a certain road.

Questions Presented.

1. Does the complaint state a cause of action?

2. Is the judgment uncertain and indefinite?

3. Are additional findings necessary?

4. (1) On a private roadway over which several home owners have rights of ingress and egress may one owner maintain a "Private Road" sign? (2) May a majority of the home owners maintain the sign "Glendome Circle" thereon?

Record.

The complaint, after alleging the character of the roadway in question as being one over which the property owners fronting thereon had permanent nonexclusive rights of ingress and egress thereover, and that plaintiffs and defendants were such owners, alleged that defendants for a long time had obstructed said roadway and interfered with plaintiffs' rights therein, and sought an injunction to restrain defendants from such obstruction and interference. Defendants answered, admitting plaintiffs' rights, but denying any obstruction thereof or interference therewith. They then cross-complained, joining the city of Oakland and two of its officers as cross-defendants, alleging that the roadway is not a public street or highway; that defendants' home is at the entrance of said roadway; that they have been disturbed day and night by all kinds of vehicles passing and repassing and interfering with defendants' free use and enjoyment of their easement on said road. It is alleged that the cross-defendants wrongfully erected a sign at the entrance reading "Glendome Circle" and that this sign encourages the public to use the road as a public street, causing a burden upon defendants' easement by reason of noise, offensive odors, frequency of use

by the public and obstruction of defendants' easement. They pray that all cross-defendants be enjoined from so obstructing or interfering with defendants' rights.

The court found that the parties (other than the city of Oakland) had the easements in the road alleged in their respective pleadings, but that defendants were obstructing the road and interfering with plaintiffs' free use thereof, had deliberately diverted plaintiffs' visitors, had threatened to bisect the road by a curb, represented the road to be a private one for their exclusive use, and had precluded plaintiffs from the full and free use of their easement, and had refused to discontinue these acts. The judgment enjoined defendants from obstructing the road or interfering with its use by plaintiffs and their visitors.

Facts.

Some years ago one Heroux subdivided a tract of land in Oakland. He prepared a map of it but never recorded the map. On the map appears a roadway designated "Glendome Circle (not dedicated)" which starts at a public street, "El Centro," and connects with (or is an extension of) a private road which traverses the tract in somewhat of a loop for about 538 feet, ends at El Centro and Hollywood Avenue some distance from where Glendome Circle started. Fronting on the roadway are a number of lots, of which plaintiffs own one in the interior of the tract and defendants own one at the corner of the easterly extremity of the private road and El Centro at Hollywood Avenue. Actually there are only four homes, including those of the parties, on the road. Defendants' home is built close to the roadway which at that point is only 16 feet wide. Glendome Circle is 26.29 feet wide. The persons living on the road give Glendome Circle as their postal and residence address. It is conceded that the parties, as well as other owners in the tract, are the owners of a nonexclusive easement and right of way on and over the roadway and that it is not a public road or street. According to plaintiff, Don Hucke, his difficulties with defendants started about 1946, shortly after Heroux, the subdivider, died. He testified that defendants for several months placed their car at almost a diagonal across the entrance to the circle, so that it was impossible to get through, especially for trucks intending to deliver to plaintiffs' home; that at one time in front of defendants' premises there was a long bar supported across the road which constituted a full road block. Defendants claimed that this was only there while they were repairing the road and that they never blocked the road, merely parking their car beside their garage. While there is a conflict in the testimony and defendants denied any of the acts of obstruction testified to by plaintiffs and their witnesses, there is substantial evidence to the effect that defendants stated that they owned the road and were going to stop plaintiffs from using it if they could and that they threatened to install a curb bisecting the road and thereby closing it. Defendants installed a sign, "Private Road," at the entrance to the road. Plaintiff testified that this confused some of his visitors who concluded that the private road, Glendome Circle, was a private entrance to somebody's home. There is considerable conflict as to when the sign "Glendome Circle" was first put up. Plaintiff testified it had been there off and on since 1939, and that it was first removed in 1948. Defendants claim that it was not there prior to 1947. Mrs. Coffee, a resident on the roadway, testified it had been there for the last ten years. Oakland's traffic engineer thought the sign was first put up about 1946. The basis of the dispute between the parties is that defendants want the general public kept off the street. Plaintiffs do not. Defendants testified that prior to the erection of the street sign the traffic was light but thereafter it increased 70 to 80 per cent. Defendant Dan Kader admitted, however, that during the last three weeks when the sign was down he noticed no diminution in traffic. Defendants contend they cannot keep their windows open day or night because of the noise and fumes of passing traffic. Defendants testified that the purpose of the "Private Road" sign was not to keep plaintiffs out, but to discourage heavy traffic. Defendant Anna Kader admitted stopping a garbage man because he stopped his truck by her bedroom window.

1. The Complaint.

[1, 2] Defendants' objections to the complaint are captious. As to defendants' acts, the complaint alleges that for a long time past defendants have wrongfully obstructed the right of way by so parking their automobile as to obstruct and interfere with its free use by plaintiffs and their visitors; that defendants have deliberately diverted plaintiffs' duly authorized visitors who were seeking to use the road; that defendants, seeking to obstruct plaintiffs in their free use of the easement, have installed a sign reading "Private Road" at its entrance, for the sole purpose of wrongly diverting duly authorized individuals; that defendants have threatened to install a curb bisecting the right of way; that defendants have represented it as a private road for their own exclusive use and have precluded plaintiffs from a full and free use of the road; that defendants refuse to discontinue its obstruction, as alleged, and threaten to and will continue to do so unless restrained, "to the irreparable damage of the plaintiffs." Plaintiffs allege damages, but during the trial waived any claim thereto. Apparently, defendants' main criticism of the complaint is that the allegations that plaintiffs are irreparably damaged and that plaintiffs have no plain, speedy or adequate remedy at law, are conclusions, and their contention that equity will not restrain by injunction the commission of "a mere ordinary or naked trespass". 43 C.J.S., Injunctions, § 60. They cite cases in which it is held that allegations of irreparable injury are mere conclusions. It is obvious that the complaint states a cause of action, as it states the facts upon which the conclusions are based. The continuing interference with plaintiffs' right to use the easement are facts which show irreparable injury. It is fatuous to contend that plaintiffs are relegated to their right to damages. The interference is a continuing injury and if not restrained would require constant suits for the daily occurrence. The facts alleged show more than "a mere ordinary or naked trespass." It should be pointed out that defendants' cross-complaint is in the very form and contains the same "conclusions" that they criticize in plaintiffs' complaint.

2. Judgment.

It provides *"that the plaintiffs have judgment as prayed for in this complaint;* that the defendants * * * be perpetually enjoined and restrained from interfering with and obstructing the road * * * as well as from in any manner interfering with the plaintiffs' use of said road by so parking their automobile upon said road as to obstruct its free use and interfere with the right of access and egress to and from plaintiffs' premises for the plaintiffs and their visitors * * * by threatening to install a curb bisecting the road, by representing said road as a private road for their own exclusive use, and by other acts calculated to prevent the plaintiffs from their free enjoyment of said way." (Emphasis added.)

[3–7] It is not clear just what the meaning of "plaintiffs have judgment as prayed for in this complaint" is. As the judgment thereafter details the specific acts enjoined this phrase should be deleted from the judgment. It is uncertain and indefinite. Defendants also contend that the phrase which enjoins them from *"in any manner* interfering with the plaintiffs' use of said road by so parking their automobile" etc. (emphasis added), is too broad, and cite cases like People v. Robin, 56 Cal.App.2d 885, 133 P.2d 436, 438, holding that under the circumstances of the particular case, the use of the words "in any manner" is too broad. However, that principle is not applicable here. In the above phrase "in any manner" is modified by the words "by so parking their automobile" as to obstruct plaintiffs' free use of the road. Thus defendants are only enjoined from so using the street as to interfere with plaintiffs' rights. The judgment must be construed reasonably and does not require, as defendants attempt to construe it, that defendants may not park their own car on the road, provided, of course, it is not so parked as to interfere with the use of the road by plaintiffs and their visitors. Although the road is only 16 feet wide, if defendants park in the customary manner such parking would not in-

terfere with plaintiffs' rights. The rights of both parties in the road are nonexclusive. Again, "other acts calculated to prevent the plaintiffs from their free enjoyment of said way" is not too indefinite, nor is it a violation of section 525, Code of Civil Procedure. While this clause is somewhat general, it is particularized by the requirement that the prohibited acts be ones calculated to prevent plaintiffs from the free enjoyment of the right of way. It is unnecessary in a judgment to set forth in minute detail all the acts which defendants have performed or threaten to perform which interfere with plaintiffs' rights. Again, here, the judgment must be interpreted reasonably in view of the nonexclusive rights of the parties.

Defendants contend that because they testified they always recognized the rights of all the owners along the road and had never done anything to the contrary, the injunction could not lie. This completely ignores the testimony of plaintiffs and their witnesses.

3. Additional Findings.

[8] Defendants contend that the findings omitted to mention that the easements of the respective parties are *permanent* ones. The court's finding on the subject is "that it was expressly agreed and understood between the appurtenant property owners, that each owner had and would have, in accordance with his respective deed, an easement" etc. Inasmuch as the easements and their permanency were never questioned in the case, this finding is sufficient. It shows that the parties have such easements in accordance with their respective deeds.

[9] The court did not find in so many words that Glendome Circle is not a public street. No one contended that it is. Defendants in their answer asked that the court grant the right to maintain the sign "Private Road." In their cross-complaint they alleged that the "Glendome Circle" sign was an infringement of their rights. They did not ask in the prayer, in express terms, for its removal. However, its removal was an issue in the case. Cross-defendant city of Oakland did not allege that the circle or the private road was a public street. They did allege that the city had erected the sign at the insistence of all the residents along the road, and that the city had no interest in whether the sign remains or is removed. It then asked the court to direct either the posting of the sign or its removal, as the evidence determined. The court made no finding on the subject, other than the fact that at the time of the submission of the cause the sign was down, nor did it refer to it in the judgment. Nor did the court expressly find on the subject of the maintenance by defendants of the "Private Road" sign. The evidence shows that defendants are the only ones who object to the "Glendome Circle" sign. Plaintiffs contend that the "Private Road" sign makes visitors to the area conclude that the road only goes to one home. The court should have made a finding on the subject. There is no question but that the road is actually a private road, namely, a road over which the four owners have an easement. In view of that fact, we can see no reason why the mere maintenance of a sign "Private Road" at its entrance is not a right which defendants have in enjoying their nonexclusive easement over the roadway. While their deed describes the private road as "running from Glendome Circle to Hollywood Avenue" and perhaps the legend "Glendome Circle" on the map only referred to that short portion of the road extending from the westerly end of the private road to El Centro (the map is subject to the interpretation that the term "Glendome Circle" includes the private road), we can see no reason why the majority owners may not call their roadway any name they want and erect a sign at its entrance. Particularly is this so when they choose the name of a roadway of which the private road is an extension. We see nothing inconsistent in the maintenance of the two signs, nor any interference thereby in the rights of the easement owners. If the city of Oakland, without claiming any rights in the road, is willing to erect and maintain a sign there at the request of the majority owners, we see no difference from a situation in which the majority erected the sign themselves

or hired a carpenter to put it up. Neither party has any right to represent that either sign gives them more rights than appear in their respective deeds.

Considerable of the difficulty here would be avoided if the "Private Road" sign appeared on the same post, just below the "Glendome Circle" sign, rather than for the signs to be on two separate posts. At the oral argument, both parties agreed that the trial court should have made findings on the subject of the signs, although, of course, they disagreed on what the findings should be.

[10, 11] We have the power to amend the findings and judgment. Code Civ.Proc. § 956a. The findings are amended to provide that plaintiffs are entitled to install and maintain at the junction of the private road and El Centro Avenue the sign "Glendome Circle." This sign may be erected and maintained by any agency designated by plaintiffs or by cross-defendant city of Oakland, provided said city makes no claim to the road as a public street. Defendants may maintain at said location, preferably on the same post as the above sign, a sign "Private Road," and the erection and maintenance of both signs are consistent with the rights of the parties under their respective easements.

The judgment is amended by striking therefrom the words "that the plaintiffs have judgment as prayed for in this complaint" and by inserting therein, at the end thereof, the following: Plaintiffs may erect and maintain at the junction of the private road and El Centro Avenue a sign containing the words "Glendome Circle." Such erection and maintenance may be by plaintiffs or any agency designated by them, or by cross-defendant city of Oakland as long as said city makes no claim to the road as a public road. Defendants Kader may erect and maintain a sign with the words "Private Road" thereon, at the entrance to said road, but preferably on the same post as and below said sign "Glendome Circle."

As so amended, the judgment is affirmed. Each party shall bear his own costs.

PETERS, P. J., and FRED B. WOOD, J., concur.

38 Cal.2d 447

NICHOLS v. McCOY.

L. A. 22173.

Supreme Court of California, In Bank.

Feb. 21, 1952.

James Wilson Nichols brought an action against Roy Gilbert McCoy for death of plaintiff's father who was struck and killed by defendant's automobile while attempting to walk across a street at or near a poorly lighted pedestrian crosswalk. The Superior Court, Los Angeles County, J. A. Smith, J., rendered a judgment adverse to the plaintiff and the plaintiff appealed. The Supreme Court, Traynor, J., held that sufficient foundation was laid for admission in evidence of testimony as to contents of official record of coroner's office which stated that test made of decedent's blood indicated presence of alcohol.

Judgment affirmed.

Schauer and Carter, JJ., dissented.

Prior opinion 235 P.2d 412.

1. Appeal and Error ⇐204(4)

Where plaintiff made no objection in trial court to fact that official record in coroner's office was proved by allowing head toxicologist of county coroner's office to testify to contents of record rather than by introducing record itself in evidence, plaintiff could not complain on appeal as to manner in which evidence of record was presented.

2. Evidence ⇐150

In action for death of plaintiff's father who was struck by automobile while attempting to walk across a street, sufficient foundation was laid to justify admission in evidence of testimony as to contents of official record of coroner's office which stated that test made of decedent's blood indicated presence of alcohol, as against contention that there was no proof that blood tested was that of decedent.

Royal M. Galvin and Daniel Schnabel, Beverly Hills, for appellant.

Bauder, Gilbert, Thompson, Kelly & Veatch and Henry F. Walker, Los Angeles, for respondent.

TRAYNOR, Justice.

Plaintiff brought this action for the wrongful death of his father, who was struck and killed by defendant's automobile while attempting to cross San Fernando Road on foot. The accident occurred in the early evening at or near a poorly lighted pedestrian crosswalk. There was evidence from which the jury could infer that defendant was negligent in failing to yield the right of way to decedent or in failing to observe him crossing the highway until the moment of impact. There was a conflict in the evidence as to whether or not decedent was in the crosswalk, and the jury could infer that he was negligent in walking or running into the path of defendant's automobile. The jury returned a verdict for defendant upon which judgment was entered, and plaintiff has appealed.

[1] Plaintiff's only contention is that the trial court erred in allowing the head toxicologist of the Los Angeles County coroner's office to testify to the contents of an official record of his office. The record stated that a test made of the blood of decedent indicated the presence of 0.11 percent alcohol. Plaintiff made no objection in the trial court to the fact that the record was proved by allowing the witness to testify to its contents rather than by introducing the paper itself in evidence, and accordingly, it is now too late to object to the manner in which the evidence of the record was presented. Estate of Huston, 163 Cal. 166, 173, 124 P. 852. Plaintiff contends, however, that it was prejudicially erroneous to admit the results of the test in evidence, on the ground that there was no proof that the blood tested was that of decedent. See People v. Smith, 55 Cal.App. 324, 327, 203 P. 816; American Mut. Liability Ins. Co. v. Industrial Accident Comm., 78 Cal.App.2d 493, 496–497, 178 P.2d 40. Defendant, on the other hand, contends that under sections 1920 and 1953e–1953h of the Code of Civil Procedure, the record of the coroner's office was admissible to prove all the facts stated therein, including the source of the blood, and that in any event there was sufficient

additional evidence to prove that the blood referred to in the coroner's record was that of decedent.

[2] Since we have concluded that the challenged record was admissible under the Uniform Business Records as Evidence Act, Code Civ.Proc. §§ 1953e–1953h, it is unnecessary to decide whether it was also admissible under section 1920 of the Code of Civil Procedure. Section 1953e provides: "The term 'business' as used in this article shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not." Section 1953f provides: "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." In McGowan v. City of Los Angeles, 100 Cal. App.2d 386, 223 P.2d 862, it was the opinion of the trial court that the sources of information, method and time of preparation of the record in question were not such as to justify its admission. In that case neither the embalmer nor any other witness from the mortuary testified as to the procedure followed in taking blood samples, and the trial court was therefore justified in concluding that the proper foundation had not been laid. In the present case, however, the trial court concluded that a proper foundation had been laid, and the evidence supports this ruling. There was evidence that as part of the regular operation of the coroner's office, blood samples were collected from undertakers for the purpose of analysis. An analysis was made from a sample taken from a bottle bearing decedent's name. The embalmer testified that he took the sample before embalming the body, labeled the bottle, and left it for an employee of the coroner's office to pick up. He was informed of the name of decedent at the time of the embalming and again the next day when his employer had him sign the embalming certificate. It was not necessary that he have personal knowledge of the identity of decedent. Loper v. Morrison, 23 Cal.2d 600, 608–609, 145 P.2d 1. The trial court was justified in concluding that the embalmer's sources of information with respect to the identity of decedent were accurate and that he would not label a bottle of blood with decedent's name unless he were reasonably sure that it was decedent's. See Health and Safety Code, § 10451. "It is the object of the business records statutes to eliminate the necessity of calling each witness, and to substitute the record of the transaction or event." Loper v. Morrison, supra, 23 Cal.2d 600, 608, 145 P.2d 5. Accordingly, it was unnecessary to call the witness who supplied the embalmer with the information he recorded.

Aside, however, from the evidence provided by the record itself, there was additional evidence that the blood in the bottle labeled with decedent's name was his blood. Decedent's daughter-in-law testified that his body was taken to the Paschall Mortuary shortly after the accident. The embalmer testified that he took a sample of blood from the only body in the mortuary that night and labeled it with decedent's name. Since decedent's body was in the mortuary, and since there was only one body there, it is clear that the sample of blood taken was that of decedent. It is immaterial, therefore, whether or not the embalmer knew personally the identity of decedent. A sufficient foundation was laid to justify the trial court's conclusion that the blood tested by the coroner's office was decedent's, and accordingly, there was no error in admitting the record in evidence.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

In matters of legal proof which directly concern security of life, liberty and property I do not like to exchange any portion of certainty, which at best is but relative, for mere convenience, which is unnecessary.

I would prefer that we concern ourselves more with advancing standards of authenticity and reliability of evidence, and enhancing certainty of proof, rather than with developing more convenient substitutes for trustworthy evidence and complacency in lower standards of certainty. The breaking down[1] of the safeguards for reliability of evidence which have been culled from the accumulated experiences of the civilized world in its quest for justice through showing the truth in free courts, does not, in my view, make for the security of a free people. The end, however desirable it might appear in individual cases, does not justify the means.

A sufficient discussion of the reasons for the rule to which I think we should adhere is contained in the opinion authored by Justice Wood (Parker) for the District Court of Appeal, reported at 235 P.2d 412. Upon the grounds stated by Justice Wood, and emphasized by considerations suggested above, I should reverse the judgment.

CARTER, Justice.

I dissent.

I agree with Mr. Justice SCHAUER that we should be more concerned with reliable and accurate evidence than with convenient methods of producing it. The holding of the majority that the evidence produced in this case, over plaintiff's objection, was admissible to prove that plaintiff's decedent was guilty of contributory negligence, is one of the most flagrant examples of judicial sanction of nebulous hearsay that has come to my attention.

Mr. Justice Parker Wood's excellent opinion, which I adopt in full as my dissent in this case, points out that no witness who testified had any independent recollection that the official county coroner's record, covering the blood analysis in question, was based on *the* blood taken from *the decedent.* All witnesses either assumed that it was, thought it must have been, or should have been, or could have been, because that body was the only one in the mortuary at *that* time. Since the witnesses who testified had only a "faint" recollection or no independent recollection of the taking of the blood sample, one is forced to question the statement that decedent's body was the only one there at *that* time. *What* time? As Justice Wood points out, it did not appear that other bodies were not there later that night or at some time during the next two days before the pathologist arrived and performed the autopsy.

While I agree that entries made in the ordinary course of business in the records of business establishments should be admissible in evidence without calling as witnesses the parties making such entries, I can see a vast difference between such records and the one introduced in evidence in the case at bar. The entry in the business record is made at the time the transaction is consummated and, if properly made, discloses the nature of the transaction by indicating what was done and when and how it was done. Such a record, if made in the ordinary course of business, carries a presumption of regularity and accuracy, while here the possibility of error is so great as to completely destroy its probative value.

I quote with approval the opinion prepared by Mr. Justice Parker Wood, which was concurred in by Presiding Justice Shinn and Associate Justice Vallée, when this case was before the District Court of Appeal, Second District, Division Three, 235 P.2d 412–416, which correctly states the facts and declares the law in accordance with what has been the rule of decision in this state:

"Action for damages for the wrongful death of William Allen Nichols, a pedes-

1. This case sets one more flagstone in the path departing from established standards. Illustrative of the trend see People v. Clapp (1944), 24 Cal.2d 835, 840, 151 P.2d 237; People v. Wilson (1944), 25 Cal.2d 341, 351, 153 P.2d 720; People v. One 1941 Mercury Sedan (1946), 74 Cal.App.2d 199, 213, 168 P.2d 443; People v. Rochin (1950), 101 Cal.App. 2d 140, 143, 149, 225 P.2d 1, 913. But, suggesting a stoppage of the trend in its graver impingements on federal constitutional guaranties, see Rochin v. California (1952), 72 S.Ct. 205, 96 L.Ed. 183.

trian, resulting from the alleged negligence of defendant in operating an automobile. Plaintiff is the son and only heir of the deceased. In a trial by jury the verdict was for defendant, and the judgment was entered in accordance with the verdict. Plaintiff appeals from the judgment and from the order denying his motion for a new trial.

"Appellant contends that the trial court erred in receiving the testimony of R. J. Abernathy concerning the alcoholic content of a blood specimen. Appellant asserts that the specimen of blood was not properly identified as the blood of the deceased.

"The accident occurred about 7 p. m., on December 25, 1948, on San Fernando Road near the intersection of Arvilla Street which is outside a business or a residential district; San Fernando Road is a paved highway which extends in a northerly and southerly direction; San Fernando Road, at and near the scene of the accident, is approximately 51 feet wide, and has four marked traffic lanes—two for northbound traffic and two for southbound traffic; a pedestrian crosswalk extends across San Fernando Road near and north of that intersection; the crosswalk is 17 feet wide and is marked by white lines about 12 inches wide. There were no traffic control signals at the intersection to regulate traffic on San Fernando Road, and the intersection was 'poorly lighted.'

"On the night of the accident defendant was driving a 1936 Buick automobile in a northerly direction on San Fernando Road. After he had passed the above-mentioned intersection, the automobile he was driving struck Mr. William Allen Nichols, a pedestrian 68 years of age, who was proceeding across San Fernando Road. Mr. Nichols was taken by ambulance to the Van Nuys Receiving Hospital, and he died as a result of being struck by the automobile.

"Defendant testified that he was driving about 30 miles an hour; his automobile was in the lane next to the center of the highway; traffic proceeding in the opposite direction on the highway was quite heavy and some of the lights were bright; the headlights of his automobile were in good working order and they were burning; he believes he could see clearly for a distance of 50 feet ahead; it was dusk—a time 'when lights didn't show up very good'; he first saw the deceased just before he struck him, at which time deceased was about a foot from his automobile; he (deceased) was moving toward the west; from the glimpse he got of deceased, it appeared that he was running; defendant turned his automobile to the left away from the deceased and applied the brakes, but the right front fender of the automobile struck the deceased; his automobile came to a stop about 35 feet from the point of impact; defendant got out of the automobile and saw the deceased lying on the highway 'towards the back end' of the automobile and about 12 feet east of it; defendant saw the crosswalk before his automobile struck deceased; when his automobile struck deceased, the deceased was about 8 feet north of the north line of the crosswalk; at the time of the accident the deceased was wearing dark clothes. He also testified that the intersection 'wasn't lit up enough so that you could see anything with respect to this crosswalk that is painted across there.'

"A police officer, who investigated the accident, testified that he arrived at the scene of the accident about 7 p. m. and took measurements; the deceased was lying in the 'northbound curb lane,' 50 feet north of the north line of the crosswalk; there were solid skid marks for a distance of 48 feet, which skid marks extended from a point 3 feet 'within the crosswalk' to the rear wheels of the automobile.

"Plaintiff's wife testified that when she arrived at the scene of the accident the deceased was lying on his side and 'kind of crumpled up,' and his shoes were off; that he was wearing blue and white striped overalls, a khaki shirt and a black hat; his body was removed from the receiving hospital to the Paschall Mortuary.

"Mr. Hilburn testified that he is a licensed embalmer; in December, 1948, he was employed as a contract embalmer by the Paschall Mortuary; he had with him (at the trial) a copy of the Vital Statistics Record; *he faintly recalled doing some work on the body of the deceased;* he took a sample of decedent's blood for chemical

analysis, as he was required to do by the coroner's office; it is a routine procedure, and when they take a blood sample they 'put the name of the deceased, the date, and usually the time that the blood sample was drawn'—the sample is then turned over to the pathologist, or autopsy surgeon. He testified further that his (witness') apprentice was with him when he removed the blood from the body of the deceased; he removed the blood on the night of December 25, 1948, before the body was embalmed; he (witness) put the blood in a bottle; he inquired for the name of the deceased, and he then put his (deceased's) name on the bottle that night by writing it with a pencil on the label which was on the bottle; he left the bottle on a shelf in the preparation room at the mortuary for the pathologist; there was no other bottle there; there was no other body in the mortuary at that time; he had not known the deceased in his lifetime, *but the owner of the mortuary, Mr. Morgan, had told him the body was that of William Nichols; he had no independent recollection that Mr. Morgan had told him the body was that of William Nichols;* the following day Mr. Morgan presented a certificate to the witness for him to sign as embalmer, and that 'is the case' which he (witness) embalmed; *the night before, Mr. Morgan had not identified anything to him.* He also testified that after embalming is completed, the bottle is placed on the embalming table with the deceased, *but he did not recall doing that in this case; he may have handed the bottle to his apprentice; he did not see the bottle the next day.*

"Dr. Krieger testified that he was the pathologist for the county coroner in December, 1948; on December 27, 1948, he performed an autopsy on the deceased at the mortuary; and that he had notes of the autopsy. He testified further, over the objection of plaintiff, that a sample of the blood of the deceased was turned over to him (witness)—that according to his records he received a blood specimen of the deceased. He testified further that the 'blood samples are placed in a box and picked up by Mr. Dillard' of the coroner's office and taken to the coroner's office for analysis; the bottle in which a sample is contained has the identification of the deceased, and the result of the examination becomes a part of the official public record of the death. *On cross-examination he testified that he had no recollection of this particular autopsy; that he must have picked up a blood sample or he would not have stated 'on the specimen' submitted—'Blood for alcohol'; according to his notes there was a specimen; he (witness) did not make any test of the blood itself, and he took no blood specimen from the body.*

"R. J. Abernathy, called as a witness on behalf of defendant, testified that he is the chemist and head toxicologist for the Coroner of Los Angeles County; he occupied that position in December, 1948; in compliance with a subpoena served on him, he brought the official county records concerning the deceased to court with him; those records are the original records of the coroner's office; the records concerning the chemical work which is done are kept under his direction and supervision. The witness was then asked the following question: 'Now, do you have the records concerning your chemical analysis of the blood test of William Allen Nichols who met his death on Christmas Day in 1948?' He answered, 'I do.' Counsel for plaintiff then said, 'Objected to as a conclusion of the witness, that it was the blood of William Allen Nichols.' The court overruled the objection. The witness was then asked whether, under his supervision, a chemical analysis of the blood of the deceased was made. He replied, 'Yes.' He was then asked if that analysis revealed the content, if any, of alcohol in the deceased's blood stream. He replied, 'It did.' He was then asked what percentage of alcohol was present on examination. He replied, '0.11 per cent.' He testified further that the percentage of ethanol level in the blood required to produce intoxication in the average person is from .10 to .15 per cent.

"There was also testimony by Dr. Krieger that .15 'milligrams per cent' of alcohol in the blood is presumed to be a level at which a great many individuals are considered intoxicated.

"The evidence shows that the analysis of the blood was made under the supervision of the witness Abernathy. *It does not appear that he personally made the analysis or that he was present when it was made. The person who made the analysis under his supervision did not testify and the name of that person was not disclosed.* Mr. Abernathy's testimony as to the alcoholic content of the specimen was based upon a record made in the coroner's office. *The person who allegedly brought the specimen from the Paschall Mortuary to the coroner's office did not testify and his name was not disclosed.* The autopsy was performed at the mortuary two days after the accident occurred. The pathologist, who performed the autopsy, testified that 'blood samples are placed in a box and picked up by Mr. Dillard' and taken to the coroner's office. It seems that said testimony was a statement pertaining to blood samples generally and the customary procedure of the coroner's office in obtaining the samples, rather than a statement referring particularly to the sample involved herein. Mr. Dillard, referred to in that statement, was in the courtroom but he did not testify. *Although the pathologist also testified on direct examination that a sample of the blood of the deceased was turned over to him, it appears from the cross-examination that he had no recollection of this particular autopsy, that he did not take a specimen from the body of the deceased, and he concluded that he 'must have picked up a blood sample' because, according to his notes, there was a specimen.* The embalmer, who had only a faint recollection of having done some work on the body of deceased, testified as to the 'routine procedure' in taking a blood sample. He also testified that on the night of December 25th, he put the blood in a bottle, inquired for the name of the deceased, put the name of deceased on a label on the bottle, and left the bottle on a shelf in the preparation room for the pathologist; and no other bottle was there. It is to be noted that he also testified that after embalming is completed the bottle containing the sample is placed on the embalming table with the deceased, but he did not recall doing that in this case; that he may have handed the bottle to his apprentice. *It thus appears that he did not remember whether he put the bottle on a shelf or on the embalming table, or whether he handed it to his apprentice. He also testified that no other body was in the mortuary at that time. It does not appear, however, that other bodies were not there later that night or at some time during the next two days which elapsed before the pathologist arrived and performed the autopsy. No bottle or label purporting to be the bottle or label referred to herein was produced in court. There was no evidence as to when or how or by whom the specimen of blood involved here was taken from the mortuary to the coroner's office; and there was no evidence as to the appearance or condition of the bottle or label at the time the specimen was taken from the mortuary or at the time it was received at the coroner's office.* It thus appears that the various steps in the keeping and the transportation of the specimen of Mr. Nichols' blood, from the time the specimen was taken from his body to the time it was analyzed by Mr. Abernathy, were not traced or shown by the evidence. *The blood specimen which was analyzed, and concerning which Mr. Abernathy testified, was not identified as the blood of Mr. Nichols.*

"Respondent asserts that it must be presumed that official duty was performed properly and that the public records of the coroner's office are correct. In the case of McGowan v. City of Los Angeles, 100 Cal.App.2d 386, 223 P.2d 862, 863, a toxicologist, employed in the coroner's office in charge of the examination of blood of deceased persons, testified that a paper entitled 'Blood alcohol determination' was made by his department in the regular course of business; that the death of Charles Cox was recorded; that the record indicated that the blood that was examined came in a bottle from a certain mortuary; that on the bottle there was the name of Charles Cox and the name of the mortuary; and that the analysis was noted on the paper. An assistant toxicologist, employed in the coroner's office, testified

therein that she received the bottle, examined the blood and prepared the said paper. Defendant therein contended that the court erred in refusing to admit the paper in evidence, and relied upon the provisions of section 1920 of the Code of Civil Procedure. Section 1920 provides: 'Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein.' In that case the court said, 100 Cal.App.2d at page 389, 223 P.2d at page 864: 'If it had been proved that the blood analyzed by the county coroner's office had been taken from the body of Cox before any extraneous matter had been injected into his body, the coroner's record of the analysis would have been admissible and prima facie evidence of the facts therein stated.' It was also said therein, 100 Cal.App.2d at page 390, 223 P.2d at page 864: '* * * the record of the analysis of blood in the present case without tracing the blood to the body of Cox was not admissible.' It was also stated therein, 100 Cal.App.2d at page 392, 223 P.2d at page 866: 'The statute does not change the rules of competency or relevancy with respect to recorded facts. It does not make that proof which is not proof. It merely provides a method of proof of an *admissible* "act, condition or event". * * * In the absence of proof that the blood analyzed was the blood of Cox, taken from his body prior to the injection of any fluid therein, oral testimony of the result of the analysis would not be admissible.' It was also said therein on the same page: 'There was no evidence that any blood was ever taken from the body of Cox, or, if any was taken, the identity of the person who took it, or when it was taken—* * * how, when, and the identity of the person by whom the container was labeled, or who delivered the bottle to the coroner's office, or that the blood analyzed was that of Cox. Neither the label nor the bottle was identified, offered or received in evidence. No excuse, explanation or justification was given for failure to lay the necessary foundation. The court did not err in refusing to admit the paper in evidence.' In the present case, since the specimen of blood was not identified as the blood of Mr. Nichols, the court erred prejudicially in receiving the testimony as to the analysis of the specimen."

For the foregoing reasons, I would reverse the judgment.



38 Cal.2d 399

BENTON et al. v. SLOSS.

L. A. 22125.

Supreme Court of California, in Bank.

Feb. 15, 1952.

Action for personal injuries by Beatrice J. Benton, and others, against L. D. Sloss, and another, sustained while plaintiffs were passengers in an automobile which allegedly had defective brakes at time the named defendant, an automobile dealer, gave possession of it to defendant driver. The Superior Court, San Diego County, Arthur L. Mundo, J., tried case without jury and rendered judgment against the defendants and the named defendant appealed. The Supreme Court, Traynor, J., held that evidence substantiated finding that dealer was negligent and that his negligence was a contributing cause of the accident.

Judgment affirmed.

Schauer, J., dissented.

Prior opinion 234 P.2d 749.

1. Automobiles ⇐181(1)

Guest statute protects driver and all persons legally liable for his conduct from liability to guests for ordinary negligence. Vehicle Code, § 403.

2. Automobiles ⇐181(1), 192(8)

Where minor, after making down payment, was given possession of used automobile by dealer, dealer was not liable, under guest statute or statute imputing to owner liability for negligent operation of automobile, for injuries sustained by minor's guests because of minor's alleged wil-

ful misconduct, in absence of showing that minor was dealer's agent. Vehicle Code, §§ 402, 403.

3. Automobiles ⇐181(1)

Guest statute bars action against automobile owner where he is vicariously liable for driver's conduct because of relationship of parties, as principal-agent, or because of imputed negligence under statute imputing to owner liability for negligent operation of vehicle, but guest statute does not limit common-law liability of owner of vehicle for his own negligence as owner. Vehicle Code, §§ 402, 403.

4. Automobiles ⇐16, 181(1)

Where minor had obtained used automobile from dealer after paying part of purchase price and minor's guests were injured in accident which occurred when brakes locked, guest statute did not absolve dealer from liability for negligent delivery of automobile to minor with defective brakes. Vehicle Code, §§ 660, 670.

5. Automobiles ⇐16

Although dealer in used automobiles does not insure safety of automobile he sells and is under no duty to disassemble automobile to examine its parts, he must make reasonable inspection for defects that would make automobile menace on highways. Vehicle Code, §§ 660, 670.

6. Automobiles ⇐16, 244(33, 38)

In action against automobile dealer from whom minor had obtained automobile on making down payment, for injuries sustained by minor's guests in accident which occurred when brakes locked, evidence sustained court's findings that dealer could have discovered by reasonable inspection that brakes were defective, that dealer was negligent, and that his negligence was contributing cause of plaintiffs' injuries. Vehicle Code, §§ 660, 670.

7. Appeal and Error ⇐1010(1)

Where issue as to negligence is not so clear that reasonable men cannot differ, trial court's finding must be sustained.

8. Automobiles ⇐16, 201(9)

Where minor driver made down payment to and obtained from dealer automobile having defective brakes and two days thereafter was involved in accident caused by locking of brakes on automobile and negligent operation of automobile by minor, dealer could have reasonably foreseen that his negligence coupled with that of minor could result in injury to passengers in automobile and thus was not relieved from liability by minor's negligence. Vehicle Code, §§ 660, 670.

9. Automobiles ⇐16

Duty of dealer in used automobiles to provide adequate brakes on automobiles sold extended not only to buyer but also to third persons reasonably expected to be in the vicinity of probable use of automobile. Vehicle Code, §§ 660, 670.

10. Automobiles ⇐181(1), 192(8)

Where minor paid dealer part of purchase price for used automobile and was directed by dealer to drive automobile to home of minor's father to obtain his signature on purchase contract and where next day automobile was involved in accident when minor was driving it on pleasure trip after attempt to return automobile to dealer failed because dealer's lot was not open, minor's operation of automobile at time of accident was not risk beyond that created by dealer on day before and did not excuse dealer from liability. Vehicle Code, §§ 660, 670.

McInnis & Hamilton and John W. McInnis, San Diego, for appellant.

Johnson & Johnson and Harry Ashfield, San Diego, for respondents.

Belli, Ashe & Pinney, San Francisco, as amici curiæ on behalf of respondents.

TRAYNOR, Justice.

On Friday, May 23, 1947, defendant Jay Fetters, a nineteen year old boy, selected at defendant Sloss' used car lot a 1935 Chevrolet that Sloss had purchased five days earlier. Sloss did not ask Jay his age or whether he had a driver's license. Jay paid $75 of the $100 down payment, and Sloss allowed him to take the car home. On Saturday afternoon, Jay returned with the car and the $25 balance of the down payment. While filling out the sales con-

tract, Sloss discovered that Jay was a minor and refused to complete the contract unless Jay's father signed it. Jay left the lot about five o'clock with the car and a contract form for his father to sign. The father refused to sign. He testified that "when I looked at the car and seen it was nothing but a wreck I called up Sloss and told him to come and get the car; that the kid had no business with it; that he had no driver's license and no experience, and that it was nothing but a wreck, but he wouldn't pick it up." The father then told Jay to return the car. Jay drove it to the lot Saturday night and again Sunday morning, but Sloss was not there at either time.

After leaving the car lot on Sunday morning, Jay met two minor girl friends, Beatrice Benton and Marlie Alden, plaintiffs in this action, and a boy friend, Richard Kasitz, and took them for a ride in the country. They were accompanied by another car driven by Elden Earnest. The two drivers were racing and alternately passing each other on a two-lane highway at about 45 miles per hour. As Jay was passing Elden's car, another car suddenly emerged from a dip in the road. To avoid a head-on collision, Jay swerved to the right, and passed in front of Elden's car and behind a car immediately ahead of Elden travelling in the same direction. Since the Chevrolet did not have a horn, Jay could not warn Elden to pull over or slow down. To avoid hitting the car in front of Elden, Jay applied his brakes. The right rear wheel locked and the left wheel brakes failed to operate. His car skidded across the highway, leaving black skid marks on the right side only. Jay attempted to drive onto the shoulder of the highway, but the car slid into a telephone pole by the highway. Plaintiffs were injured by the collision of the car with the telephone pole.

Plaintiffs filed this action against Sloss, Jay, and Jay's father. The case was tried without a jury, and each plaintiff recovered judgment against Jay and Sloss. Judgment was returned in favor of Jay's father. Defendant Sloss alone has appealed.

[1, 2] Sloss first contends that he is absolved from liability under section 403 of the Vehicle Code.[1] This statute protects the driver and all persons legally liable for his conduct from liability to guests for ordinary negligence. The driver is liable, however, for injuries to his guests caused by his intoxication or wilful misconduct. There is no evidence of intoxication in the present case, but the trial court found that Jay was guilty of wilful misconduct in operating a defective car, operating it without experience, and racing it on the highway against another car. Sloss, however, cannot be held under section 403 for Jay's wilful misconduct, since there was no showing that Jay was Sloss' agent. Stober v. Halsey, 88 Cal.App.2d 660, 665, 199 P.2d 318. For the same reason Sloss cannot be held under Vehicle Code, § 402, imputing to the owner of a vehicle liability for negligent operation, for, in the absence of a principal-agent relationship between the owner and the driver, the owner is not liable for the driver's wilful misconduct. Weber v. Pinyan, 9 Cal.2d 226, 238, 70 P.2d 183, 112 A.L.R. 407.

[3] In the present case, however, plaintiffs seek to hold Sloss for his own negligence, and not as a person legally responsible for the driver's acts under section 403, or as an owner under section 402. See Weber v. Pinyan, supra, 9 Cal.2d 226, 237, 70 P.2d 183. Section 403 bars actions against the "driver" of a vehicle or against "any other person legally liable for the conduct of such driver". The phrase "person legally liable" for the driver's conduct is clearly intended to cover cases in which the owner is vicariously liable for the

1. "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver."

driver's conduct because of the relationship of the parties, as principal-agent, or because of imputed negligence under section 402. Stober v. Halsey, supra; Stephan v. Spaulding, 32 Cal.App.2d 326, 89 P.2d 683. Section 403 does not limit the common-law liability of the owner of a vehicle for his own negligence as owner.

Sloss contends that since the owner of an automobile would be guilty of ordinary negligence in failing to make proper repairs, and would be protected by section 403 if he were driving the car at the time of the accident, Rhoads v. Studley, 15 Cal. App.2d 726, 59 P.2d 1082; Ohlson v. Frazier, 2 Cal.App.2d 708, 39 P.2d 429, the purpose of the section would be defeated if he were held liable for the same act of negligence merely because he was not driving at the time of the accident.

[4] Section 403, however, nowhere refers to owners of vehicles. The only persons absolved from liability are the driver and those legally responsible for his acts. Sloss was not the driver and the action against him is not based on any responsibility he might have for the driver's conduct. Sloss would bring himself within the section by construing "driver" to include "owner," but the section does not admit of that construction. Moreover, plaintiffs were Jay's guests, not Sloss', and are in the same position as any one else who was injured because Sloss failed to maintain his vehicle in proper mechanical condition.

The controlling question, therefore, is whether Sloss was negligent and if so whether his negligence was a contributing cause of the accident.

[5] Although a used car dealer does not insure the safety of a car he sells, and is under no duty to disassemble the car to examine its parts, he must make a reasonable inspection for defects that would make the car a menace on the highways. Supera v. Moreland Sales Corp., 13 Cal. App.2d 186, 191, 56 P.2d 595; Egan Chevrolet Co. v. Bruner, 8 Cir., 102 F.2d 373, 375, 122 A.L.R. 987; Flies v. Fox Bros. Buick Co., 196 Wis. 196, 210, 218 N.W. 855, 60 A.L.R. 357; see, Prosser, Torts, p. 680; 122 A.L.R. 997; 99 A.L.R. 240.

[6] Section 660 of the Vehicle Code provides: "No dealer shall sell a used motor vehicle without first testing and if necessary adjusting the lights and brakes on such vehicle to conform with the provisions of this code". The standards for adequate brakes are set forth in section 670 of the Vehicle Code. Thus, a motor vehicle must be equipped with brakes adequate to bring it to a complete stop within 188 feet, when it is operated at a speed of 45 miles per hour on a dry asphalt or concrete pavement where the grade does not exceed 1%. Although Sloss testified that he had given the car a road test about five days before the proposed sale to Jay and that the brakes had then operated satisfactorily, there is no evidence that he made any test of the brakes to determine whether they met the standards prescribed by this section. Sloss' mechanics did not inspect or do any work on the brakes. The failure of the brakes shortly after delivery of the car to Jay indicates that the defect was present and discernible at the time of the proposed sale. Sloss' testimony at best created a conflict in the evidence, which the trial court resolved in plaintiffs' favor. The trial court could reasonably conclude that a reasonable inspection would have disclosed the defective brakes. Egan Chevrolet Co. v. Bruner, supra.

We are also of the opinion that the trial court could reasonably conclude that Sloss' negligence was a contributing cause of plaintiffs' injuries. Jay's testimony, corroborated by the testimony of his guests and by the skid marks on the pavement, established that the right rear wheel of the car locked when Jay attempted to apply the brakes. At the most critical part of the operation, the brakes locked. Jay described the situation: "Elden put on his brakes and I tried to get in between them [the two cars], and I hit my brakes and the back wheel locked and it [Jay's car] fish-tailed, and I didn't want to hit the fellow in front of me, and so I went clear over to hit the shoulder and cramped the wheels and it slid right into the pole." The shoulder had a gravel surface and once the car skidded off the pavement, Jay was unable to get it back on the highway. One

of Jay's guests, Richard Kasitz, testified that the car swung to the right when Jay applied the brakes, although Jay kept turning the steering wheel to the left.

[7] Jay's negligent driving was unquestionably a cause of plaintiffs' injuries. Sloss' negligence was also a cause of those injuries, if it was a substantial factor in bringing them about. McEvoy v. American Pool Company, 32 Cal.2d 295, 298, 195 P.2d 783; Rest., Torts, § 431. This question of fact the trial court resolved in plaintiffs' favor. In the light of the evidence it could reasonably conclude that because of the defective brakes Jay could not avoid the collision. Since we cannot say that the issue is so clear that reasonable men cannot differ, the trial court's finding must be sustained.

[8] The question remains whether the injury falls within the limits of Sloss' legal responsibility for the consequences of his conduct. Sloss could reasonably foresee that the brakes would be used in emergency conditions arising under ordinary highway speeds. See Nebelung v. Norman, 14 Cal. 2d 647, 652, 96 P.2d 327. The negligent conduct of Jay did not relieve Sloss from liability, for the likelihood of negligent operation of the vehicle was one of the hazards that Sloss could reasonably foresee. Mosley v. Arden Farms Co., 26 Cal.2d 213, 219, 220, 157 P.2d 372, 158 A.L.R. 872; McEvoy v. American Pool Corp., supra, 32 Cal.2d 295, 298, 195 P.2d 783; Lacy v. Pacific Gas & Electric Co., 220 Cal. 97, 29 P.2d 781; Opple v. Ray, 208 Ind. 450, 456, 195 N.E. 81; see Rest., Torts, § 447. The possibility of a driver's negligently placing himself in a position from which he could not extricate himself without adequate brakes imposed on Sloss a duty to test and adjust the brakes of the car, and thus prevent it from endangering the lives of occupants, pedestrians, and other users of the highway. Veh.Code, § 660; Flies v. Fox Bros. Buick Co., supra; Forman v. Shields, 183 Wash. 333, 341, 48 P.2d 599.

[9] Sloss' duty extended not only to the prospective buyer, but to third persons who could reasonably be expected to be in the vicinity of the probable use of the automobile. Flies v. Fox Bros. Buick Co., supra (pedestrian); see Prosser, Torts, p. 680; Rest., Torts, §§ 388, 392. The injury to Jay's guests was therefore within the limits of the risk created by Sloss' negligence.

[10] Sloss contends that Jay was given permission only to take the automobile to his father's home to induce him to sign the contract. Therefore, he argues, the use of the car for a pleasure trip on the following day was without his implied or express permission. The evidence shows that Sloss allowed Jay to take the car home on Saturday afternoon about five o'clock, knowing that he was only nineteen years old. Sloss could reasonably expect, and indeed anticipate with a sale in mind, that Jay would not only test the performance of the car but drive it for pleasure pending the negotiation of the contract. Sloss' own absence from the lot precluded Jay's returning the car. He closed his lot about seven o'clock Saturday night and went to a ball game, although Jay's father had telephoned earlier and asked Sloss to come for the car. The lot was likewise closed on Sunday morning. Under these circumstances, it cannot be said that Jay's operation of the car on Sunday was a risk beyond that created when Sloss allowed Jay to take the car from the lot on Saturday afternoon.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

I do not view the evidence as sufficient to sustain a finding that Sloss was guilty of negligence proximately contributing to the accident; neither do I find the judgment against Sloss sustainable, upon the record, on any tenable theory of law. Accordingly, I should reverse the judgment.

38 Cal.2d 375

HAYES et ux. v. RICHFIELD OIL CORP.

L. A. 21982.

Supreme Court of California, in Bank.

Feb. 7, 1952.

Rehearing Denied March 6, 1952.

Edmund Hayes and Ruth Hayes sued Richfield Oil Corporation to recover for injuries sustained by Ruth Hayes when she fell into open grease pit on premises leased by defendant to another for operation of gasoline service station. The Superior Court, Los Angeles County, Samuel R. Blake, J., rendered judgment in favor of plaintiff and defendant appealed. The Supreme Court, Gibson, J., held that evidence sustained recovery against defendant on ground that premises were in dangerous condition when leased and they were leased for purpose involving admission of public.

Affirmed.

Prior opinion 229 P.2d 32.

1. Landlord and Tenant ⇐169(8)

In action against lessor for injuries sustained by third party who fell into unguarded grease pit on premises leased for operation of gasoline service station, evidence was insufficient to sustain finding that lessor retained joint control of premises or that it assumed duty of inspecting property.

2. Landlord and Tenant ⇐169(8)

In action against lessor for injuries sustained by third party who fell into unguarded grease pit on premises leased for operation of service station, evidence supported recovery for injured party on theory that premises were in dangerous condition when leased, and that they were leased for purpose involving admission of public and that lessor was under duty to see that they were safe for purpose intended.

3. Landlord and Tenant ⇐167(8)

A lessor who leases property for a purpose involving admission of public is under a duty to see that it is safe for purposes intended and to exercise reasonable care to inspect and repair property before possession is transferred so as to prevent unreasonable risk of harm to public who may enter.

4. Landlord and Tenant ⇐167(8)

Premises leased for operation of gasoline service station were leased for a "public purpose" within purview of rule imposing liability on lessor for injuries sustained as result of dangerous condition existing on premises at time of transfer when premises are leased for public purpose.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Purpose".

5. Landlord and Tenant ⇐167(8)

Where premises were leased for operation of gasoline service station such purpose was also properly served by incidental use of a portion of lot as free parking space for patrons and in making such lease lessor should reasonably have anticipated that lessee might use premises for activities connected with or in aid of main business and when lessee offered free parking to patrons and invited customers to park over night, that included invitation to them to enter property whenever they wished to leave or pick up their vehicles and lessor's responsibility extended to persons who entered lot when station was not open for sale of gasoline.

6. Pleading ⇐388, 398

A variance between allegations of a pleading and proof will not be deemed material unless it has actually misled adverse party to his prejudice in maintaining his action or defense on the merits, and a variance may be disregarded where action has been as fully and fairly tried on merits as though variance had not existed. Code Civ. Proc. § 469.

7. Appeal and Error ⇐889(3)

Where action against lessor of gasoline service station to recover for injuries sustained by third party when she fell into unguarded grease pit on leased premises was based on theory that lessor and lessee were in joint control of premises and there was no allegation of existence of landlord and tenant relationship between them but it was alleged that injuries were caused by dangerous condition on premises and that property was used for purposes involving admission to public in view of trial court's

statements and rulings that case involved law relating to lessor's duty under lease contemplating admission of public, lessor was in no position to claim that it was misled by plaintiffs' failure to amend their complaint.

8. Trial ⇐295(6), 296(3)

In action against lessor of gasoline service station for injuries sustained by third party when she fell into unguarded grease pit on leased premises at night, where instruction relating to lessor's duty regarding property leased for purpose involving admission of public indicated when read as a whole that words "any such dangerous condition" in last sentence necessarily refer to conditions existing on leased premises at time possession was transferred to lessee instruction was not erroneous as imposing on lessor absolute duty to enter and inspect for dangerous conditions arising after transfer of possession particularly in view of instructions given.

9. Trial ⇐296(3)

In action against lessor of gasoline service station to recover for injuries sustained by third party when she fell into unguarded grease pit on leased premises at night, where evidence was not sufficient to show that lessor retained joint control with lessee over premises, instruction relating to duty of lessor retaining control of leased property, to use reasonable care to keep premises in safe and suitable condition should not have been given but as jury was told that under terms of lease lessor retained no right to control lighting of premises and that operation of parking lot after station was closed was not an activity which lessor could control, any possible harm was offset and there was no miscarriage of justice.

10. Landlord and Tenant ⇐169(10)

In action against lessor of gasoline service station to recover for injuries sustained by third party when she fell into unguarded grease pit on leased premises at night, instruction that even though lessor is not bound to inspect premises under terms of lease if he undertakes to make such inspection he must exercise ordinary care in making of such inspection was not subject to interpretation that it imposed on lessor duty to remedy a dangerous condition which inspection would reveal but instead set forth one aspect of general rule that volunteer who undertakes to proceed affirmatively when he is not under duty to do so must use reasonable care.

11. Trial ⇐268

In action against lessor of gasoline service station to recover for injuries sustained by third party when she fell into unguarded grease pit on leased premises at night, lessor's requested instruction which misstated law relating to doctrine of assumption of risk was properly refused.

12. Negligence ⇐105

Doctrine of assumption of risk is based on theory that there has been a voluntary acceptance of a risk and such acceptance, whether express or implied, requires knowledge and appreciation of the risk.

13. Negligence ⇐65, 105

Where facts are such that plaintiff must have had knowledge of hazard, situation is equivalent to actual knowledge, and there may be an assumption of risk, but where it merely appears that a person could or should have discovered danger by exercise of ordinary care, defense is not assumption of risk but contributory negligence.

14. Husband and Wife ⇐235(2)
Landlord and Tenant ⇐169(11)

In action against lessor of gasoline station to recover for injuries sustained by woman when she fell into unguarded grease pit on leased premises at night, questions as to contributory negligence of woman or her husband were for jury's determination.

Moss, Lyon & Dunn, Gerold C. Dunn and Henry F. Walker, all of Los Angeles, for appellant.

Shacknove & Goldman and Ben F. Goldman, Jr., all of Los Angeles, for respondents.

GIBSON, Chief Justice.

Mr. and Mrs. Hayes brought this action to recover damages for personal injuries sustained when Mrs. Hayes fell into the

grease pit of a gasoline service station operated by defendant Scavone and leased by him from defendant Richfield Oil Corporation. The jury returned a verdict for plaintiffs, judgment was entered accordingly, and defendant Richfield has appealed.

The principal contentions are that the evidence is not sufficient to show that Richfield violated any duty which it owed to plaintiffs, that there was a material variance between pleadings and proof, that there were errors in the giving and refusal of instructions, and that plaintiffs were guilty of contributory negligence as a matter of law.

Mr. Hayes was a regular patron of the station and had taken Mrs. Hayes there on several occasions. He purchased gasoline, oil and accessories from Scavone, and for approximately a year he had been parking his private car on the premises while making business trips in a truck which was kept at a storage place across the street. Scavone had told him he could leave his car at the station while making these trips as long as he continued to trade there. Hayes' working hours were irregular, and he made numerous overnight trips out of town, on some of which he was accompanied by Mrs. Hayes.

At about 2:30 a. m. on the night of the accident Mr. and Mrs. Hayes left their car at the rear of the station, intending to take a trip in their truck. No attendant was present at the time, and all lights had been turned off except two lights inside the station building. Mr. and Mrs. Hayes walked along one side of the building following a course which was partially illuminated by a street lamp. They crossed the street to where the truck was parked but discovered that it was not in operating condition. They then started to return to their car by a shorter route which led along the other side of the station building where the illumination was not as good and objects could be only vaguely distinguished. Mr. Hayes walked ahead of his wife, and in the darkness she fell into the grease pit. She testified that she was not aware of the existence of the pit, and her husband stated that he knew of its location but did not think about it prior to the accident.

The pit was parallel to the rear wall of the station building, and it protruded on both sides about five feet beyond the extended lines of the building. It had concrete abutments four inches high at the ends and steel rails of the same height along the sides. There were sockets for guard rails, and the inventory attached to the lease listed chain guards for the pit, but no such protective devices were ever given to Scavone, and none had been used at any time prior to the accident.

When the accident occurred the pit was in the same condition as it was when Scavone took possession under his lease from Richfield. The lease recited that the property was designed for the operation of a gasoline service station and required Scavone to use it "primarily for such purpose," to make no material alterations without the lessor's consent and to maintain the premises in good order. In the event of a failure to repair, the lessor reserved the right to enter and make repairs. The lease could be terminated by either party on twenty-four hours' notice.

About once a week a Richfield employee called at the station, inspected the grounds and made suggestions with respect to methods of increasing sales. On two occasions, when equipment was in need of repairs, Scavone called the company's maintenance service, which did the necessary work. There was a large "Richfield" sign on the roof of the station and smaller ones on the pumps indicating that Richfield gasoline was for sale. Scavone purchased all his gasoline and oil from Richfield but obtained other merchandise elsewhere. At different times he distributed advertising leaflets and courtesy cards offering free parking to patrons, and from time to time he permitted a number of customers to park their vehicles overnight. Scavone operated the station on a twenty-four hour basis for a few months after the lease was made and then discontinued selling gasoline between midnight and 6 a. m. Thereafter, during those hours, the only lights left burning were those inside the station building.

[1, 2] The first question involves the sufficiency of the evidence. Plaintiffs urge that the judgment may be supported on any

one of the following theories: (1) that Richfield retained joint control with the lessee over the property and was liable for injuries resulting from dangerous conditions thereon; (2) that Richfield assumed the duty of inspecting the property but performed that duty in a negligent manner; and (3) that the premises were in a dangerous condition when leased, that they were leased for a purpose involving admission of the public, and that the lessor was under a duty to see that they were safe for the purpose intended. We are of the opinion that the evidence was not sufficient to show that Richfield retained joint control or that it assumed the duty of inspecting the property but we need not discuss these contentions in detail since we have concluded that there is ample evidence to support a recovery on the third theory.

[3–5] A lessor who leases property for a purpose involving the admission of the public is under a duty to see that it is safe for the purposes intended and to exercise reasonable care to inspect and repair the property before possession is transferred so as to prevent any unreasonable risk of harm to the public who may enter. Burroughs v. Ben's Auto Park, Inc., 27 Cal.2d 449, 453, 164 P.2d 897; King v. New Masonic Temple Ass'n, 51 Cal.App.2d 512, 515, 125 P.2d 559; Boothby v. Town of Yreka City, 117 Cal.App. 643, 649, 4 P.2d 589. There is authority that a lessor is not liable if the land is used for a public purpose not contemplated by the lease, see Prosser on Torts [1941] p. 655, but Richfield cannot avoid liability on this ground. The lease to Scavone required him to use the premises "primarily" as a gasoline service station, and not only does this purpose involve admission of the public, but it appears that such purpose would be properly served by the incidental use of a portion of the lot as a free parking space for patrons. In making such a lease the lessor should reasonably anticipate that the lessee might use the premises for activities connected with or in aid of the main business, and here the use of part of the premises for parking as an accommodation to customers of the service station appears to be clearly within the uses contemplated by the lease. There is no merit in Richfield's contention that its responsibility as lessor did not extend to persons who entered the lot when the station was not open for the sale of gasoline. Scavone offered free parking to his patrons and invited Hayes and other customers to park overnight, and this necessarily included an invitation to them to enter the property whenever they wished to leave or pick up their vehicles.

Although the premises were in the same condition at the time of the accident as they were when possession was delivered to Scavone, Richfield argues that they became dangerous only because Scavone had turned off all the lights at midnight without putting up any protective device around the pit. We cannot say as a matter of law, however, that the premises were safe even when fully illuminated. As we have seen the grease pit was open and unguarded, and while the lease listed chains for the pit as part of the equipment, and there were sockets for guard rails, no such means of protection were furnished to Scavone or placed in use prior to the accident. But if we should assume that the premises were safe when illuminated, there is nothing in the lease which required Scavone to operate the station on a twenty-four hour basis or to keep it fully lighted throughout the night. In the absence of such requirements, the jury could have concluded that Richfield should reasonably have anticipated that Scavone might not wish to keep the station open day and night, that he might leave the lot dimly lighted when gasoline was not being sold, and that customers might use the parking facilities when the station was not open for the sale of gasoline.

A more serious problem is presented by the variance between the pleadings and proof. The complaint was framed on the theory that Richfield and Scavone were in joint control of the premises, and there was no allegation of the existence of a landlord and tenant relationship between them. It was alleged, however, that the injuries were caused by a dangerous condition on the premises and that the property was used for purposes involving admission to the public. The existence of the lease was developed through plaintiffs' examination of Scavone under section 2055 of the Code

of Civil Procedure, and there was evidence that the premises were leased for use as a service station and were in the same condition at the time of the accident as when leased. In ruling on a motion for nonsuit, the court stated that the case involved the question of Richfield's liability as lessor of property which was leased to be used for a public purpose. Richfield first objected that the court was going beyond the pleadings and then argued that the theory was not applicable to the facts. The same grounds were subsequently urged in support of Richfield's motion for a directed verdict. Upon denial of the motion, Richfield offered an instruction, which was given, pertaining to the duties of a landlord under a lease of property to be used for a purpose involving admission of the public. It should be noted, however, that Richfield did not at any time concede that a cause of action based on this theory was properly presented by the pleadings, and the instruction was offered only because the court had taken the position that the matters covered thereby were within the issues.

[6, 7] A variance between the allegations of a pleading and the proof will not be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense on the merits, and a variance may be disregarded where the action has been as fully and fairly tried on the merits as though the variance had not existed. Code Civ. Proc. § 469; Chelini v. Nieri, 32 Cal.2d 480, 486, 196 P.2d 915; see Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 523, 203 P.2d 522; Devens v. Goldberg, 33 Cal.2d 173, 177, 199 P.2d 943; Genger v. Albers, 90 Cal.App.2d 52, 55, 202 P.2d 569. In view of the trial court's statements and rulings that the case involved the law relating to a lessor's duty under a lease contemplating admission of the public, Richfield is in no position to claim that it was misled by plaintiffs' failure to amend their complaint. If anything, Richfield's continued insistence that the issue was not presented by the pleadings indicates that it was fully aware that the court's rulings would permit recovery under that theory. It does not appear that Richfield has been in any way prejudiced by the variance, and it may therefore be disregarded.

It is next contended that there was error in the giving of certain instructions, and the first claim is that the court misstated the law relating to a lessor's duty regarding property leased for a purpose involving admission of the public. The following instruction, requested by plaintiff, was modified as indicated: "When property is leased to be used for a public or semi-public purpose, or involving admission of the public, if at the time possession of the premises is delivered to the lessee to be held under the lease thus executed, a condition exists on the leased premises such as to make its intended use dangerous to other persons or their property, and if that condition then is known to the lessor, or if it then would be known to him in the exercise of ordinary care, the lessor becomes liable to an invitee of the lessee for any injury suffered by such invitee and proximately caused by the unsafe condition (provided, of course, that the injured person is not guilty of contributory negligence). Whenever, by virtue of the terms of such a lease, the lessor has the right of re-entry ~~before the lessee commences possession under a renewal of the lease or under a new lease for a like purpose~~, the lessor's duty is to exercise that right of re-entry for the purpose of inspecting the premises to the end of removing or preventing any such dangerous condition that reasonable inspection would disclose to him."

[8] The last sentence of the instruction, as requested, was based on the decision in Burroughs v. Ben's Auto Park, Inc., 27 Cal. 2d 449, 164 P.2d 897. It obviously does not apply here since this case does not involve the renewal of a lease, and the trial court attempted to make the instruction fit the facts by deleting some of the language. Richfield contends that the modification resulted in imposing upon it an absolute duty to enter and inspect for dangerous conditions arising *after* the transfer of possession. When the whole instruction is read, however, it is clear that the words "any such dangerous condition" in the last sentence necessarily refer to conditions exist-

ing on the leased premises at the time possession was transferred to the lessee. Moreover, any doubt in the minds of the jurors must have been removed by the next instruction in which they were again told that the lessor of property which is to be used for a purpose involving admission of the public "is required to exercise only reasonable care to inspect and repair the premises before possession is transferred to the lessee."

[9] The court also instructed the jury that where a lessor retains control of leased property, it has the duty of using reasonable and ordinary care to keep the premises in a safe and suitable condition so that invitees of the tenant will not be unnecessarily or unreasonably exposed to danger. Since the evidence is not sufficient to show that Richfield retained joint control over the leased premises, this instruction should not have been given. The jury was told, however, that under the terms of the lease Richfield retained no right to control the lighting of the premises and that the operation of the parking lot after the station was closed was not an activity which Richfield could control. This instruction tended to offset any possible harm which could have resulted from the challenged instruction, and, under all of the circumstances, we cannot say that there was any miscarriage of justice.

[10] Complaint is also made that the court should not have given the following instruction: "Even though a lessor is not bound to inspect the premises under the terms of the lease entered into with the tenant, if, despite this fact, he undertakes to make such inspection, he must exercise ordinary care in the making of such inspection." It is argued that the instruction imposes upon a lessor a duty to remedy a dangerous condition which an inspection would reveal. The instruction, however, is not subject to that interpretation and imposes no such duty. Instead it sets forth one aspect of the general rule that a volunteer who undertakes to proceed affirmatively when he is not under a duty to do so must use reasonable care. See Prosser on Torts [1941] pp. 194–197; cf. Janofsky v. Garland, 42 Cal.App.2d 655, 657, 109 P.2d 750.

[11–13] The trial court properly refused to give instructions requested by Richfield which misstated the law relating to the doctrine of assumption of risk. These instructions were to the effect that one assumes a risk "when he knows, or in the exercise of ordinary care would know, that a danger exists" and voluntarily places himself within the area of danger, and that, to bar recovery, plaintiff must have actual knowledge of the danger "or the conditions must be such that he would have such knowledge if he exercised ordinary care." The doctrine of assumption of risk is based on the theory that there has been a voluntary acceptance of a risk, and such acceptance, whether express or implied, requires knowledge and appreciation of the risk. See Rest., Torts, § 893; Prosser on Torts [1941], pp. 377–386; 10 So.Cal.L.Rev., 67, 74. Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge, and there may be an assumption of risk; but where it merely appears that a person could or should have discovered the danger by the exercise of ordinary care, the defense is not assumption of risk but contributory negligence. See Prosser on Torts [1941], pp. 379–380, 400. There are statements in DeGraf v. Anglo California Nat. Bank, 14 Cal.2d 87, 100, 92 P.2d 899, 905, which appear to ignore the distinction between these defenses, but immediately following the questionable language the opinion correctly states the rule to be that "before it can be said that one has 'assumed the risk' of a specified hazard, it must be shown that he had knowledge of the condition creating the hazard." In the present case the trial court was not required to modify the requested instructions or to supply correct ones, and in any event the question of Mrs. Hayes' awareness and appreciation of the danger was submitted to the jury under other instructions and the implied finding was in her favor.

[14] Finally, Richfield contends that plaintiffs were guilty of contributory negli-

gence as a matter of law. It is argued that Mr. Hayes, who knew of the location of the pit, was negligent in failing to warn his wife of its existence and that his negligence must be imputed to her. As to Mrs. Hayes, it is argued that she was negligent in proceeding over unfamiliar ground in the darkness instead of returning to the car over the better lighted route by which they had left the premises. The question of contributory negligence, however, was one of fact for the jury, and we cannot say that either plaintiff was negligent as a matter of law. Under the evidence the jury could have concluded that Mr. Hayes was not negligent in failing to keep in mind the existence of the pit or in failing to warn his wife. It could also have found that Mrs. Hayes was not aware of the hazard and did not act unreasonably in assuming that there was nothing of a dangerous character on the premises. See Neel v. Mannings, Inc., 19 Cal.2d 647, 656, 122 P.2d 576; Meindersee v. Meyers, 188 Cal. 498, 502–504, 205 P. 1078. The cases of Medcraft v. Merchants' Exchange, 211 Cal. 404, 295 P. 822, and Powers v. Raymond, 197 Cal. 126, 239 P. 1069, relied on by Richfield, are clearly distinguishable on their facts.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

Rehearing denied; SCHAUER, J., not participating.



38 Cal.2d 444

HIXSON v. HIXSON.

L. A. 21943.

Supreme Court of California, in Bank.

Feb. 21, 1952.

Action for divorce. The Superior Court, Los Angeles County, Harold W. Schweitzer, J. pro tem., directed that plaintiff pay $200 per month to defendant for support of children and the plaintiff appealed. The Supreme Court, Shenk, J., held that order was consistent with prior decree and did not constitute a change therein.

Order affirmed.

Prior opinion 233 P.2d 920.

Divorce ⇐309

Where divorced wife was required to support the children of the marriage, and divorce decree contemplated that children would reside with the wife, court order directing the wife to pay $200 per month to the husband so long as the children continued to live with him, which amount was to be offset against the $600 monthly payments due to the wife from the husband under divorce decree for support and maintenance of her and the children was not an unqualified disposition of property rights and did not modify or change prior divorce decree.

Stanley N. Gleis, Beverly Hills, for appellant.

Paul R. Hutchinson, Los Angeles, for respondent.

SHENK, Justice.

The plaintiff wife has appealed on the judgment roll from a minute order in a divorce action requiring her to make monthly payments to the defendant, her divorced husband, for the support of two of their children.

The defendant secured an order to show cause why the interlocutory and final decrees of divorce previously secured by the plaintiff should not be modified by reducing the amount of payments required to be made to the wife. He relied on the fact that the two children were voluntarily living with and being supported by him. After a hearing the trial court found that under the interlocutory decree, which approved a property settlement agreement, the plaintiff was required to support the children of the marriage; that the decrees contemplated that the children would reside with the plaintiff; and that $200 per month was necessary for the support of the two children residing with the defendant. The court made the order appealed from directing the plaintiff to pay $200 per month to the defendant so long as the

children continued to live with him, and providing that this amount might be offset against the $600 monthly payments due to the plaintiff from the defendant under the decree "for her support and maintenance and for the support and maintenance of the children."

The plaintiff contends that the action of the trial court is invalid as an attempt to modify an unqualified disposition of property rights. See Leupe v. Leupe, 21 Cal. 2d 145, 130 P.2d 697; Puckett v. Puckett, 21 Cal.2d 833, 136 P.2d 1. She relies on the interlocutory decree and the property settlement agreement which was made a part of that decree and approved by it. Inasmuch as the final decree does no more than reaffirm the interlocutory decree, only the latter decree and the agreement it incorporates need be considered.

The plaintiff's argument is relevant only if the order "modified" the earlier decree. It does not purport to do so in terms and it does not do so in legal effect. Although it may result in smaller payments to the plaintiff from the defendant than provided for in the interlocutory decree, such a reduction is a result of what is also provided for in the same decree, namely that the agreement between the parties be performed by both the plaintiff and the defendant. In the agreement the plaintiff promised "to support and maintain the children of the parties during their minority." The order merely directs her to furnish the sum reasonably necessary for the support of two of the children and offsets this obligation against that of the defendant.

It should be noted that that portion of the agreement headed "Custody" declares that "It is contemplated that the children shall reside with the mother during their minority." The continuing power of the court to establish a different place of residence, which it expressly reserved in the interlocutory decree, is undisputed. The trial court has here impliedly determined that the residence of two of the children should be with the father so long as they desire. The statement quoted does not deprive the court of power to make such a determination. But the plaintiff contends that her duty to support the children was conditioned on their continued residence with her. The validity of such a construction need not, however, be determined. Even if the duty the plaintiff assumed was so conditioned, certainly the duty the defendant assumed can with equal justice be said to be similarly conditioned.

The order is consistent with the prior decree whether it be considered as directing the performance of an unqualified duty on the part of the plaintiff to support the children or as recognizing that the defendant's duty to make periodic payments to the plaintiff was qualified by the expectation that the children would live with the plaintiff and be supported by her. Under neither theory does the order constitute a change in the decree. It simply makes clear the application of the earlier order to the new factual situation arising out of the changed residence of the two children. No contention is made that the earlier orders are invalid in any respect. Since the order appealed from is consistent with them, its validity may not properly be questioned.

The order is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



38 Cal.2d 419

TUTTLE v. TUTTLE.

S. F. 18253.

Supreme Court of California, in Bank.

Feb. 19, 1952.

Divorce action by husband. The Superior Court, San Francisco County, Daniel R. Shoemaker, J., entered decree requiring husband to make monthly payments to wife of a specified amount for eight years, and defendant's motion to modify decree was denied, and defendant appealed. The Supreme Court, Edmonds, J., held that the trial court's finding in the order denying modification that the provision for payments to wife in divorce decree was a disposition of property rights and not alimony was supported by the evi-

dence, and that the husband in resisting the motion to modify the decree was not making a collateral attack upon the decree.

Order affirmed.

Prior opinion 236 P.2d 639.

1. Divorce ⇐245(1), 254

In proceeding to modify divorce decree, trial court had jurisdiction to determine whether decree was based upon a property settlement agreement with payments provided as a phase of property adjustment and therefore not subject to modification, or was based upon alimony or support allowance covenants and therefore subject to modification.

2. Divorce ⇐286

A divorce court's finding upon issue whether payments awarded by decree were alimony, or part of a settlement of property rights, if supported by sufficient evidence, is binding upon an appellate court.

3. Divorce ⇐243

Use of the words "support and maintenance" in divorce decree did not necessarily indicate that decree provided for alimony rather than property settlement.

4. Divorce ⇐245(3)

In proceeding to modify provision in divorce decree requiring husband to pay monthly installments to wife for support and maintenance for a limited period, it was the duty of the trial court to determine whether or not alimony had been awarded.

5. Divorce ⇐254

In proceeding to modify terms of divorce decree, trial court's finding in order denying modification that provision for limited payments to wife was a disposition of property rights and not alimony was supported by the evidence.

6. Divorce ⇐254

Where payments awarded by divorce decree were part of a settlement of property rights, decree was not subjected to modification.

7. Divorce ⇐255

In proceeding to modify terms of divorce decree, husband's assertion that court was without jurisdiction to modify decree because provision for limited payments was not alimony but a property settlement agreement was not a collateral attack upon the decree.

Albert M. Hardie and Robert A. Kaiser, Oakland, for appellant.

Gardiner Johnson and Samuel C. Shenk, San Francisco, for respondent.

EDMONDS, Justice.

The marital rights of Emmett Norton Tuttle and Lillie Alma Tuttle were determined by interlocutory and final decrees of divorce. Both decrees included certain provisions in regard to their property and required Emmett to make monthly payments to Lillie of a specified amount for eight years. Before the expiration of that time, Lillie moved the court to modify the final decree. Her appeal, taken upon the clerk's transcript, is from an order denying the motion.

The interlocutory decree, granted to Lillie upon the ground of desertion, made no mention of any property settlement agreement. As here material, the court "* * * decreed that the hereinafter designated property which is found to be community property be * * * divided and apportioned in the following manner, to-wit: * * *

"7. That plaintiff pay to the cross-complainant, as and for her support and maintenance the sum of One Hundred Fifty ($150.00) Dollars per month for a period of one year commencing April 10, 1947; the sum of One Hundred Thirty-five ($135.00) Dollars per month for the next year; the sum of One Hundred Twenty-five ($125.00) Dollars per month for the next year; and the sum of One Hundred ($100.00) Dollars per month for the next five (5) years, at which time all payments shall cease and determine; * * *."

By the first six of the numbered paragraphs, the court made an approximately equal division of the property of the parties. Emmett was required to pay specified community debts. Paragraphs 8 and 9, which immediately follow the quoted por-

tion of the decree, provide that Emmett should pay income taxes and attorney fees.

Lillie's motion was based upon the ground that a change of circumstances of the parties justified an increase in the amounts payable to her. In support of the motion, she filed an affidavit in which she made certain statements of fact. Emmett answered by a counter-affidavit, setting forth at length the discussion between the court and counsel upon trial of the divorce action. He alleged that the provision of the decree for the payment of stated amounts for a limited period was not an award of alimony but an integral part of a property settlement agreement referred to in these discussions. Lillie replied by a further affidavit in which she denied the making or existence of any property settlement agreement.

The trial court, in its order denying Lillie's motion, found as follows: (1) The provision for limited payments to Lillie "was not permanent alimony, but was an unqualified disposition of property rights resulting in full satisfaction of any and all claims by the * * * wife for her support and maintenance"; (2) In reliance upon the property settlement agreement Emmett changed his position and presented no evidence in support of his complaint and Lillie is estopped from seeking modification of the decree; (3) The court did not reserve any power subsequently to modify the agreement or decree; and (4) The court is without jurisdiction to modify the decree.

Lillie contends that the court has jurisdiction to modify the decree and that she is not estopped from seeking modification. She characterizes Emmett's claim that the provision for support was based on a property settlement agreement as a collateral attack on the decree.

Emmett asserts that the court is without jurisdiction to modify the decree because the provision for limited payments was not alimony but a property settlement agreement. This position, he says, is not a collateral attack upon the decree. In addition, he argues that Lillie is estopped from seeking modification.

[1, 2] The decisive question presented by Lillie's motion is whether the payments awarded by the decree were alimony, or part of a settlement of property rights. In such a proceeding, "the trial court has jurisdiction to determine whether the decree was based upon a property settlement agreement with payments provided as a phase of property adjustment and therefore not subject to modification or was based upon alimony or support allowance covenants and therefore subject to modification." Codorniz v. Codorniz, 34 Cal.2d 811, 814, 215 P.2d 32, 34; Hough v. Hough, 26 Cal.2d 605, 615, 160 P.2d 15; Puckett v. Puckett, 21 Cal.2d 833, 841, 136 P.2d 1. A finding upon this issue, if supported by sufficient evidence, is binding upon an appellate court. Codorniz v. Codorniz, supra, 34 Cal.2d at pages 814–815, 215 P.2d 32; Hough v. Hough, supra, 26 Cal.2d at pages 615–616, 160 P.2d 15; Wallace v. Wallace, 136 Cal.App. 488, 493, 29 P.2d 314; Atlass v. Atlass, 112 Cal.App. 514, 517, 297 P. 53.

[3, 4] Lillie argues that this rule is inapplicable where the decree, upon its face, clearly is one for alimony. However, the provision requiring the payment of stated amounts for a limited period is one of eight numbered paragraphs which specify in detail how "the hereinafter designated property which is found to be community property * * * [is to be] divided and apportioned". The use of the words "support and maintenance" does not necessarily mean that the amount ordered to be paid in monthly installments was an award of alimony and not a part of the settlement of the property rights of the parties. Puckett v. Puckett, supra, 21 Cal.2d at page 842, 136 P.2d 1. Under these circumstances, upon a motion to modify the terms of the decree, it was the duty of the trial court to determine whether or not alimony had been awarded.

[5, 6] There is ample evidence to support the trial court's finding in the order denying modification that the provision for payments to Lillie was a disposition of property rights and not alimony. The decree, therefore, is not subject to modifica-

tion. Puckett v. Puckett, supra, 21 Cal.2d at page 840, 136 P.2d 1; Leupe v. Leupe, 21 Cal.2d 145, 148, 130 P.2d 697; Dupont v. Dupont, 4 Cal.2d 227, 228, 48 P.2d 677; Ettlinger v. Ettlinger, 3 Cal.2d 172, 178, 44 P.2d 540.

[7] In resisting the motion, Emmett is not making a collateral attack upon the decree. He is relying upon the decree and the record in the original proceeding which clarifies its provisions. He does not, as did the defendant in Gosnell v. Webb, 60 Cal.App.2d 1, 4, 139 P.2d 985, 987, upon which Lillie relies, "attack the decree by evidence that it is not what it appears to be, or that it is not in accordance with the agreement of the parties."

These conclusions make it unnecessary to discuss any of the other points presented.

The order is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., and WOOD, Justice pro tem., concur.



38 Cal.2d 423

PEOPLE v. REED.

Cr. 5262.

Supreme Court of California, in Bank.

Feb. 19, 1952.

Diamond Reed was convicted in the Superior Court, Alameda County, Charles Wade Snook, J., of murder, and he appealed. The Supreme Court, Edmonds, J., held that evidence sustained implied finding that defendant killed decedent in perpetration of rape of decedent.

Judgment and order denying new trial affirmed.

1. Criminal Law ⇐825(2)

Where defendant who was convicted of murder did not claim that instructions given were erroneous, and instructions were couched in statutory language and in additional explanatory terms, and no instruction requested by defendant was refused, defendant on appeal from conviction could not be heard to say that such instructions were insufficient in that they did not adequately cover rape or attempted rape and homicide, and in that they did not state facts necessary to be proved to establish commission of crimes involved in instructions.

2. Criminal Law ⇐825(1)

Where instruction on particular point or points as given by court is correct as far as it goes, and only valid objection, if any, to it is that it is deficient or inadequate by reason of its generality, indefiniteness, or incompleteness, if defendant desires additional, amplified, explanatory, fuller, or more complete, elaborate, comprehensive, definite, specific or explicit instructions on such point or points, he must properly request same, otherwise error cannot be predicated upon failure to give such additional instruction.

3. Criminal Law ⇐808½

Court may couch its instructions defining elements of offense in language of code where no instructions in elaboration or exposition of principles of statutory definitions are requested by defendant, and, even if such instruction cannot be commended as a full or clear exposition of meaning of section of code, it cannot be said that it was error for court in giving the law to have conformed to language of code, and to have omitted what code omits.

4. Criminal Law ⇐808½

In murder prosecution, wherein court's instruction on presumption of innocence and defining reasonable doubt followed language of Penal Code, no instruction was required to be given to effect that each element of crime must be proved beyond reasonable doubt. Pen.Code, §§ 1096, 1096a.

5. Homicide ⇐250

Circumstantial evidence is as adequate to convict of murder as direct evidence.

6. Homicide ⇐332(3)

Province of Supreme Court on appeal from murder conviction is not to determine conflicts in evidence, nor to choose between different inferences which reasonably may be drawn from testimony, and sole question, so far as admissible evidence is concerned, relates to its sufficiency to support verdict.

7. Homicide ⇐235

In murder prosecution evidence sustained implied finding that defendant killed decedent in perpetration of rape of decedent.

8. Criminal Law ⇐438

In murder prosecution of a defendant who allegedly killed decedent in perpetration of rape of decedent, trial court did not err in admitting into evidence a photograph of decedent's body taken when body was found lying face down between two of a group of buildings, with her underpants removed and lying across her legs and other portions of her clothing disarranged.

William T. Belcher, Jr., Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., J. F. Coakley, Dist. Atty., Alameda, and John S. Cooper, Deputy Dist. Atty., Oakland, for respondent.

EDMONDS, Justice.

Diamond Reed, with a record of two prior felony convictions which are admitted by him, was found guilty of the murder of Flyzella Braggs. Following the denial of his motion for a new trial, the death sentence was imposed in conformity with the verdict of the jury. The principal points presented upon the appeal from the judgment, automatically before this court, Pen. Code, § 1239(b), concern the sufficiency of the evidence to support the verdict and the instructions to the jury.

The record shows testimony which may be summarized as follows:

On Christmas Eve, Reed sought out Theopolis Cain, an acquaintance. Reed and Cain joined Flyzella at the Sundown Cafe in Oakland. Flyzella asked the two men to drive her to the home of Dorothy Bucanon. When they arrived, she, and later Reed, went into Mrs. Bucanon's apartment.

After a short time, Reed and Flyzella returned to the car and asked Cain to drive them to another address. Flyzella entered this house and the two men again remained in the car. Soon after Reed joined her. Matthew Butler also was there. A few minutes later, Reed and Flyzella returned to the automobile. Butler followed and watched them get into the front seat of the car. According to both Cain and Butler, Flyzella and Reed were quarreling and Reed grasped Flyzella about the neck with his hands.

Cain let Flyzella out on the left side of the car and she asked him to take Reed away because he was trying to hurt her. Reed jumped out of the car from the right-hand side and followed Flyzella into the house.

Shortly thereafter, about 2:30 or 2:45 a. m., Minnie Lee Ford, whose home faced Prescott Junior High School, heard a woman's screams coming from the direction of the school.

Some 12 hours later Flyzella's body was found. She was lying face down between two of a group of small wooden buildings in the Prescott Junior High School yard. Her underpants had been removed and were lying across her legs. Other portions of her clothing had been disarranged. Her shoes were found at some distance from the body. All gates to the school grounds except one located at the northeast corner were closed and locked.

The findings upon an autopsy were that death was caused by subarachnoid hemorrhages with injury to the brain, accompanied by multiple fractures of the skull. External lacerations and abrasions on the head indicated that the wounds were made by a blunt instrument. There were spermatozoa in the vaginal tract.

Blood was found on the shoes which Reed was wearing on Christmas Eve. Soil samples taken from them and those worn by Flyzella were analyzed by a mineralogist of the Federal Bureau of Investigation. He testified that, in his opinion, the soil found on Reed's left shoe and that on both of Flyzella's came from the direct route between the only open gate of the school yard and the place where the body was found. His conclusions were based upon comparisons of the shoe soil with samples taken on the school premises and also from the ground at Reed's home, at Cain's home,

at Butler's home and at the places where Flyzella's shoes and her body were found.

Cain testified that he met Reed sometime after 8:00 o'clock on Christmas Eve in front of Cain's house. Reed wanted to go riding and asked Cain to drive him to the Sundown Cafe in Oakland to find Flyzella. Cain said that he and Reed rode around for some time, stopping at the Sundown Cafe three times. They finally found Flyzella there sometime after midnight. While they were riding around looking for Flyzella, Reed told Cain he wanted to pick up a girl that night. According to Cain, Reed said that he had taken Flyzella out recently and she had only kissed him; "* * * he hadn't had anything to do with her yet, but if he kept going with her, he would."

Other testimony of Cain was that they remained at the Sundown Cafe until about 1:00 a. m. The three of them then left and Flyzella directed him to the homes of two friends whom she wished to visit. At the first stop, Flyzella got out of the automobile and went into the house. He and Reed remained in the car. Cain said that he dozed off to sleep, but thought that Reed got out of the car to look for Flyzella. Later he recognized Reed and Flyzella getting back into the car. They asked him to take them to the second friend's house.

There, Cain testified, Flyzella went into the house. About fifteen minutes later, Reed left. After a few minutes, Flyzella and Reed came out of the house, followed by another man. Continuing his account of what took place, Cain said that Flyzella and Reed got into the front seat of the car with Cain and started scuffling. Reed had his hands around Flyzella's neck. The man who followed them from the house tried to open the car door. Cain got out of the car and let Flyzella out on his side. Then Reed left the car and followed Flyzella into the house. The man who was standing beside the car went into the house behind them.

At no time while at this house, said Cain, was he asleep. He placed the hour when the three left him as being about 2:00 a. m. He said that he then drove home. This was the last time he saw Flyzella alive. He did not see Reed again that night.

Mrs. Bucanon told the jury that Flyzella came into the house about 1:30 a. m. and remained for an hour or more. Approximately fifteen minutes later, Reed joined them. According to Mrs. Bucanon, Reed and Flyzella both appeared sober; there was no trouble, just friendly conversation.

Butler testified that Flyzella came into his room at 1:15 a. m. and woke him up. Reed followed her. Butler got up and went to the bathroom. When he returned to his room, they had left. Butler looked out and saw Reed and Flyzella entering a car. When he got to the car, he looked in and heard Flyzella tell Reed, "Stop choking me." Reed then had his right hand on Flyzella's neck. Butler said he tried to see the face of the man driving the car but could not do so.

After observing the scuffle, Butler said, he returned to the house and went to bed. Shortly thereafter, he heard the sound of a skirmish in the hall and Flyzella saying, "You don't have to be beating and choking on me, because you are not my man." Butler again got up, put on his shoes and coat, and went to the door. Flyzella and anyone with her had then disappeared and he saw no car.

Butler told the jury that before going home on Christmas Eve, he consumed a couple of bottles of beer. At home, he and a friend drank about a third of one pint of wine and part of another pint. He had been drinking earlier in the day. He was not intoxicated nor did he pass out; he was "just sleepy." He went to sleep about 11:00 p. m. while his friend was still in the room. Sometime thereafter his friend left.

Lillian Scoby, one of the owners of the house in which Butler lived, related a conversation with him which she said occurred a few days after Christmas. She asked Butler whether Flyzella had visited him. Butler replied, "I didn't know anything about it because I was high * * * Drunk * * * I didn't see the license of the car or them, hardly, myself, because I was too high."

John E. Davis, of the Oakland Police Laboratory, testified to collecting the soil samples and the places from which they were taken. He made no examination of

Flyzella's clothing at the place where her body was found. At a later date, he said, some of her clothing was brought into the laboratory from the property clerk's office and he then examined it. When received by him, Flyzella's underpants were wrong-side out. There were apparent seminal stains on them which he did not examine completely.

Davis gave the jury the conclusions he reached when he examined the underpants. In his opinion, Flyzella replaced them after having had intercourse and they were later pulled off inside out. He assumed that the underpants were inside out before they were put into the property clerk's office, that the stains actually were semen stains, that they were on the inside of the garment, and that intercourse had occurred.

The police officer who arrested Reed on December 27th testified that there were then two scratches on Reed's face. According to Butler, Reed's face was not scratched on Christmas Eve, but he noticed that condition when he saw Reed in jail.

Anna Belle Branch testified that during the afternoon of December 24th, Reed accompanied her on a visit to a sick friend. During the call they scuffled on the bed and tried to hold Reed's head down. Reed may have been scratched at that time, she said. She had no recollection of such an occurrence but the sick girl's fingernails were long.

It appears that, about one week before the homicide, Reed was employed to work in the kitchen of the Prescott Junior High School cafeteria at a club dinner. The cafeteria is near the only entrance to the school yard which was open on the evening of the homicide.

Cecil Massie was a prisoner in the Oakland City Jail when Reed was arrested. As a witness for the state, Massie related a conversation with Reed. At that time, said Massie, Reed told him he had killed a girl. According to the witness, Reed admitted having had sexual intercourse with her. Reed asked him to go to his house and remove some bloody clothing. Massie testified that Reed repeated the same story to him in the jail on March 31st.

At the trial, Reed took the stand in his own behalf. He testified that during the afternoon of December 24th, he and Anna Branch visited one of her friends who was ill. The three of them were "tussling" and "the skin was knocked off" of a facial bruise. Later he went to the Sundown Cafe, leaving there sometime between 7:00 and 8:00 p. m.

Continuing with his testimony, he said that he then picked up a streetwalker, went to a hotel with her for about a half an hour, leaving sometime between 8:00 and 9:00 p. m. After looking for Cain, and not finding him, he kept walking around town. About midnight, he returned to the Sundown Cafe, where he found Cain and Flyzella together.

After the three talked for a few minutes they left in Cain's car. Cain then suggested that Flyzella find another girl so they could celebrate. Flyzella directed them to the home of a friend where she thought she could find a girl.

Reed did not recall the time spent there, but eventually he and Flyzella returned to the car and woke up Cain. Flyzella then directed them to the house of another friend. She went in, leaving the men in the car. About five or ten minutes later, when Reed went into the house, he met Butler coming back from the bathroom. A few minutes later he heard Flyzella talking in Butler's room but he did not go into it. He continued back to the car where he found Cain asleep. When he closed the door, Cain aroused and asked where Flyzella was. The two men sat there for about ten minutes and Cain went back to sleep.

Reed said he was half way dozing when headlights behind the car awakened him and he heard loud voices. He looked out and saw Flyzella and a man. Reed opened the car door and jabbed Cain to wake him up. The man with Flyzella had his hands on her neck, but loosened his grip slightly when he saw Reed.

As Reed related what then occurred, Flyzella told the man, "Turn me loose! Turn me loose! You are no man or husband of mine." At that time, Flyzella broke loose and returned to the house. The

man went to his car, parked behind Cain's, shut off his headlights, and then followed Flyzella. Meanwhile, Cain awakened and asked what had occurred. Reed told Cain, "I don't know. I don't know who he is, but I know where I am going. I'm going home. You know my position, I don't want to get into trouble."

Reed then walked away from the car and Cain drove off. This was about 3:30 a. m. He then went to a place where, about 4:00 a. m., he had two orange sodas. Later he stopped in front of a restaurant, and returned home between 4:00 and 5:00 a. m.

Other testimony of Reed was that the week before Christmas he had been in the Prescott Junior High School yard looking for the entrance to a building where he had been asked to help serve a dinner. He walked through the entrance at the northeast corner, which was the only one open. Not finding any door into the building at that point, he returned to the street and located a street door which he entered. The last time he saw Flyzella was about 3:30 a. m. on Christmas morning. He did not kill her, and he never had sexual intercourse with her.

Admitted into evidence during the trial was a photograph of Flyzella's body taken at the scene where it was discovered. It shows the position of the body when found and the disarrangement of the clothing.

Following the presentation of evidence, the jury was given the statutory definitions of murder of the first degree, murder of the second degree, manslaughter, rape, and malice. The record also includes instructions concerning the elements of an attempt to commit a crime. In addition, the jurors were instructed as to the rules relating to intent, manslaughter and heat of passion. The difference between, and elements of, the various degrees of homicide were explained and the court defined an assault which amounts to a felony.

Reed contends that these instructions are insufficient. He says that they do not adequately cover rape, or attempted rape, and homicide. Nor do they, he says, state the facts necessary to be proved to establish the commission of each of these crimes.

The court instructed the jury regarding the law applicable to the facts shown by the evidence. The instructions given are couched both in the statutory language and in additional explanatory terms. Reed does not claim that any of the instructions are erroneous and no instruction requested by him was refused.

[1, 2] "Where an instruction on a particular point or points as given by the court is correct as far as it goes, and the only valid objection, if any, to it is that it is deficient or inadequate by reason of its generality, indefiniteness, or incompleteness, if defendant desires additional, amplified, explanatory, fuller, or more complete, elaborate, comprehensive, definite, specific or explicit instructions on such point or points, he must properly request the same, otherwise error cannot be predicated upon the failure to give such additional instruction." People v. Carothers, 77 Cal.App.2d 252, 255, 175 P.2d 30, 32.

[3] The court may couch its instructions defining the elements of the offense in the language of the code where no instructions in elaboration or exposition of the principles of the statutory definitions are requested by the defendant. People v. Treschenko, 159 Cal. 456, 458, 114 P. 578. Even if such an instruction "cannot be commended as a full or clear exposition of the meaning of the section of the Code, still it cannot be said that it was error for the court, in giving the law, to have conformed to the language of the Code, and to have omitted what that Code itself omits." People v. Dobbins, 138 Cal. 694, 698, 72 P. 339, 341. The defendant will not be heard to complain where he has failed to request an amplification of an instruction in that form. People v. Laird, 69 Cal.App. 511, 514, 231 P. 596.

[4] The court's instruction on the presumption of innocence and defining reasonable doubt followed the language of section 1096 of the Penal Code. By additional instructions, the court explained the effect of the presumption of innocence and stated the doctrine of reasonable doubt.

These instructions, Reed complains, are only general. No instruction was given to the effect that each element of the crime must be proved beyond a reasonable doubt. But the law expressly specifies that the court may read section 1096 of the Penal Code and need not give any other instruction on the presumption of innocence or reasonable doubt. Pen.Code, § 1096a. Considering all of the instructions, it appears that the jury was fully and fairly instructed as to all of the rules of law applicable to the evidence.

Reed next contends that, as a matter of law, the evidence is insufficient to support the verdict of guilty of murder of the first degree. He argues that, by the evidence presented, the prosecution's case is limited to the theory of murder committed in the perpetration of rape. This, he says, the prosecution has failed to prove beyond a reasonable doubt. Reed relies upon the testimony of Davis, given on cross examination, as proving intercourse by consent.

[5, 6] Circumstantial evidence is as adequate to convict as direct evidence. People v. Koenig, 29 Cal.2d 87, 91, 173 P.2d 1; People v. Hills, 30 Cal.2d 694, 700, 185 P.2d 11; People v. Green, 13 Cal.2d 37, 42, 87 P.2d 871; People v. Latona, 2 Cal.2d 714, 721, 43 P.2d 260. "It is not the province of this court to determine conflicts in the evidence, nor to choose between different inferences which reasonably may be drawn from the testimony. The sole question, so far as the admissible evidence is concerned, relates to its sufficiency to support the verdict. * * * The ultimate fact found by the trial court was that defendant was guilty of murder of the first degree. If there is substantial evidence in the record to support that judgment, the determination must be upheld." People v. Hills, supra, 30 Cal. 2d at page 701, 185 P.2d at page 15; People v. Eggers, 30 Cal.2d 676, 685, 185 P.2d 11, 15; People v. Smith, 15 Cal.2d 640–647, 104 P.2d 510; People v. Green, supra, 13 Cal.2d at page 42, 87 P.2d 871; People v. Perkins, 8 Cal.2d 502, 510, 66 P.2d 631; People v. Latona, supra, 2 Cal.2d at page 722, 43 P.2d 260; People v. Tedesco, 1 Cal. 2d 211, 219, 34 P.2d 467; People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389; People v. Rico, 180 Cal. 385, 386, 181 P. 663; People v. Machuca, 158 Cal. 62, 64, 109 P. 886; People v. Mahatch, 148 Cal. 200, 203, 82 P. 779.

Applying this rule to the record in this case, and conceding that the prosecution is limited to the theory of murder committed in the perpetration of rape, it cannot be said "that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." People v. Tom Woo, supra [181 Cal. 315, 184 P. 393]. Flyzella was found dead as the result of violence. There is evidence tending to prove that sexual intercourse had been accomplished. The jury was not required to conjecture that the intercourse had been with consent.

[7] A reasonable inference to be drawn from the evidence is that Flyzella offered resistance and was raped. There is direct evidence of Reed's expressed intentions and that earlier he had used violence upon her. The evidence concerning his admission of the crime also tends to prove his guilt. Considering the entire testimony, it amply supports the implied finding of the jury the Reed killed Flyzella in the perpetration of rape.

[8] Reed objects to the admission of certain photographic evidence. In particular, he contends that the admission of a photograph of Flyzella's body as found was inflammatory and prejudicially erroneous. It should not have been admitted, he argues, because there was other evidence showing the nature and extent of the wounds and the location of the body. However, there is ample authority for the ruling of the court in this regard. People v. Guldbrandsen, 35 Cal.2d 514, 522, 218 P.2d 977; People v. Smith, supra, 15 Cal.2d at page 649, 104 P.2d 510; People v. Shaver, 7 Cal.2d 586, 592, 61 P.2d 1170; People v. Sisson, 1 Cal.2d 510, 511, 36 P.2d 116; People v. Burkhart, 211 Cal. 726, 732, 297 P. 11; People v. Magsaysay, 210 Cal. 301, 302, 291 P. 582.

The judgment and the order denying a new trial are affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

38 Cal.2d 302

Ex parte JAMES.

Cr. 5243.

Supreme Court of California.

Jan. 22, 1952.

Original application for writ of habeas corpus by O. D. James wherein validity of judgment of conviction entered on petitioner's guilty plea to charge of first degree murder was attacked because petitioner had not been represented by counsel. The Supreme Court, Traynor, J., held, inter alia, that petitioner had not waived his right to counsel, and therefore the conviction would be set aside.

Writ granted.

Edmonds, J., dissented in part.

See also 99 Cal.App.2d 476, 222 P.2d 117.

1. Habeas Corpus ⇐50

Even if the strict requirement of diligence in coram nobis proceedings were prerequisite of writ of habeas corpus, that, because of ignorance, petitioner for writ of habeas corpus did not realize that he had any grounds for attacking judgment of conviction entered on guilty plea to first degree murder charge until long after time for appeal had expired, and that, because he could hardly read or write, he had no friends or acquaintances in outside world with whom he could correspond or who could press his cause, and that he was dependent solely upon prison officials for any move in his behalf, and that finally, through aid of prison chaplain, he received competent legal advice, satisfactorily explained six year delay in bringing habeas corpus proceeding. Pen.Code, § 1475; Const. art. 6, § 4.

2. Habeas Corpus ⇐4

Writ of habeas corpus may not be used as substitute for appeal, but if fundamental constitutional rights of petitioner have been violated, the writ will lie. Pen.Code, § 1475; Const. art. 6, § 4.

3. Criminal Law ⇐641(1)

An accused's right to counsel is a fundamental constitutional right. Const. art. 1, § 13.

4. Criminal Law ⇐641(1)

The accused has the right in criminal prosecution in any court whatever to appear and defend in person and with counsel. Pen.Code, §§ 858, 859a, 987, 1018; Const. art. 1, §§ 8, 13; Const.Amend. 14.

5. Criminal Law ⇐232

At preliminary examination, magistrate must inform accused of his right to counsel, ask accused if he desires counsel, and allow accused reasonable time to send for counsel. Pen.Code, §§ 858, 859a, 987, 1018; Const. art. 1, §§ 8, 13; Const.Amend. 14.

6. Criminal Law ⇐641(1)

As the seriousness of the charge increases, a purported waiver of right to counsel must be scrutinized with corresponding care. Pen.Code, §§ 858, 859a, 987, 1018; Const. art. 1, §§ 8, 13; U.S.C.A. Const.Amend. 14.

7. Criminal Law ⇐264

Where capital crime was charged, the mere statement that accused wished to plead guilty was not enough to show waiver of constitutional guarantee of right to counsel. Const. art. 1, §§ 8, 13; U.S.C.A. Const.Amend. 14.

8. Criminal Law ⇐641(1)

A court cannot accept waiver of counsel from any one accused of serious public offense without first determining that such person understands nature of the charge, elements of the offense, the pleas and defenses which may be available, or the punishments which may be exacted. Pen. Code, §§ 858, 859a, 987, 1018; Const. art. 1, §§ 8, 13; U.S.C.A.Const.Amend. 14.

9. Habeas Corpus ⇐25(1)

Where itinerant farm hand was not informed of his right to counsel at time of preliminary hearing on charge of first degree murder or at time of acceptance of guilty plea and was not asked if he waived right to counsel at time of such plea or if he no longer wished counsel as he had requested it at time of arraignment, and where it was not established that accused had had deliberate intent to kill, and no evidence was taken for purpose of determining degree of crime, judgment of conviction would be set aside in habeas corpus proceedings as being in violation of petitioner's constitutional rights. Pen.Code, §§ 188, 189, 858, 859a, 987, 1018, 1192, 1475; Const.

art. 1, §§ 8, 13; art. 6, § 4; U.S.C.A.Const. Amend. 14.

10. Criminal Law ⇐238

Evidence at preliminary hearing on first degree murder charge was sufficient to justify committing magistrate's concluding that public offense had been committed and that there was reasonable cause to hold accused for trial. Pen.Code, § 872.

11. Criminal Law ⇐641(1)

Denial of accused's right to counsel in prosecution for first degree murder did not serve to acquit accused of the offense, but left him subject to trial. Pen.Code, §§ 799, 858, 859a, 987, 1018, 1486; Const. art. 1, §§ 8, 13; U.S.C.A.Const. Amend. 14.

12. Criminal Law ⇐1216(5)

Where judgment of conviction entered on guilty plea to charge of first degree murder was set aside in habeas corpus proceedings for failure to advise accused of his right to counsel, if accused were subsequently convicted of manslaughter, his confinement based upon the invalid judgment, together with any time credits for good conduct earned thereon, would be credited upon new sentence. Pen.Code, §§ 799, 858, 859a, 987, 1018, 1475, 1486, 2900.1, 2920; Const. art. 1, §§ 8, 13; art. 6, § 4; U.S.C.A.Const.Amend. 14.

Adams & Reynolds, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., and Clarence A. Linn, Asst. Atty. Gen., for respondent.

TRAYNOR, Justice.

Petitioner, O. D. James, an inmate of San Quentin State Prison, seeks a writ of habeas corpus. He pleaded guilty to a charge of murder. The court determined that the crime was first degree murder and sentenced petitioner to imprisonment for life. Petitioner now contends that his constitutional rights were violated and his plea of guilty vitiated because he was not given the aid of counsel.

Petitioner's version of the events leading to the homicide are set forth in his affidavit. On December 2, 1944, a number of farm workers were engaged in a dice game at the canteen on the ranch where they worked. Petitioner and Charlie Thomas, the decedent, were watching the game awaiting their turns with the dice. Petitioner placed 55 cents in front of him on the table in anticipation of hazarding that sum when he gained possession of the dice. Thomas, who had not previously wagered any money and had no claim to the coins, suddenly snatched them. Petitioner demanded that Thomas return the money. They argued for about a minute and Thomas then ran out a side door. At this point a bell rang summoning the workers to supper. With the triple purpose of avoiding the rush for the front door, responding to the supper bell, and looking for Thomas, petitioner walked out the side door previously used by Thomas. Thomas was waiting outside, and petitioner again demanded his 55 cents. Thomas thereupon struck petitioner on the head with a beer bottle, stunning him and inflicting a bloody scalp wound. Petitioner staggered back and reached down to pick up his cap. As he did so he heard a shout "Look out" and saw that Thomas was bearing down upon him with a knife. In the struggle that followed, petitioner's hand was slashed and is now marked by a large scar. He seized the knife and struck Thomas in the neck, killing him. After his wounds were attended to, petitioner retired to his quarters to await the arrival of law enforcement officers.

It is unnecessary to decide whether this version of the homicide is true. It is set forth simply to show that petitioner had a defense, which, if wholly or partially believed by the trier of fact on a plea of not guilty, would lead to acquittal or at most to a conviction of a lesser crime than first degree murder.

Petitioner appeared without counsel at the preliminary hearing on December 12, 1944 in the Justice's Court and was not informed of his right to counsel.[1] Bill Wat-

1. "The Court: You have no attorney at this time have you?

"The Defendant: No.

"The Court: All right. Proceed."

son, a worker on the ranch, testified that Thomas and petitioner had been at the dice table, that Thomas picked up some money from the table, and that Thomas and petitioner had an argument over some money and "something about point eight." As to what happened thereafter, he testified as follows:

"Q. * * * What did they do after you got in there? A. Well, the bell rung for supper. Everybody was going out to eat, so they went out the door and I went out the door.

"Q. Which door did they go out? A. The little door there on the side. * *

"Q. Which one went out the door first? A. Charlie [Thomas] * * *.

"Q. Did he go out the side door in a hurry or did he just walk out slowly? A. He went out in a hurry.

"Q. When he went out the side door in a hurry, did the defendant, O. D. James, go out this same door? A. Yes, sir. He went outside.

"Q. How close behind Thomas was he when he went out the door? A. I don't know exactly.

"Q. Well, approximately. Approximate it. About how far behind him? A. Well, I told you the truth, I don't know, because they was going out to supper there, you know, so I couldn't tell how close he went out behind.

"Q. Did he go out in a hurry or did he just walk out casually? A. Well, when he went out the door, he was going out, he was just walking out. * * *

"Q. Did anybody else go out that side door? A. I didn't see nobody. I went out the front door there. * * *

"Q. Did you see Charlie Thomas at any time after he had gone out the side door? A. No, sir.

"Q. You never saw him again? A. Well, I seen him laying on the ground, after I walked across to the mess hall there. * * *

"Q. How long after he picked up the money was it that he left by the side door? A. About five minutes.

"Q. He stood there with the money in his hand five minutes before he left by the door? A. I think it was five minutes. I don't know. I didn't have no watch on me.

"Q. Well, as a matter of fact, did the defendant here O. D. James follow the man Charlie Thomas, out the side door right away? Did he go right out after he went out? A. I don't know whether he went right out behind him or not. All I know, he walked out the same door.

"Q. Was that about the same time? A. Shortly after."

Felix Neal, another worker at the ranch, testified that he had been shooting the dice, that he made his point, which was eight, that he did not know anything about a side bet, that the argument started when Thomas grabbed some money from the table and that the argument continued for about five minutes. As to what happened thereafter, he testified as follows:

"Q. Then what happened? A. Then they went out—well, before they went out, I walked out, I started to leave out of them, out of the room there. So they went out and I don't know what happened.

"Q. Where were the two men, Thomas and James when you left the canteen? A. They was inside that little small room there.

"Q. They hadn't gone out yet? A. No. They started to leave out before I beat it out; I left out.

"Q. Which door did you go out? A. The front door.

"Q. Had they started to go out when you left? A. Well, they had—they looked like they was going out.

"Q. Do you know which door they headed for? A. No, sir.

"Q. Or started to go out? A. I didn't see them.

"Q. They started to go out. Who was going out first? A. Charlie. I think he started to go out, something like that.

"Q. Did this man James follow him or not, do you know? A. Well, he went around the table there. That is when I left there.

"Q. Who went around the table? A. The defendant here.

"Q. Where was Thomas when the defendant went around the table. A. Thomas?

"Q. Yes. Charlie Thomas. A. Charlie Thomas, oh, he was on this side of the table, close to the small heater they got there.

"Q. Where was James? On the same side of the table or the other side? A. On the other side of the table.

"Q. That is when you mean that James went around the table? A. When he went around the table, that is when I left.

"Q. Why did you leave at that time? A. Well, because I was waiting for chow time. * * *

"Q. Well, then, Leal, when you shot the dice and made your point of 8, that is when Thomas grabbed the money, is that right? A. Yes, sir.

"Q. Then there was an argument over it between Thomas and James? A. Well, I didn't—I didn't understand if it was an argument, they made so much fuss there.

"Q. You called it an argument. A. It sounded like an argument about some money.

"Q. Is that when James went around the table? A. Yes, sir. Is this James here?

"Q. Yes. A. Yes.

"Q. He went around the table after Charlie? A. Yes.

"Q. Is that when you left? A. Yes, sir, that is when I left. I left out the front door.

"Q. Did you see Charlie after that? No, sir, I didn't see him."

Albert H. Lopez, constable of the township testified that petitioner said that he had made a side bet with Thomas on the fall of the dice and that the argument was over the question whether Thomas had bet with or against the dice. Lopez further stated that immediately after the homicide, petitioner told him what happened, giving substantially the same version as that set forth in petitioner's affidavit. No other witnesses testified, and petitioner did not testify in his own behalf.

At the arraignment in the Superior Court, on December 15th, the court asked petitioner if he would like to have a lawyer and petitioner replied that he would like to have one.[2] Petitioner then pleaded not guilty. The court continued the matter one week for the appointment of an attorney.

Four days later Melvin K. Gibbs, Assistant District Attorney, and petitioner, again without counsel, appeared in the Superior Court. Nothing was said by Gibbs or the court about the order of continuance to December 22nd, and no order was entered advancing the case on the calendar. Gibbs told the court that petitioner had sent a note asking to see him and stating that he wanted to plead guilty. The trial court asked petitioner if he wished to plead guilty and he replied that he did. The court then permitted him to withdraw his plea of not guilty and to plead guilty. Gibbs then stated: "If the Court please, it might—your Honor might be able now to fix the degree, that will take but a moment. In brief the facts are that this defendant and the deceased were playing dice at Griffen Ranch No. 2. Some altercation arose over the fact that the deceased person grabbed the money from the dice

2. "Q. Now, is O. D. James your true name? A. Yes.
"Q. Are you represented by counsel? A. No.
"Q. By a lawyer? A. No.
"Q. Do you want a lawyer to represent you? A. I would like to have one.
"Q. Do you have any money to pay for a lawyer? A. No, not yet.
"Court: Well Mr. Ozias [an attorney present at the proceedings] will you represent him for the purpose of arraignment with, however, the right to withdraw if you wish? Ozias: Yes. * * *
"Gibbs: If you are going to appoint an attorney that should be done before the case is set. It might not be an agreeable date for the attorney. * * *
"Court: The matter will be continued one week from today for the appointment of an attorney."

game—that money did not belong to this defendant by the way[3]—this defendant started after him, and then the deceased man ran out the side door, followed by the defendant. The defendant stated to me that then and there he dropped his hat and as he reached to get it, the deceased, Charlie Thomas pulled a knife on him; that this defendant took the knife away from him, and thereupon proceeded to stab him, and that stab wound caused the death. There is no doubt in my mind but what it is murder in the first degree. But those are the facts as I have outlined them, and including the statement the defendant made." Gibbs then asked petitioner "Did you hear what I said? Is that about right?" Petitioner replied "That is right." The trial court accepted Gibbs' claim that the degree of the crime was first degree murder, and the case was continued for determination of the sentence.

On December 22nd petitioner came into court for sentence, again without counsel. The court informed petitioner of the several steps that had occurred in the proceedings, omitting, however, petitioner's request for the appointment of counsel, the continuance of the case for that purpose, and the special appearance on the 19th and the change of plea. The court fixed the punishment at life imprisonment. The court then asked petitioner questions about his education, family background, military record, and work history.

On March 3, 1950, counsel for petitioner appeared in the Superior Court of Fresno County before the same trial judge who had presided at the December 1944 proceedings for hearing on a motion in the nature of a petition for a writ of error coram nobis. The trial judge denied the motion. On September 18, 1950, the District Court of Appeal, Fourth District, affirmed the order of the trial court on the ground that petitioner's contentions could not be determined on a petition for a writ of error coram nobis. People v. James, 99 Cal.App.2d 476, 222 P.2d 117. On July 17, 1951, petitioner filed an original petition for habeas corpus in this court. Cal.Const. Art. VI, § 4; Penal Code, § 1475. The petition appeared meritorious, and we entered an order to show cause why the relief prayed for should not be granted. The Attorney General has filed the record on appeal in the coram nobis proceeding, which includes a full transcript of the proceedings upon the original commitment.

[1] The Attorney General, relying on People v. Adamson, 34 Cal.2d 320, 327, 210 P.2d 13 and People v. Shorts, 32 Cal.2d 502, 513, 197 P.2d 330, contends that the petition should be dismissed without consideration of its merits for inadequate explanation of the delay in filing it. Neither case is applicable, for both involved coram nobis proceedings. Even if the strict requirement of diligence in coram nobis proceedings were a prerequisite of the writ of habeas corpus, petitioner's affidavit and the record of the 1950 coram nobis proceeding present a satisfactory explanation of the delay. It appears therein that because of his ignorance, petitioner did not realize that he had any grounds for attacking the judgment until long after the time for appeal had expired, that because he could hardly read or write he had no friends or acquaintances in the outside world with whom he could correspond or who could press his cause, that he was dependent solely on the officials at the prison for any move in his behalf, and that finally, through the aid of a chaplain at the prison, he was able to get the National Association for the Advancement of Colored People interested in his case and thus receive competent legal advice. See, In re Jones, 88 Cal.App.2d 167, 169, 198 P.2d 520.

[2, 3] The writ of habeas corpus may not be used as a substitute for an appeal, but if fundamental constitutional rights of the petitioner have been violated the writ will lie. People v. Adamson, 34 Cal.2d 320, 210 P.2d 13; In re McCoy, 32 Cal.2d 73, 76, 194 P.2d 531; In re Wallace, 24 Cal.2d 933, 938, 152 P.2d 1; In re Bell, 19 Cal.2d 488, 494, 507, 122 P.2d 22. The right to counsel is a fundamental constitutional right, which has been carefully guarded by the courts of this state. In re McCoy, 32 Cal.2d 73,

3. There was no evidence that the money did not belong to petitioner.

194 P.2d 531; People v. Manchetti, 29 Cal.2d 452, 458, 175 P.2d 533; People v. Chesser, 29 Cal.2d 815, 178 P.2d 761; People v. Lanigan, 22 Cal.2d 569, 140 P.2d 24, 148 A.L.R. 176; In re Jones, 88 Cal.App.2d 167, 198 P.2d 520; People v. Avilez, 86 Cal.App.2d 289, 194 P.2d 829; People v. Zammora, 66 Cal.App.2d 166, 152 P.2d 180; People v. McGarvy, 61 Cal.App.2d 557, 142 P.2d 92; see earlier cases collected in 7 Cal.Jur. 939, 973, 990.

[4, 5] The accused has the right in criminal prosecutions in any court whatever "to appear and defend, in person and with counsel." Cal.Const. Art. I, § 13. At the preliminary examination the magistrate must inform the accused of his right to counsel, ask him if he desires counsel, and allow him a reasonable time to send for counsel. If the felony charged is not punishable with death, the defendant may plead guilty to the offense at the preliminary examination in the presence of counsel. Art. I, § 8. These basic guarantees are supplemented by many provisions of the Penal Code. When the defendant is brought before the magistrate, the latter "must immediately inform him * * * of his right to the aid of counsel in every stage of the proceedings." Penal Code, § 858. "If the public offense charged is an offense not punishable with death * * * while the charge remains pending before the magistrate and when his counsel is present, the defendant may, with the consent of the magistrate and the district attorney or other counsel for the people, plead guilty to the offense charged * *. The foregoing provisions of this section shall not be construed to authorize the receiving of a plea of guilty from any defendant not represented by counsel." Penal Code, § 859a. "If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him." Penal Code, § 987. In 1949, after the proceedings in the present case, Penal Code section 1018 was amended to provide that no plea of guilty to a felony for which the maximum punishment is death shall be received from a defendant who does not appear with counsel.

The United States Supreme Court has repeatedly stated that the due process clause of the Fourteenth Amendment of the United States Constitution requires counsel to be furnished to the accused in capital cases. Quicksall v. Michigan, 339 U.S. 660, 666, 70 S.Ct. 910, 94 L.Ed. 1188; Gibbs v. Burke, 337 U.S. 773, 780, 69 S.Ct. 1247, 93 L.Ed. 1686; Uveges v. Pennsylvania, 335 U.S. 437, 441, 69 S.Ct. 184, 93 L.Ed. 127; Bute v. Illinois, 333 U.S. 640, 674, 68 S.Ct. 763, 92 L.Ed 986; Williams v. Kaiser, 323 U.S. 471, 474, 65 S.Ct. 363, 89 L.Ed. 398; Tomkins v. Missouri, 323 U.S. 485, 488, 65 S.Ct. 370, 89 L.Ed. 407; Powell v. Alabama, 287 U.S. 45, 71, 53 S.Ct. 55, 77 L.Ed. 158; 22 So.Calif. L. Rev. 259. A state court is required "to initiate an inquiry into the desire of the accused to be represented by counsel, to inquire into the ability of the accused to procure counsel or, in the event of the inability of the accused to procure counsel, to assign competent counsel to the accused to conduct his defense." Bute v. Illinois, 333 U.S. 640, 674, 68 S.Ct. 763, 780, 92 L.Ed. 986.

The record shows that petitioner was represented by counsel only for the purpose of arraignment and at no other stage of the proceedings. Thus, in clear violation of the express mandate of Article I, Section 8 of the California Constitution and of Penal Code section 858, petitioner was not informed of his right to counsel when first brought before the magistrate. Moreover, the trial court did not inform him of his right to counsel at the time it accepted his plea of guilty, or even ask him if he waived the right to counsel or if he no longer wished counsel as requested at the time of arraignment. Nor did the court inform him of the possible maximum penalty or of the possibility of there being different degrees of the crime charged. Petitioner, an illiterate farm laborer without previous encounters with the law or experience in the intricacies of criminal procedure, could hardly be expected to comprehend the possible offenses and various punishments

involved in this homicide or to know how to weigh, let alone present, the defenses available thereto. The elements of murder and manslaughter, the distinctions between first and second degree murder and the principles governing defenses to charges of such crimes are often difficult even for experienced judges and skilled practitioners to apply. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." Mr. Justice Sutherland in Powell v. Alabama, 287 U.S. 45, 68–69, 53 S.Ct. 55, 64, 77 L.Ed. 158.

The record in this case is eloquent proof of the wisdom of the observation that "the guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed." Tomkins v. State of Missouri, 323 U.S. 485, 488, 65 S.Ct. 370, 372, 89 L.Ed. 407. Not only the record, but even Gibbs' statement to the court, indicates that the crime was less than murder in the first degree. It is difficult to believe that a lawyer representing petitioner would have advised petitioner to plead guilty to murder or permitted Gibbs' statement to go unchallenged.

When petitioner's plea of guilty was accepted by the trial court, the prosecution had yet to establish that he had a deliberate intent to kill when he struck Thomas. Penal Code, §§ 188, 189. At no time did the court take any evidence for the purpose of determining the degree of the crime, as it was required to do, Penal Code, § 1192; People v. Mendez, 27 Cal.2d 20, 23, 161 P.2d 929; In re Hough, 24 Cal.2d 522, 534, 150 P.2d 448; People v. Verdier, 96 Cal. App.2d 29, 214 P.2d 433; In re Hammond, 24 Cal.App.2d 18, 74 P.2d 308; People v. Hammond, 26 Cal.App.2d 145, 78 P.2d 1172, but depended solely upon the opinion of the Assistant District Attorney that it was murder in the first degree. There is no evidence that this killing occurred during the commission of a felony, and the only evidence that might possibly indicate premeditation is that petitioner followed Thomas outside the canteen.

The Attorney General, relying on In re Tedford, 31 Cal.2d 693, 192 P.2d 3, contends that by requesting to change his plea, petitioner impliedly waived his right to counsel and is therefore precluded from making his present contention that he was deprived of his constitutional rights. Unlike petitioner, however, Tedford did not request counsel, nor was he charged with a capital offense. The record showed that he was fully aware of the nature of the proceedings and had an intelligent conception of the consequences of his act. Under these circumstances it was held that a plea of guilty was sufficient to waive the right to counsel. In re Tedford, 31 Cal.2d 693, 695, 192 P.2d 3; In re Jingles, 27 Cal.2d 496, 165 P.2d 12; People v. Walker, 93 Cal.App.2d 54, 57, 208 P.2d 724.

[6–8] Even if it is assumed that a plea of guilty in a capital case could be received at the time of petitioner's plea in 1944, before the amendment to Penal Code § 1018, supra, from a defendant who did not appear with counsel, it does not follow that in such a case a plea of guilty implied a waiver of the right to counsel. As the seriousness of the charge increases, a purported waiver must be scrutinized with corresponding care. If a capital crime is

charged, as herein, the mere statement that the accused wishes to plead guilty is not enough to show a waiver of the constitutional guarantee. Moreover, the court cannot accept a waiver of counsel from any one accused of a serious public offense without first determining that he "understands the nature of the charge, the elements of the offense, the pleas and defenses which may be available, or the punishments which may be exacted". People v. Chesser, 29 Cal.2d 815, 822, 178 P.2d 761, 765; Uveges v. Pennsylvania, 335 U.S. 437, 440–441, 69 S.Ct. 184, 93 L.Ed. 127. There was no attempt to make such a determination in this case. The record shows that defendant was an itinerant farm hand, without formal education, without money, and evidently without previous experience with courts.

[9] Since the procedure here was in clear violation of petitioner's constitutional rights, the conviction must be set aside. In re McCoy, 32 Cal.2d 73, 77, 194 P.2d 531; In re Jones, 88 Cal.App.2d 167, 198 P.2d 520; Uveges v. Pennsylvania, 335 U.S. 437, 69 S.Ct. 184, 93 L.Ed. 127; Gibbs v. Burke, 337 U.S. 773, 69 S.Ct. 1247, 93 L.Ed. 1686.

[10, 11] Petitioner contends that if the judgment is void, he "should be restored to his liberty." The evidence at the preliminary hearing, however, was sufficient to justify the committing magistrate's concluding that a public offense had been committed and that there was reasonable cause to hold petitioner for trial. Pen.Code, § 872; People v. McGee, 31 Cal.2d 229, 234, 187 P.2d 706; People v. Nagle, 25 Cal.2d 216, 222, 153 P.2d 344. The denial of petitioner's right to counsel did not serve to acquit him of the offense charged, and he is still subject to trial. In re McCoy, supra, 32 Cal.2d 73, 77, 194 P.2d 531; see Penal Code, §§ 799, 1486; State ex rel. Cacciatore v. Drumright, 116 Fla. 496, 156 So. 721, cases collected in 97 A.L.R. 160.

[12] On oral argument the Deputy Attorney General stated that "an examination of the record convinces the Attorney General's office that manslaughter was the greatest crime committed by this Petitioner, and we are taking the laboring oar in calling the matter to the attention of the Governor, asking for commutation of sentence to time served.[4]" If petitioner were convicted of manslaughter on a second trial, his confinement based upon the invalid 1944 judgment, together with any time credits for good conduct earned thereon, Penal Code, § 2920, would be credited upon the new sentence for the same criminal act. Penal Code, § 2900.1.

The writ is granted, the return to the order to show cause shall stand as the return to the writ, and the petitioner is discharged from the custody of the warden at San Quentin and committed to the custody of the Sheriff of Fresno County for further proceedings in accordance with the views expressed in this opinion.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, and SPENCE, JJ., concur.

EDMONDS, Justice (concurring and dissenting).

Upon the hearing of a motion here characterized as "in the nature of a petition for a writ of error coram nobis", the superior court denied James any relief and that order was affirmed by the district court of appeal. People v. James, 99 Cal.App.2d 476, 222 P.2d 117. The facts upon which the present determination is based are taken from the record of that proceeding. I concur in the conclusion that, under the circumstances there shown, if those facts now can be accepted as true, the conviction of James was in clear violation of his con-

4. The petition alleges that the Adult Authority has also recommended commutation. "On April 21, 1949, the Adult Authority at its clemency meeting held at Sacramento considered your affiant's application for Commutation of Sentence and the said Adult Authority recommended to the Governor that Commutation of Sentence to reduce the offense of Murder first degree to Manslaughter be granted; that the complete file was returned to the Governor's office on April 25, 1949, with this recommendation, but as yet no action has been taken on this recommendation."

stitutional rights and he is entitled to have it set aside.

However, I see no reason for here referring to the law which would be applicable in the event that James is tried and convicted of manslaughter. That is a contingency which has nothing to do with the decision in the present proceeding.



38 Cal.2d 350

DORSEY et al. v. BARBA et al.

S. F. 18369.

Supreme Court of California, in Bank.

Feb. 4, 1952.

Action for personal injuries sustained in collision with automobile registered in name of defendant wife and driven by husband from whom she had been separated under interlocutory decree of divorce. The Superior Court, Alameda County, Donald K. Quayle, J., denied plaintiff's motion for new trial on condition that defendant husband consent to increase of damages, and plaintiffs appealed. The Supreme Court, Gibson, C. J., held that in case involving disputed and unliquidated damages, increasing amount of inadequate award over plaintiff's objection and denial of new trial on such grounds, abridged plaintiff's right to trial by jury.

Reversed.

Schauer and Traynor, JJ., dissented in part.

Prior opinion 226 P.2d 677.

1. Automobiles ⇐56

In absence of compliance with statutes requiring notice to department of motor vehicles of intended transfer of ownership of automobile, purported transfer is ineffective to relieve owner of statutory imputed liability for negligence of person operating vehicle with owner's express or implied permission. Vehicle Code, §§ 176–178, 186, 402.

2. Automobiles ⇐192(1)

Under statute imputing to owner of automobile, liability for negligence of person operating vehicle with owner's express or implied permission, person may be liable as owner even though he does not have all incidents of ownership. Vehicle Code, § 402.

3. Automobiles ⇐56

Under statute imputing to owner of automobile, liability for negligence of person operating vehicle with owner's express or implied permission, when automobile was registered in name of wife alone and wife had in fact consented to her husband's use and operation of the vehicle, liability could be imputed notwithstanding wife's assertion that she was without power to give such consent in that husband had right of management and control by virtue of Civil Code provision. Vehicle Code, §§ 176–178, 186, 402; Civ.Code, § 172.

4. Automobiles ⇐29

Statutes requiring registration of motor vehicles were enacted in interest of public welfare and for purpose of affording identification of vehicles and persons responsible in cases of accident and injury. Vehicle Code, §§ 176–178, 186, 402; Civ. Code, § 172.

5. Jury ⇐10, 31(1)

Constitutional guarantee that right of trial by jury shall be secured to all and remain inviolate preserves right of jury trial as it existed at common law when constitution was adopted, but does not require adherence to letter of common law practice and permits substitution of new procedures better suited to efficient administration of justice, if there is no impairment of substantial features of jury trial. Const. art. 1, § 7.

6. Jury ⇐31(7½)

Where verdict in personal injury action in which damages were disputed and unliquidated made no allowance for damages for pain and disfigurement suffered by plaintiff, denial of plaintiff's motion for new trial upon defendant's consent to increase of award of damages in amount fixed by court without consent of plaintiff was violation of plaintiff's constitutional right to trial by jury. Const. art. 1, § 7.

7. Jury ⇐37

A court may not increase an inadequate award in case involving contested

and unliquidated damages without defendant's consent. Const. art. 1, § 7.

8. Jury ⇐31(7½)

The right to trial by jury is not abridged if verdict is set aside and motion for new trial granted. Const. art. 1, § 7.

9. New Trial ⇐161(1)

Where verdict of jury is inadequate, defendant's waiver of his right to jury trial by consenting to modification of judgment and increasing of damages cannot be treated as binding on plaintiff, and does not preclude plaintiff from obtaining new trial.

10. New Trial ⇐162(1)

Court has power to require reduction of jury's award over defendant's objection as condition to denying his motion for new trial in cases in which damages are uncertain and speculative. Const. art. 1, § 7.

Theodore Golden, J. Bruce Fratis, Oakland, and Julius M. Keller, San Francisco, for appellants.

James F. Galliano, C. Paul Paduck, Oakland, Henry Teichert, Sacramento, Gerald P. Martin, San Francisco, Clark & Heafey, Edwin A. Heafey, Augustin Donovan and Louis B. DeAvila, all of Oakland, for respondents.

GIBSON, Chief Justice.

This action was brought to recover damages for personal injuries sustained by plaintiffs Dorsey and Anderson in an automobile accident. They sought recovery against Vincent Barba as operator, and Catherine Barba as registered owner, of the car which collided with the one in which they were riding. The jury returned verdicts against Vincent but in favor of Catherine, and judgment was entered accordingly. Thereafter, pursuant to a conditional order made on plaintiffs' motion for a new trial, the court, with Vincent's consent, modified the judgment against him by increasing the amount of damages awarded. Plaintiffs, who did not consent to the increase, have appealed from the modified judgment against Vincent and from the judgment in favor of Catherine.

Liability of Catherine

The automobile, which was purchased with community funds, was registered in Catherine's name alone, and she testified that Vincent "had it put in my name so that I would feel that half of it belonged to me and the other half belonged to him." Defendants separated, and a property settlement agreement was entered into by which Catherine transferred "all of her right, title, and interest" in the car to Vincent. The agreement was approved by an interlocutory decree of divorce signed about three months prior to the accident. Before the separation Vincent drove the car to and from work and used it whenever he desired, and it was in his possession when the agreement was made. The car was never driven by Catherine, and she testified that she allowed Vincent to keep it after the separation, that she "presumed he was using it," and that she did not ask him to return it or tell him he could not drive it. Catherine did not endorse the ownership certificate until some months after the accident, and she did not give the Department of Motor Vehicles any notice of the intended transfer as provided by statute. See Vehicle Code, §§ 176, 177, 178, 186.

[1] Section 402 of the Vehicle Code, as amended in 1943, imputes to the owner of an automobile liability for the negligence of a person operating the vehicle with the owner's express or implied permission. In the absence of compliance with Vehicle Code sections 178 and 186, a purported transfer of an automobile is ineffective to relieve an owner of the liability imposed under section 402. See Weinberg v. Whitebone, 87 Cal.App.2d 319, 196 P.2d 963; Stewart v. Norsigian, 64 Cal.App.2d 540, 149 P.2d 46, 150 P.2d 554; Leplat v. Raley Wiles Auto Sales, 62 Cal.App.2d 628, 145 P.2d 350; Bunch v. Kin, 2 Cal.App.2d 81, 37 P.2d 744; see, also, Votaw v. Farmers Automobile Inter-Ins. Exch., 15 Cal.2d 24, 97 P.2d 958, 126 A.L.R. 538. Catherine does not dispute this rule but contends that it is inapplicable to her because she had only a community interest in the car and never was an owner within the meaning of that section. She relies on section 66 of the Vehicle Code, which defines an owner as

"a person having all the incidents of ownership," and argues that since the exclusive management and control of community personal property is given to the husband by section 172 of the Civil Code, she did not have all of the rights of an owner in the car.

[2] It is clear, however, that a person may be liable as an owner under section 402 even though he does not have "all the incidents of ownership". That section provides that *every owner* of a motor vehicle is liable for imputed negligence except conditional vendors, their assignees, and chattel mortgagees, when those persons are out of possession. The express mention of these exceptions indicates that the framers of section 402 did not intend to incorporate the definition of owner found in section 66. If the intent had been to limit liability to those having "all the incidents of ownership," it would not have been necessary to expressly exempt conditional vendors and chattel mortgagees, who, of course, do not possess all the rights of ownership. Catherine, as sole registered owner of the automobile, obviously is included in the term "every owner," and since she is not within the exceptions she can avoid liability only by showing she did not actually consent or had no power to consent to Vincent's use of the car.

[3] There can be no question that at the time of the accident Vincent was driving the car with Catherine's permission, but she contends that any consent she may have given was ineffective because she lacked power to give her husband permission to use the car since he had the right of management and control under section 172 of the Civil Code. In support of her position Catherine relies upon Pacific Tel. & Tel. Co. v. Wellman, 98 Cal. App.2d 151, 219 P.2d 506, where the car involved in the accident was registered in the names of both Mr. and Mrs. Wellman. The court held that the car must be presumed to be community property and that for the purposes of section 402 the negligence of Mr. Wellman in operating the car could not be imputed to his wife because she lacked power to consent to his use of it. Cf. Cox v. Kaufman, 77 Cal.App. 2d 449, 175 P.2d 260, where the husband was the sole registered owner. There is also language in Wilcox v. Berry, 32 Cal. 2d 189, 191–192, 195 P.2d 414, and Caccamo v. Swanston, 94 Cal.App.2d 957, 963, 965, 212 P.2d 246, indicating that when a car is registered in the names of both husband and wife, she may show that she had only a community interest and therefore had no power to give her husband consent to operate the car.

[4] The foregoing cases may be distinguished, however, because none of them involved the situation here present where the car was registered in the wife's name alone and she in fact consented to her husband's use and operation of it. Under these circumstances, the wife should not be permitted to claim that she was without power to give such consent. The requirements for registration were enacted in the interests of public welfare, and one of the purposes for the legislation is to afford identification of vehicles and persons responsible in cases of accident and injury. See Henry v. General Forming, Ltd., 33 Cal.2d 223, 227, 200 P.2d 785, where the registration shows the names of both husband and wife, their identity is disclosed as contemplated by the statute, and, if an accident occurs while the husband is driving, there may be some justification for permitting the wife to explain and amplify the record by showing the true status of her ownership. On the other hand, where, as here, the registration is in the wife's name alone with her knowledge, and she in fact gives her husband implied or express permission to use the car, the statutory purpose would be defeated if she were permitted to contradict the record by showing that, instead of being the sole owner, she had merely a community property interest and no power to give permission. [1]

1. For cases establishing the right of an injured party to proceed against an owner other than the registered owner, see Ferroni v. Pacific Finance Corp., 21 Cal. 2d 773, 778, 135 P.2d 569; Logan v. Serpa, 91 Cal.App.2d 818, 822, 206 P.2d 70; McCalla v. Grosse, 42 Cal.App.2d 546, 549–550, 109 P.2d 358.

It appears from the foregoing that the record establishes as a matter of law that Catherine was liable, to the extent provided by section 402, for any injuries to plaintiffs resulting from negligent operation of the car by Vincent. Since the jury determined that plaintiffs' injuries were the proximate result of Vincent's negligence, it could not properly have found for Catherine, and the judgment in her favor must therefore be reversed.

Propriety of Order Increasing Awards

The verdicts against Vincent apparently made no allowance for damages for pain and disfigurement suffered by plaintiffs since the amounts awarded were insufficient to cover medical expenses and loss of earnings. Plaintiffs' motion for new trial was denied on condition that Vincent consent to a modification of the judgment increasing each award in an amount fixed by the court. The figures arrived at exceeded the special damages proved and apparently included some compensation for pain and disfigurement. Vincent agreed to the increases, but plaintiffs' assent was not required or given. The primary question concerns the propriety of the court's action in assessing damages without plaintiffs' consent.

[5] Plaintiffs contend that the amounts fixed by the court are inadequate and that, since the damages are contested and uncertain, the act of the court in increasing the jury's award without their consent constitutes a denial of their right to a jury trial in violation of article I, section 7, of the California Constitution which provides that the "right of trial by jury shall be secured to all, and remain inviolate". This section guarantees the right of jury trial as it existed at common law when the Constitution was adopted in 1849. People v. Kelly, 203 Cal. 128, 133, 263 P. 226; People v. Martin, 188 Cal. 281, 285–286, 205 P. 121, 21 A.L.R. 1399; Southern Pacific Land Co. v. Dickerson, 188 Cal. 113, 117–118, 204 P. 576; Cline v. Superior Court, 184 Cal. 331, 339, 193 P. 929; Martin v. Superior Court, 176 Cal. 289, 292–294, 168 P. 135, L.R.A.1918B, 313; see Estate of Bainbridge, 169 Cal. 166, 167, 146 P. 427; Ingraham v. Weidler, 139 Cal. 588, 589–590, 73 P. 415. At that time, apparently, there was no recognized common law practice allowing the court to increase a jury's award in a case involving unliquidated damages. See Dimick v. Schiedt, 293 U.S. 474, 476–482, 55 S.Ct. 296, 297–299, 79 L.Ed. 603; Mayne's Treatise on Damages [2d ed., 1856], pp. 303–305, [9th ed. 1919], pp. 571, 580; Sedgwick, Treatise on Damages [1847], pp. 19, 21, footnote p. 582, cf. [4th ed. 1868], pp. 710–717.

The constitutional guarantee does not require adherence to the letter of common law practice, and new procedures better suited to the efficient administration of justice may be substituted if there is no impairment of the substantial features of a jury trial. People v. Hickman, 204 Cal. 470, 476, 268 P. 909, 270 P. 1117. An essential element of such a trial, however, is that issues of fact shall be decided by a jury, and the assessment of damages is ordinarily a question of fact. The jury as a fact-finding body occupies so firm and important a place in our system of jurisprudence that any interference with its function in this respect must be examined with the utmost care.

[6] There is a conflict of authority as to the extent of a court's power to increase the amount of an inadequate award over plaintiffs' objection. Some jurisdictions do not permit the exercise of such a power. Lemon v. Campbell, 136 Pa.Super. 370, 7 A.2d 643, citing Bradwell v. Pittsburg & W. E. R. Co., 139 Pa. 404, 20 A. 1046; see Watt v. Watt, L.R. [1905], A.C. 115, 119–121. Some allow it where damages are liquidated or can be ascertained by a fixed standard. Rudnick v. Jacobs, 9 W.W. Harr., Del., 169, 197 A. 381, 383, 384, discussing Mass. and Mich. decisions; Kraas v. American Bakeries Co., 231 Ala. 278, 164 So. 565, 570. Other jurisdictions apparently allow the court to assess increased damages as a condition to denying a new trial without regard to whether damages are liquidated or unliquidated. See Markota v. East Ohio Gas Co., 154 Ohio St.

546, 97 N.E.2d 13, 18–19.[2] The Wisconsin rule permits a court to increase an award over plaintiffs' objection if defendant consents to pay the largest amount which a jury could assess under the proof. See Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374, 53 A.L.R. 771.

The leading authority on this subject is Dimick v. Schiedt, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603, which held that a federal court could not increase a jury's award without the consent of both parties. The decision points out that the practice was not recognized generally at common law, and that an attempt by the court to fix damages over plaintiff's objection constitutes a violation of the Seventh Amendment to the United States Constitution which provides that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." State courts, of course, are not bound by the Seventh Amendment, Pearson v. Yewdall, 95 U.S. 294, 296, 24 L.Ed. 436; Walker v. Sauvinet, 92 U.S. 90, 92, 23 L.Ed. 678, and it is true that there is some difference in language between that amendment and the parallel provision of the California Constitution.[3] The reasoning of the Dimick case, however, is applicable here since both the state and federal Constitutions adopted the existing rules of common law with regard to trial by jury, and the variation in language does not warrant a different interpretation of the state Constitution.

[7] It is generally recognized that a court may not increase an inadequate award in a case involving contested and unliquidated damages without the defendant's consent. See note 53 A.L.R. 783; 95 A.L.R. 1165; cf. discussion of the Wisconsin practice in Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374, 53 A.L.R. 771. It would seem to follow, logically, that the plaintiff's consent is also necessary. The assessment of damages by a court where they are speculative and uncertain constitutes more than a technical invasion of the plaintiff's right to a jury determination of the issue. Despite the fact that he has apparently benefited by the increase, the plaintiff has actually been injured if, under the evidence, he could have obtained a still larger award from a second jury. In the present case, for example, the evidence would sustain recovery for pain and disfigurement well in excess of the amounts assessed by the court.

[8, 9] In support of the practice of denying a new trial over the plaintiffs' objection on condition that defendant consent to pay an increased amount, it has been said that the constitutional guarantee is satisfied when the plaintiff has had one jury

2. Numerous cases contain broad statements recognizing the practice but involve procedural and factual situations distinguishable from the one before us. See, for example, Secreto v. Carlander, 35 Cal.App.2d 361, 364, 95 P.2d 476; Clausing v. Kershaw, 129 Wash. 67, 224 P. 573, 574, and Gaffney v. Illingsworth, 90 N.J.L. 490, 101 A. 243, at page 243 [defendant refuses to assent to increase and appeals from order granting new trial, claiming court without power to make new trial order conditional]; Esposito v. Lazar, 2 N.J. 257, 66 A.2d 172, 173, [defendant appeals from order granting new trial on issue of damages alone, claiming verdict indicated compromise—see also Elvin v. Public Service Coordinated Transp., 4 N.J.Super. 491, 67 A.2d 889, 890]; Blackmore v. Brennan, 43 Cal.App.2d 280, 289, 110 P. 2d 723 [defendant, appealing from modified judgment, waived right to jury trial by consenting to increased award]; Adamson v. County of Los Angeles, 52 Cal.App. 125, 131, 198 P. 52 [collateral attack on modified final judgment in condemnation proceeding in which county had consented to increased award. Damages certain and computable.]

Minnesota and New Hampshire have noted the question of interference with plaintiff's right to jury trial but have not passed upon it. Olson v. Christiansen, 230 Minn. 198, 41 N.W.2d 248–249; Hackett v. Boston & M. R. R., 89 N.H. 514, 6 A.2d 139, 140, 142.

3. Article I, section 7, of the California Constitution provides merely that the right of trial by jury "shall be secured to all, and remain inviolate", and it does not contain the further language that "no fact tried by a jury shall be otherwise re-examined * * * than according to the rules of the common law."

trial and that the court's exercise of its power to grant or deny new trials will not be disturbed in the absence of an abuse of discretion. See dissenting opinion Dimick v. Schiedt, 293 U.S. at pages 492–498, 55 S.Ct. at pages 303–305. However, it is not the mere form of a jury trial to which one is entitled under the Constitution, but the fundamental right to have a jury determination of a question of fact. It is, of course, clear that there has been no denial of such right if a verdict is set aside and motion for new trial granted. Estate of Bainbridge, 169 Cal. 166, 146 P. 427; Ingraham v. Weidler, 139 Cal. 588, 73 P. 415. But it does not follow that, in lieu of ordering a new trial, the court may itself assess damages on conflicting or uncertain evidence and modify the judgment with the assent of only one party. Neither can such procedure be justified as a proper exercise of the court's authority to prescribe terms in granting or denying motions for new trials. A court may not impose conditions which impair the right of either party to a reassessment of damages by the jury where the first verdict was inadequate, and the defendant's waiver of his right to jury trial by consenting to modification of the judgment cannot be treated as binding on the plaintiff.

[10] It is true that a court has power to require *reduction* of a jury's award over the defendant's objection as a condition to denying his motion for a new trial in cases where damages are uncertain and speculative. Draper v. Hellman Com. T. & S. Bank, 203 Cal. 26, 42–43, 263 P. 240; Morris v. Standard Oil Co., 192 Cal. 343, 219 P. 998, 30 A.L.R. 1103; Zibbell v. Southern Pacific Co., 160 Cal. 237, 254, 116 P. 513. There is considerable doubt whether this power was recognized at common law[4], but, as stated by this court in 1893, the practice is "too firmly established in this state by a long line of decisions to be now questioned." Davis v. Southern Pacific Co., 98 Cal. 13, 17, 18, 32 P. 646. There may be no real distinction between the powers to increase and decrease an award of damages, but it does not follow that because the practice of remitting damages over the defendant's objection has been approved through what appears to have been a misconception of common law procedure, we must now allow the court to assess increased damages over the plaintiff's objection, a practice which has even less basis in the common law. Like the United States Supreme Court in the Dimick case, we are reluctant to extend the precedent of the remittitur cases, by analogy or otherwise, to the present situation, since it would result in impairment of the right to jury trial.

Arguments to the effect that courts should be permitted to increase awards without the plaintiff's consent because such procedure is more expeditious and would constitute an improvement over established practice might be persuasive if addressed to the people in support of a constitutional amendment, but they are not appropriate here.

The judgment is reversed as to both defendants.

SHENK, EDMONDS, CARTER, and SPENCE, JJ., concur.

SCHAUER, Justice (concurring and dissenting).

I agree that the modified judgment should be reversed as to Vincent; I would, however, affirm the judgment as to Catherine. She lacked the power to *forbid* Vincent's use of the car and, hence, as a matter of law she could not in any legally material sense *consent* to his use of it. (See Krum v. Malloy (1943), 22 Cal.2d 132, 135, 137 P.2d 18; People v. Forbath (1935), 5 Cal.App.2d(Supp.) 767, 769, 42 P.2d 108.)

TRAYNOR, Justice (concurring and dissenting).

For the reasons stated in the majority opinion, I agree that the judgment in favor

4. It was apparently taken for granted in this state, as it was in the early federal courts, that the practice was established at common law. See Dimick v. Schiedt, 293 U.S. 474, 482–484, 55 S.Ct. 296, 299–300, 79 L.Ed. 603; Benedict v. Cozzens, 1854, 4 Cal. 381; see, however, Payne v. Pacific Mail Steamship Co., 1850, 1 Cal. 33, 36–37 and George v. Law, 1 Cal. 363, 364–365.

of Catherine Barba should be reversed. I dissent, however, from the holding that the courts of this state do not have the power of additur.[1]

I

It is incongruous that plaintiffs should base their appeal upon the ground that they have been denied a constitutional right to jury trial. Although they had a jury trial, they do not want a judgment entered on the jury verdict. They attack that verdict and ask the court to rescue them from it by granting a new trial before another jury. The right to a jury trial, however, does not include the right to a new trial.

Plaintiffs' erroneous reliance upon the constitutional guarantee results from a failure to recognize the dual character of the right to jury trial. Section 7 of Article I of the California constitution operates at the time of trial to require submission of certain issues to the jury. Once a verdict has been returned, however, the effect of the constitutional provision is to prohibit improper interference with the jury's decision. This secondary effect of the constitutional right is well illustrated by the reluctance of the English common law judges to grant new trials in tort cases on the grounds of excessive or inadequate damages. At the time of the American Revolution,[2] the jury's determination of the amount of damages in contract actions and in certain tort actions involving property was subject to judicial supervision through the granting of new trials; in tort actions involving interests in personality, however, the courts rarely[3] interfered with the amount of the jury's verdict. Wilford v. Berkeley, 1 Burr. 609, 97 Eng. Rep. 472 [K.B. 1758]; Sharpe v. Brice, 2 Bl.W. 942, 96 Eng.Rep. 557 [C.P. 1774]; Beardmore v. Carrington, 2 Wils.K.B. 244, 248, 95 Eng.Rep. 790, 792 [C.P. 1764]; see Buller, J., on Nisi Prius [1785 ed.], p. 327; Sedgwick on Damages [9th ed. 1913], pp. 688–689; Mayne on Damages [11th ed. 1946], pp. 632–636; McCormick on Damages, pp. 26–27; Washington, Damages in Contract at Common Law, 47 L.Q.Rev. 345, 364. Moreover, the judges expressly recognized that the reason for their refusal to grant new trials in such cases was the fact that the determination of the amount of damages was within the exclusive province of the jury. Thus, in 1764, in a case involving trespass and false imprisonment, the Court of Common Pleas reviewed the earlier decisions and, in a unanimous opinion, said: "We are now come to the case in 1 Stra. 691, Chambers v. Robinson, which seems to be the only case where ever a new trial was granted merely for the excessiveness of damages only: we are not satisfied with the reason given in that case, and think it of no weight, and want to know the facts upon which the Court could pronounce the damages to be excessive. The principle on which it was granted, mentioned in Strange, was to give the defendant a chance of another

1. "Additur," sometimes called "increscitur," is used herein to describe an order by which a plaintiff's motion for a new trial on the ground of inadequate damages is denied on the condition that the defendant consent to a specified increase of the award. "Remittitur" is used to describe an order by which a defendant's motion for a new trial on the ground of excessive damages is denied on the condition that the plaintiff consent to a specified reduction of the award.

2. With the inclusion of jury trial provisions in the early state and federal constitutions, see 35 C.J. 147, § 12, 50 C.J.S., Juries, § 9, the concept of jury trial in this country became fixed and has not been affected by subsequent changes in English law. It is this American concept of jury trial, based on the English jury system of Revolutionary times, that was adopted in California in 1849. See Koppikus v. State Capitol Com'rs, 16 Cal. 248, 253, 254; People v. Hickman, 204 Cal. 470, 475, 268 P. 909, 270 P. 1117; cf. Fletcher v. Los Angeles Tr. & Sav. Bank, 182 Cal. 177, 184, 187 P. 425.

3. Tort cases of the 17th and early 18th centuries in which new trials were granted for excessive damages appear to have involved also actual misconduct of the jury. See Wood v. Gunston, Style 466, 82 Eng.Rep. 867 [U.B. 1655]; Roe v. Hawkes, 1 Lev. 97, 83 Eng.Rep. 316 [K.B. 1663]; Ash v. Ash, Comb. 357, 90 Eng.Rep. 526 [K.B. 1697]; Beardmore v. Carrington, 2 Wils.K.B. 244, 249, 95 Eng.Rep. 790, 793 [C.P. 1764].

jury: this is a very bad reason; for if it was not, it would be a reason for a third and fourth trial, and would be digging up the constitution by the roots; and therefore we are free to say this case is not law; and that there is not one single case (that is law) in all the books to be found, where the Court has granted a new trial for excessive damages in actions for torts. * * * We desire to be understood that this Court does not say, or lay down any rule that there never can happen a case of such excessive damages in tort where the Court may not grant a new trial; but in that case the damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against, at first blush." Beardmore v. Carrington, 2 Wils.K.B. 244, 249, 95 Eng.Rep. 790, 793.[4]

Unwillingness to interfere with the jury's decision was likewise a controlling consideration in the first California case to discuss the constitutional function of the jury with respect to the assessment of damages. In Payne v. Pacific Mail S. S. Co., 1 Cal. 33, a tort action decided in 1850, the evidence on the issue of damages was conflicting, and the jury returned a verdict for $1,000. The trial court ordered a new trial unless the plaintiff consented to a remittitur of $400, but the plaintiff refused and appealed from the order granting a new trial. In unanimously reversing the action of the trial judge, this court said: "Courts with great reluctance ever interfere with the finding of a jury in an action for unliquidated damages for reason that the damages are excessive, and a court ought never to set aside a verdict for such a cause, unless, beyond doubt, the verdict be unjust and oppressive, obtained through some undue advantage, mistake, or in violation of law, as upon questions so peculiarly pertaining to the powers and investigation of the jury, it ought to be presumed that the verdict of the jury is correct. * * * The right of trial by jury in civil as well as criminal cases, being secured by the Bill of Rights, and believing as we do, that it is the duty of this court to remove every obstacle in the way of a free exercise of its right, and that it should not be interfered with on the part of the courts, except for the reasons above alluded to, and that in the end, however just it may have appeared to the court below to set aside this verdict, great abuse, if not the destruction of this right, would ensue, we are of the opinion that the order of the court of First Instance, granting a new trial, should be reversed." 1 Cal. 33, 36–37.

The following year, the Payne case was expressly approved in George v. Law, 1 Cal. 363, 365, which was decided under circumstances even more directly analogous to the present appeal. The plaintiff was awarded $1,000 by the jury, but the trial court ordered a new trial unless the plaintiff should consent to a remission of $500. This time the plaintiff consented, and the defendants appealed. In affirming the judgment, the court said: "It can scarcely be just ground of complaint on the part of appellants that the judgment of the court stands for but one-half the amount, for which the verdict of the jury was rendered. The respondent, if he had not acquiesced in the action of the court below by filing his *remittitur*, might, with more reason, have sought the intervention of this court to sustain the finding of the jury. * * *" 1 Cal. 363, 365.

These early English and California cases show clearly that when the constitutional right to jury trial was established it was

4. After the American Revolution, dicta continued to appear to the effect that new trials for excessive damages would be granted in cases of torts against the person under appropriate circumstances; by the end of the 18th century the Court of King's Bench had acted upon this doctrine. Jones v. Sparrow, 5 T.R. 257, 101 Eng.Rep. 144 [K.B. 1793]; cf. Duberly v. Gunning, 4 T.R. 651, 100 Eng.Rep. 1226 [K.B.1792]. Until the middle of the 19th century, however, the English courts refused to grant new trials in such cases on the ground of inadequate damages. See Phillips v. London & S. W. Ry., 5 Q.B.D. 78 [1879]; Manton v. Bales, 1 C.B. 444, 135 Eng.Rep. 613 [1845]; cf. Armytage v. Haley, 4 Q. B. 917, 918, 114 Eng.Rep. 1143, [1843].

regarded as a protection to parties relying upon a verdict. Not until today has this court undertaken to extend that protection to parties who attack a verdict. It is true that new trials because of excessive or inadequate damages are more frequently granted now than a century ago (cf. Holmes, The Common Law, pp. 122–129), but it is also true that this modern practice constitutes a limitation upon the former powers of the jury. Whatever may be the basis of a party's right to a new trial on the ground of inadequate damages, it is obvious that such relief is granted in spite of, rather than because of, the constitutional right of trial by jury.

II

In an attempt to overcome the fact that plaintiffs have already had their jury trial, it is contended that there has been thus far only a formal compliance with the constitutional requirement; it is said that plaintiffs have yet to be accorded the substance of the right to jury trial—"the fundamental right to have a jury determination of a question of fact." Unquestionably, the practical effect of additur is to give plaintiffs a judgment based, as to amount, upon a finding made by the trial judge. Moreover, the mere fact that plaintiffs have benefited from the disagreement between judge and jury is not of itself a sufficient answer to the claim that the judge had no authority to make such a finding.

Under appropriate circumstances, judges constitutionally may, and constantly do, determine fact issues. The broad scope of this fact-finding activity refutes the contention that the framers of the constitution regarded the jury as the exclusive fact tribunal. Thus, in a common law action tried before a jury, the trial judge makes innumerable fact decisions in admitting and excluding evidence, in determining the court's jurisdiction, in passing on pleadings, and in interpreting documents. Fairbank v. Hughson, 58 Cal. 314, 315; Vallejo & Northern R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 575, 147 P. 238; United States v. Cotter, 2 Cir., 60 F.2d 689, 691; People v. Hillman, 246 N.Y. 467, 472–474, 159 N.E. 400; State v. White, 70 Vt. 225, 228, 39 A. 1085; Durr v. State, 175 Miss. 797, 808, 168 So. 65; see 9 Wigmore on Evidence [3d ed.], pp. 499–530, §§ 2549–2559; Thayer, Preliminary Treatise on Evidence, pp. 185, 202, 203, 249. These decisions may even involve the same fact issues that, for other purposes, are placed before the jury and may be of equal importance to the outcome of the case. See, for example, Peat's Case, 2 Lewin 288, 168 Eng.Rep. 1157, and note. Moreover, in equity, admiralty, probate, divorce, bankruptcy, and an ever-growing number of administrative cases, there is no constitutional right to a jury at all—fact questions may constitutionally be decided by the judge or administrative body alone.

It is apparent that these many instances of judicial fact-finding cannot be reconciled with what plaintiffs claim is the underlying principle of jury trial. In reality the explanation of the right to jury trial is neither logical nor theoretical—it is historical.[5] The jury system developed in England over a period of centuries, and during that development many fundamental changes took place; at no time was the system wholly consistent within itself. The framers of the constitution wisely refrained from attempting to rationalize into a single principle the conflicting rules relating to juries. Their object was not to perfect the jury system but to perpetuate it, and the right they established was therefore a limited one—the right to have a jury trial of certain questions of fact

5. It is sometimes said that the constitutional guarantee was intended primarily to limit the power of judges. This view of the jury system as essentially a protection against judicial officials does not conflict with additur. The jury by its verdict has already provided the contemplated protection. So far as the present plaintiffs are concerned, the limits fixed by the jury have not been violated, for the judge has awarded plaintiffs more than did the jury. Any objection that the judge has gone beyond the verdict in the other direction is removed by defendant's consent.

under certain circumstances. Expansion and improvement were left to statute and to constitutional amendment.[6]

In deciding the issue of constitutionality, therefore, we must be governed by an historical standard. At the time of the American Revolution, would plaintiffs have had the right to a reassessment of damages by a second jury? They would have had no such right simply because, as has been seen, the first jury's determination of the amount of damages was conclusive. The re-examination of the damages issue following an inadequate verdict in cases of torts against the person is a modern development unknown to the common law. Moreover, there is every reason to believe that the English judges of the late eighteenth century would have utilized the additur device, had they been willing to give plaintiffs' motion any consideration at all.

It must be borne in mind that plaintiffs are in this court on an appeal from the trial court's ruling on their motion for a new trial on the ground of the insufficiency of the evidence to support the verdict. Two of the well-established principles governing the disposition of such motions are of particular importance.

1. The granting of new trials on the ground of the insufficiency of the evidence is discretionary with the court.[7] Such new trials developed in the seventeenth century after punishment of jurors and the harsh remedy of attaint had fallen into disuse. 1 Holdsworth, History of English Law, p. 225; Thayer, Preliminary Treatise on Evidence, pp. 169, 172. Equity had undertaken to relieve against unjust verdicts, and, in seeking to protect their jurisdiction from the encroachment of the chancellor, the common law courts themselves began to set aside verdicts that were inequitable. Bright v. Eynon, 1 Burr. 390, 394–395, 97 Eng.Rep. 365, 367; 5 Holdsworth, History of English Law, p. 301; Washington, Damages in Contract at Common Law, 47 L.Q.Rev. 345, 358. There never developed an absolute right to a new trial; instead the considerations that govern the court's discretion have always been equitable in nature. Thus, a textbook published at the end of the colonial period states: "As the granting of a new trial is absolutely in the Breast of the Court, they will often govern their discretion by collateral matters; and therefore will not grant a new trial in hard actions, such as case for negligently keeping his fire; nor where the equity of the cause is on the other side." Buller, J., on Nisi Prius [1785 ed.], p. 326. See also 3 Bl.Com. 392; Wilkinson v. Payne, 4 T.R. 468, 100 Eng.Rep. 1123 [K.B. 1791]; and cases collected in 2 Salk. 644–653, 91 Eng. Rep. 543–556. Judicial discretion in ruling on new trial motions has continued to this day. It is well settled in California that the trial court's decision on such a motion will not be reversed on appeal in the absence of a showing of an abuse of discretion. Williams v. Field Transportation Co., 28 Cal.2d 696, 698, 171 P.2d 722; Mosekian v. Ginsberg, 122 Cal.App. 774, 780, 10 P.2d 525. Even the statute that specifies the grounds for a new trial states only that it "may" be granted if one of those grounds is shown to exist. Code Civ.Proc. § 657.

By their motion for new trial, therefore, plaintiffs in effect appealed to the conscience of the court. They cannot complain that the court, viewing all the equities of the case, has selected a more expeditious and less costly method of remedying the alleged injustice of the verdict.

6. This responsibility has not been ignored. For example: the requirement of a unanimous verdict has been removed in civil cases, Cal.Const. Art. I, § 7; the broad principles of the Fourteenth Amendment prohibit exclusion of Negroes from jury service. See Neal v. Delaware, 103 U.S. 370, 385, 26 L.Ed. 567; Cassell v. Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839; cf. Ballard v. United States, 329 U.S. 187, 193, 67 S.Ct. 261, 91 L.Ed. 181 [women as jurors]; 157 A.L.R. 461; the right to jury trial has been extended to probate matters by statute. Probate Code, § 371.

7. The court's discretion is more limited, of course, when a new trial is sought on the ground of legal error committed by the trial judge. The constitutional guarantee may well include the right to a jury that has not been misled by irregularities during the trial or by incorrect instructions on the law.

The trial judge's solution is reasonable and equitable—plaintiffs are entitled to no more.

2. New trial orders are frequently conditional. At common law a typical condition was that the moving party pay the costs of the first trial. Bright v. Eynon, 1 Burr. 390, 97 Eng.Rep. 365; see also Rice v. Gashirie, 13 Cal. 53, 54. According to Blackstone, the moving party might even be required to consent to a change in the rules of evidence at the second trial. 3 Bl.Com. 392. New trials have also been conditioned upon payment of the opposing party's counsel fees, see Brooks v. San Francisco & N. Pac. Ry. Co., 110 Cal. 173, 174, 42 P. 570, and upon consenting to go to trial at a particular term of court. Nelson v. Devney, 7 Cir., 102 F.2d 487, 491. Similarly, new trials have been refused on condition that the opposing party remit excess damages, Hughes v. Hearst Publications, Inc., 79 Cal.App.2d 703, 704, 180 P.2d 419, and even on condition that certain land awarded by the verdict be excluded from the judgment. Fry v. Stowers, 98 Va. 417, 421–423, 36 S.E. 482; see also Gillespie v. Jones, 47 Cal. 259, 264; Eaton v. Jones, 107 Cal. 487, 491, 40 P. 798. There is no impropriety, therefore, in the conditional nature of the new trial order now under review. If new trials can be granted on condition that a certain amount be paid by one party to another, why may they not be denied on the same condition? In each situation the court exercises a sound discretion in the interests of an equitable solution of the case.

There are dicta in some of the common law cases to the effect that the verdict of a jury can be re-examined only by a second jury. See, for example, Bright v. Eynon, 1 Burr. 390, 393, 97 Eng.Rep. 365, 366 [K.B. 1757].[8] It is clear, however, that in making such statements the judges had in mind only the liability issue. On that issue there are but two possible verdicts, and the court can change the jury's decision only by making a directly contrary finding. Invariably the party relying on the verdict would oppose such a change, and to protect that party it was held that any re-examination of the liability issue must be before another jury. An entirely different situation is presented, however, by a motion for a new trial on the ground of excessive or inadequate damages—a situation not considered by the common law judges. In such a case the court is not limited to a complete reversal of the jury's determination and may decide to make only a modification. The party relying on the verdict may prefer that modification to the expense and delay of a new trial; his consent removes the necessity for a second jury.

III

Although few courts have ruled directly on additur, remittitur has been accepted in almost all states where the question has arisen. See 53 A.L.R. 783–792; 95 A.L.R. 1166–1168. Remittitur has been allowed in Calfornia for over 100 years. George v. Law, 1 Cal. 363, 365; Hughes v. Hearst Publications, Inc., 79 Cal.App.2d 703, 704, 180 P.2d 419. The majority opinion concedes that "There may be no real distinction" between additur and remittitur but finds justification for remittitur in the fact that prior decisions have approved it—"through what appears to have been a misconception of common law procedure". I am not opposed to the continuation of remittitur, for I believe it to be constitutional. I do oppose, however, the argument that, although remittitur and additur are identical in legal principle, the former may be held valid and the latter invalid. The decisions approving remittitur are controlling in any fact situation that is not materially different, and they are therefore controlling here. The first victim of an automobile accident to sue for damages was not turned out of court merely because the closest precedents involved horse-drawn carriages.

To hold remittitur constitutional and additur unconstitutional is not only illogical

8. Justice Story made a similar statement in United States v. Wonson, 28 Fed.Cas. p. 745, 750, No.16,750, but he approved remittitur in Blunt v. Little, 3 Fed.Cas. p. 760, No.1,578, 3 Mason 102.

—it is unfair. In the present case plaintiffs are being given a new trial as a matter of right, and yet, if the second jury allows excessive damages, the trial judge, with plaintiffs' consent, can select a lesser amount and require defendant to pay it. I doubt whether such a procedure accords a defendant the equal protection of the laws.

There is nothing unusual in the fact that early cases permitting remittitur are to be found whereas additur precedents are both few and recent. Courts undertook to grant new trials for excessive damages many years before similar action was taken on the ground of inadequacy. See McCormick on Damages, pp. 72–73; Washington, Damages in Contract at Common Law, 47 L.Q.Rev. 345, 365, n. 7; 46 C.J. 207–213, §§ 152–154.[9] The issue of additur, therefore, was not presented until modern times. Nevertheless, additur is an equally logical step in the growth of the law relating to unliquidated damages.[10] When the party relying on a verdict consents to a modification by the court, whether that modification be a reduction or an increase, the necessary constitutional protection has been provided.

In my opinion, therefore, it was not a misconception of common law procedure that prompted Justice Story to allow remittitur in 1822. Blunt v. Little, 3 Fed.Cas. p. 760, No.1,578, 3 Mason 102. His decision and the unanimous decision of this court in 1851, George v. Law, 1 Cal. 363, 365, show that at the time our constitution was adopted remittitur was not regarded as a violation of the right to jury trial. I do not believe that these early judges were unaware of the purposes of the Bill of Rights and the common law principles governing the granting of new trials.

The remittitur cases attest not only the constitutionality of additur but its practical value as well. Remittitur became an established rule of the law of damages as soon as the practice of setting aside excessive verdicts became general.[11] It has been utilized in innumerable cases to avoid, for both the parties and the courts, the expense and delay of repetitious litigation. In the field of inadequate verdicts, additur can be of similar value.

IV

The majority opinion relies upon Dimick v. Schiedt, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603, 95 A.L.R. 1150, in which the United States Supreme Court held that additur violates the federal constitution. That decision is not controlling here, for

9. New trials based on inadequacy are still prohibited by statute in some states. See 66 C.J.S., New Trial, § 77d, p. 258.

10. A similar development has been the practice of limiting new trials to the damages issue in appropriate cases. The contention that this procedure is unconstitutional (because it was unknown to the common law and results in presenting to the second jury an incomplete version of the case) has been rejected. Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 497–499, 51 S. Ct. 513, 75 L.Ed. 1188.

11. Once the opposition to new trials for excessive damages in cases of torts against the person had been overcome, the English courts utilized remittitur until the decision of the House of Lords in Watt v. Watt, [1905] A.C. 115. See Belt v. Lawes, 12 Q.B.D. 356, 358; Hurry v. Watson, Tr. 27 G. 3, C.B., 4 T.R. 659, 100 Eng.Rep. 1230. In this country remittitur is approximately as old as new trials for excessive damages; thus, in ordering a remittitur in 1822, Blunt v. Little, 3 Fed.Cas. p. 760, No. 1,578, 3 Mason 102, Justice Story observed that such new trials had only recently become recognized, and even for that statement he relied exclusively upon dicta in English cases in which new trials had actually been denied. In California remittitur was approved in 1851, George v. Law, 1 Cal. 363, 365, only a year after this court had reversed the granting of a new trial for excessive damages. Payne v. Pacific Mail S. S. Co., 1 Cal. 33, 37. Although medieval cases involving jury attaint are not directly in point, since the principles underlying attaints differed from those governing new trials, it is nevertheless significant that an attaint for excessive damages was barred if plaintiff remitted the excess. Washington, Damages in Contract at Common Law, 47 L.Q.Rev. 345, 349, citing: Y.B. 9 Hen. VI, f. 2, pl. 5 [1431]; Y.B. 12 Edw. IV, f. 5, pl. 13 [1473]; Y.B. 13 Edw. IV, f. 1, pl. 3 [1474].

the Seventh Amendment is not binding upon the California courts. Moreover, there are persuasive arguments for rejecting the reasoning upon which the Dimick case rests.

The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The first part of the Amendment is similar to Section 7 of Article I of the California Constitution, which reads: "The right of trial by jury shall be secured to all, and remain inviolate". As is pointed out in the majority opinion, the effect of this language is to guarantee the substance of the right to trial by jury as it existed at common law. The second part of the Seventh Amendment, however, is entirely different in spirit and effect, and carries the federal constitution beyond the substance of the common law right. Thus, in 1830, the United States Supreme Court declared that the second clause was "substantial and independent" of the first. Parsons v. Bedford, 3 Pet. 432, 447, 7 L.Ed. 732. In view of this early interpretation, it is significant that neither the Constitution of 1849 nor the present California Constitution adopted the second part of the federal guarantee.

The restrictive character of the Seventh Amendment language has more than once led the federal courts to follow anomalous rules in dealing with judicial supervision of juries. Thus, it has been held that a federal judge, sitting in a jury case, could direct a verdict when the evidence as a matter of law was conclusive, but could not enter judgment notwithstanding the verdict after he had erroneously failed to direct the verdict and the jury had erroneously found for the opposing party. Slocum v. New York Life Ins. Co., 228 U.S. 364, 399, 33 S.Ct. 523, 57 L.Ed. 879. The reason for this distinction was that, after a verdict has been returned, a federal court is limited by the second clause of the Seventh Amendment to the formal procedure of the common law. Since the California Constitution guarantees only the substance of jury trial, judgment notwithstanding the verdict is available in this state in cases where directed verdicts are proper. Code Civ.Proc. § 629; Estate of Baird, 198 Cal. 490, 506, 246 P. 324.

It is apparent that in the Dimick case the problem of constitutional construction facing the United States Supreme Court was materially different from that presented here. (See 44 Yale L.Jour. 318, 324–325.) The Court concluded that additur involves a re-examination of the damages issued after the jury has tried that question, and, since no common law precedent for the practice was found, it was held to be a prohibited innovation. The long-standing practice of remittitur in the federal courts was justified on the ground of a century of acceptance under the constitution.

Even under the narrow language of the Seventh Amendment, the United States Supreme Court had great difficulty in reaching the conclusion that additur is unconstitutional. The decision in the Dimick case was by a bare majority of five Justices, and Justice Stone, with whom Chief Justice Hughes and Justices Brandeis and Cardozo concurred, filed a well-reasoned dissenting opinion. The dissent emphasizes the board discretion of the common law judges in ruling on new trial motions, the essential identity of additur and remittitur, the dangers of too-rigid a construction of constitutional provisions, and "the generally recognized advantages of the practice as a means of securing substantial justice and bringing the litigation to a more speedy and economical conclusion than would be possible by a new trial to a jury * * *." 293 U.S. 474, 490, 55 S.Ct. 296, 302.

38 Cal.2d 432

BROWN v. OVERSHINER et al.

L. A. 22185.

Supreme Court of California, in Bank.

Feb. 20, 1952.

Ben H. Brown, Public Guardian of the County of Los Angeles, brought mandamus proceedings and prohibition proceedings against Chas. L. Overshiner and others. The Supreme Court, Shenk, J., held that the legislature, in enacting statutes dealing with the creation of the office of public guardian and subordinate positions, intended that public guardian be a public officer, and that authority of successive officers should be automatic and without the necessity of a court order.

Writs issued.

1. Constitutional Law ⇐63(3)
Guardian and Ward ⇐2

Act permitting Board of Supervisors of Los Angeles County to "create" the office of public guardian and such subordinate positions as may be necessary and fix compensation therefor, and to make necessary appointments, does not constitute an unlawful delegation of the power vested in the legislature by the Constitution. Welfare and Institutions Code, § 5175; Const. art. 11, § 5.

2. Guardian and Ward ⇐1, 27

The legislature, in enacting act dealing with creation of office of public guardian and subordinate positions, intended that the public guardian be a public officer, and that authority of successive officers should be automatic and without necessity of a court order. Welfare and Institutions Code, § 5175 et seq.

Harold W. Kennedy, County Counsel, and Lloyd S. Davis, Deputy County Counsel, Los Angeles, for petitioner.

S. V. O. Prichard, Los Angeles, for respondents.

SHENK, Justice.

The petitioner, as Public Guardian of the county of Los Angeles, seeks through the office of the writs of mandate and prohibition to have determined the respective duties and obligations of the petitioner as Public Guardian, his predecessor in office the respondent Chas. L. Overshiner, and the respondent Superior Court, upon the consolidation by the county board of supervisors of the offices of Public Guardian and Public Administrator.

Effective December 1, 1945, the board of supervisors by ordinance established the office of Public Guardian pursuant to section 5175 of the Welfare and Institutions Code. The respondent Chas. L. Overshiner was appointed to that office, whereupon he subscribed to the oath of office and furnished the required official bond. He entered upon the discharge of his duties and during his term of office obtained upwards of 750 appointments of himself as Public Guardian.

On May 15, 1951, the board of supervisors adopted ordinances designed to effect the consolidation of the offices of public administrator and public guardian pursuant to the Welfare and Institutions Code, and to establish the position of head deputy public guardian. On June 27, 1951, the petitioner, who was and is the duly appointed public administrator of Los Angeles County, took the oath as public guardian and furnished the required bond. On the same date the respondent Overshiner accepted appointment as head deputy public guardian and qualified by taking the oath of office.

Questions have arisen whether the public guardian acts in an official capacity so that his successor automatically succeeds to all of his powers and duties in pending guardianship matters; or whether the appointment as public guardian of a ward was of a personal nature requiring the appointee to continue his administration unless and until he is removed and a successor appointed in regular course by petition and order. As a consequence the respondent Overshiner has retained possession of the books and records of his office until the matter has been resolved by a final judicial declaration. The parties are uncertain as to their respective liabilities under their official bonds. Title companies have refused to insure the titles of real property to be sold

in pending proceedings. Payments of benefits to wards by the Veterans Administration are withheld pending decision. Any possible remedy by appeal or by application to the superior court in the first instance was deemed inadequate because of the numerous pending guardianships and because the delay in administering estates while awaiting a final determination would in some cases impose hardships on the wards. In two pending proceedings before the respondent court, that court announced its intention unless restrained or otherwise directed by an appropriate writ, to require that the usual procedures be taken by petition for removal and appointment of the successor.

The petitioner seeks the writ of mandate directing the respondent Overshiner to deliver to the petitioner as successor to the office of public guardian the funds and records in the pending matters; and appropriate writs restraining the respondent court from taking further proceedings in pending matters except by recognition of the petitioner as the duly appointed, qualified and acting public guardian succeeding automatically to the office upon the consolidation of that office with that of public administrator. The public and pressing nature of the questions involved seemed to render other possible remedies inadequate.

The provisions relating to the office of public guardian are contained in Article 9, Ch. 1, part 1, Div. 6, sections 5175–5189, added to the Welfare and Institutions Code in 1945. Stats. 1945, ch. 907.

[1] Section 5175 permitted the board of supervisors of Los Angeles county to "create the office of public guardian and such subordinate positions as may be necessary and fix compensation therefor", and to make the necessary appointments. The use of the word "create" does not constitute the provision an unlawful delegation of the power vested in the legislature by Article XI, section 5, of the State Constitution. The effect of the legislative language is to create the office of public guardian with permissive utilization thereof in accordance with the Code provisions depending on subsequent local action. There are familiar instances of the creation of offices by the state legislature with permissive establishment thereof depending on future action of the local political entity. Board of Law Library Trustees of Orange County v. Board of Supervisors, 99 Cal. 571, 34 P. 244, county law libraries; The Housing Authority of the County of Los Angeles v. Dockweiler, 14 Cal.2d 437, 94 P.2d 794, local housing authority; In re Hough, 24 Cal.2d 522, 150 P.2d 448, section 27700, Government Code, public defender. The legislative choice of language in describing the local action is merely fortuitous. The effect of the board's ordinance was to exercise the right to establish the office of public guardian created by the legislature in adding the pertinent sections to the Welfare and Institutions Code.

Pursuant to section 5176 as an alternative method of establishing the office, the board by ordinance may direct that the public administrator shall be ex officio public guardian. Pursuant to section 5177 the board may terminate the office of public guardian. Section 5179 provides that when another than the public administrator has been appointed as public guardian, the board may terminate the appointment and by ordinance designate the public administrator to act as public guardian "and all authority shall vest in the successor."

Pursuant to section 5181 the public guardian is authorized to apply for appointment as guardian of the person or estate or both of any person in the county who is a patient or the recipient of aid under the code and requires a guardian, and his estate does not exceed $5,000 in probable value. Section 5182 provides for an official bond. All funds are to be deposited in the county treasury and disbursed by proper warrant. Section 5183. By section 5186 no guardianship fees are to be charged or received by the public guardian; nor may the county clerk charge for the filing of documents or for official service. Section 5187. Expenses of the public guardian may be a charge upon the county although reimbursement may be had from the estate. Section 5188.

No serious question has been presented as the validity of the ordinances adopted by the board of supervisors to establish the office of public guardian and subsequently to consolidate that office with the office of public administrator. The office was validly established as of December 1, 1945, by the amendment of a salary ordinance adopted on May 29, 1945. Two ordinances were adopted on May 15, 1951. The first, an amendment to a salary ordinance of May 27, 1947, repealed the provision for the appointment of a public guardian, established the position of head deputy public guardian, and provided that the public administrator should act as ex officio public guardian without additional compensation. The second added two sections to the Administrative Code of Los Angeles County and provided that pursuant to section 5176 of the Welfare and Institutions Code the public administrator should be ex officio public guardian, and that pursuant to section 5177 the separate office of public guardian should be terminated. On July 31, 1951, the board adopted an amendatory and repealing ordinance relative to the foregoing two sections of the county Administrative Code whereby the existence of the office of public guardian was recognized, the public administrator was designated as ex officio public guardian, and the appointment of another as the public guardian was terminated, in conformity with section 5179 of the Welfare and Institutions Code. Operation of this ordinance was made retroactive to June 15, 1951. The board expressly declared that in enacting the second ordinance of May 15 it was the intention to follow the provisions of section 5179 of the Welfare and Institutions Code. The clarification was apparently deemed essential only for the technical purpose of co-ordinating the ordinance enactments with the prior establishment of the separate office of public guardian and with the May 15th amendment to the salary ordinance. The effect of each set of enactments was essentially the same. When read together the intent in the enactments of May 15th looking to consolidation of the offices is manifest.

The care of persons covered by the provisions of the Welfare and Institutions Code is unquestionably in the public interest, and the use of public funds to attain the legislative objectives is not within the scope of any constitutional prohibition. See San Francisco, City and County of v. Collins, 216 Cal. 187, 13 P.2d 912. The appointment of a guardian of the person and estate of the wards is in part to effectuate the reimbursement to the state of charges undertaken in the administration of the salutary provisions of the Code. Where the provisions of sections 5175 et seq. do not apply, other provisions admit of the appointment of a guardian. See sections 2603, 2605, 5077, Welfare and Institutions Code. The administration of the estates of wards through the public office in appropriate cases is also in their personal interest, to promote their personal welfare, conserve their properties and protect their estates from dissipation by excessive costs or otherwise. In counties to which sections 5175 et seq. apply, the cost of effecting these objectives other than through the public office thus created could be prohibitive.

The public interest and legislative intent would not be subserved by a judicial declaration that makes a distinction under this statute in the course to be pursued upon official succession. In cases of public administration of decedent's estates, public supervision or liquidation of insurance and banking institutions and the like, the successor to the office of public administrator, commissioner or liquidator upon qualification is vested with the authority of the predecessor in office without the necessity of filing a petition for the removal of the one and the appointment of the successor. See County of Los Angeles v. Kellogg, 146 Cal. 590, 80 P. 861; Mercantile Trust Co. of San Francisco v. Miller, 166 Cal. 563, 137 P. 913; Mitchell v. Taylor, 3 Cal.2d 217, 43 P.2d 803; In re Estate of Miller, 5 Cal.2d 588, 55 P.2d 491; Richardson v. Superior Court, 138 Cal.App. 389, 32 P.2d 405; Weadon v. Shahen, 50 Cal.App.2d 254, 123 P.2d 88. By three sections of the Welfare and Institutions Code, secs. 5178–5180,

it is provided that all authority of a predecessor in the office of public guardian shall vest in the successor. Succession thereby becomes a statutory matter without necessity for removal of the predecessor and appointment of the successor as in cases of private guardianship. The legislature might well be deemed to have foreseen the necessity for the statutory vesting of successive authority since otherwise, as shown by the record, the expense and delay involved would place serious obstacles in the way of the efficient and economical administration of the law and thereby defeat the legislative objective. The weight to be accorded the personal element in the initial appointment and in succession in the office has been resolved by the legislature. By appropriate provision it was deemed that the public interest outweighed the matter of personal selection in those cases where the statute applied. Protection is afforded by the requirement of an official bond, by accountability for faithful performance, and in the judicial scrutiny and confirmation given to the guardian's administration.

The public guardian is appointed and qualified as in the case of other public officers. He collects no fees but is paid a salary. His personal interest is not dependent on his continued administration of the estates after the appointment of a successor. There would seem to be no possible obstacle to a compliance with the implied direction of the statute to recognize the vested authority in a successor without further specific procedures. In Rogers v. Hoberlein, 1858, 11 Cal. 120, it was held that a public administrator was entitled to complete the administration of estates commenced before his term of office expired. But that holding was also held to depend upon the construction of a law which, contrary to that involved here, did not disclose the vesting of authority in the successor by operation of the statute. The personal interest of a public administrator in the continued administration is certainly not present under a law which provides that no fees shall be collected by virtue of the office and the sole personal interest is in the collection of salary which ceases upon the appointment of a successor. To overcome the effect in part of that case a statute in 1939 adding section 1152 to the Probate Code provided that where the compensation of the public administrator is paid by salary and not by fees his authority should cease upon the termination of his office and vest in his successor. A declaration in the prior case that authority did not vest in the absence of a provision directing that the books and records be turned over to the successor is now also overcome by section 1850 of the Government Code. That section provides that every officer is entitled to the possession of all books and papers pertaining to his office or in the custody of his predecessor by virtue of his office.

[2] The foregoing shows that the legislature intended in enacting sections 5175 et seq. of the Welfare and Institutions Code that the public guardian be a public officer, and that the authority of successive officers should be automatic and without the necessity of a court order. Provisions which, as here, do not infringe on the constitutional rights of individuals or violate constitutional inhibitions on legislative action, cannot be held to interfere with the judicial power vested in the courts. In such matters the court acts by virtue of the statute. In re Guardianship of Salter, 142 Cal. 412, 76 P. 51; Collins v. Superior Court, 52 Cal.App. 579, 199 P. 352.

Let a peremptory writ of mandate and a peremptory writ of prohibition issue as prayed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

38 Cal.2d 412

GUDAROV v. HADJIEFF.

L. A. 22095.

Supreme Court of California, in Bank.

Feb. 19, 1952.

Action for libel wherein the Superior Court of Los Angeles County, W. Turney Fox, J., entered a default judgment and an order denying defendant's motion to set aside the default and defendant appealed. The Supreme Court, Schauer, J., held that the prayed for relief did not justify granting plaintiff punitive damages against defendant.

Order in accordance with opinion.

Prior opinion 233 P.2d 593.

1. Judgment ⇐252(2)

The statutory provision that relief granted a plaintiff cannot exceed relief demanded in complaint if there is no answer to complaint is mandatory. Code Civ.Proc. § 580.

2. Judgment ⇐252(2)

In determining whether plaintiff in libel action was entitled to recover punitive damages against defaulting defendant, prayer for relief would be looked to rather than allegations of complaint, and punitive damages could not be awarded against defaulting defendant where punitive damages were not sought in prayer for relief, although allegations of complaint were sufficient to sustain award of punitive damages had they been sought. Code Civ. Proc. § 580.

3. Judgment ⇐252(2)

In a default case a prayer for general relief will not support a damage award which is not contained in prayer. Code Civ.Proc. § 580.

4. Damages ⇐1, 87(1)

Compensatory damages are given as compensation and punitive damages purely as punishment and by way of example. Civ.Code, § 3294.

5. Judgment ⇐252(1)

Prayer for judgment in libel action for $100,000, which prayer immediately followed allegations that composition, publication and circulation of allegedly libelous newspaper article damaged plaintiff in sum of $100,000, was a demand for compensatory relief only and did not justify granting plaintiff punitive damages against defaulting defendant. Code Civ.Proc. § 580; Civ.Code, § 3294.

6. Judgment ⇐162(4)

Showing made by defendant who sought to have default judgment entered against defendant in libel actions set aside on ground that defendant's failure to file answer was excusable in that at first defendant's attorney was ill and confined and later defendant was ill, was insufficient. Code Civ.Proc. 473.

7. Judgment ⇐161

A verified answer tendered by defendant who sought to have default judgment entered against defendant in libel action set aside, was to be considered in determining whether there was a showing of meritorious defense to action. Code Civ.Proc. § 473.

8. Appeal and Error ⇐957(1)
Judgment ⇐139

An application to vacate a default judgment made under provision of Code of Civil Procedure authorizing relief from a judgment taken by mistake, etc., is addressed to sound discretion of court and will not be disturbed except in case of manifest abuse of discretion. Code Civ. Proc. §§ 473, 956, 963.

Leon A. Plotnik, Fred J. Martino, Beverly Hills, and Willebrandt, Zimmerman & Kelly, Los Angeles, for appellant.

Morris Lavine, Los Angeles, for respondent.

SCHAUER, Justice.

Defendant appeals from a judgment rendered by the court against him, following the entry of his default. He contends that the judgment grants relief in excess of that demanded by the complaint, in violation of the provisions of section 580 of the Code of Civil Procedure, and, further, that the court erred in refusing to set aside the default. A hearing was granted by

this court (on petition of the plaintiff), after decision by the District Court of Appeal, Second Appellate District, Division Three, for the purpose of giving further study to the problems presented. After such study we have concluded that the opinion of the District Court of Appeal, prepared by Presiding Justice Shinn, correctly treats and disposes of the issues involved, and it is therefore adopted as and for the opinion of this court. Such opinion (with appropriate deletions and addita as indicated) is as follows:

"[* * *] Plaintiff sued to recover damages resulting from a libelous letter written by defendant and published in Narodna Volya (People's Will), a Bulgarian-English language weekly newspaper distributed in Los Angeles County, the United States and the Balkan Peninsula of Europe. It is alleged that defendant caused the publication to be made 'wickedly and maliciously and with intent to injure, disgrace and defame the plaintiff and to bring him into public disgrace and obloquy.' The complaint sets out the defamatory letter in which defendant refers to plaintiff's alleged marital unfaithfulness in Bulgaria and his amorous adventures in the United States. The letter uses such descriptive language as 'rotten element,' 'most degenerated type of person,' 'Daylight Thief' and 'clever swindler.' After this 'biographical' material the letter attacks plaintiff's announced plan to act as teacher for the children of Bulgarian immigrants. Plaintiff further alleged: 'That the entire said article concerning plaintiff was and is wilfully and maliciously false and defamatory and was known to be such by defendant, Hadjieff, when he composed it and caused it to be published and circulated.'

"'That plaintiff avers upon information and belief that by reason of the composition, publication and circulation of said article the plaintiff has been damaged by the said defendant in the sum of One Hundred Thousand ($100,000) Dollars.

"'Wherefore, plaintiff prays judgment against the defendant, John D. Hadjieff, for the sum of One Hundred Thousand ($100,000) Dollars, for costs of this action and for such other and further relief as to this Court may seem proper.'

"The complaint was filed and summons was served on defendant October 25, 1949. An oral extension of 10 days to appear was given by plaintiff's attorney to defendant's attorney on November 7th. No further contact was made between counsel until December 12th when plaintiff's attorney called and told defendant's attorney he would take a default the next day if no answer was filed. The default was taken shortly after noon on December 13th. No answer had been filed, and no attempt had been made to obtain a further extension of time from the court. On December 23d, defendant moved to vacate the default and permit answer on the ground that his neglect in failing to file an answer was excusable in that at first his attorney was ill and confined, and later defendant was ill. Defendant further alleged that his attorney had contacted plaintiff's attorney on December 13th and had been granted an additional two days in which to answer and that he was prepared to do so within that time. Plaintiff's attorney denied this conversation by affidavit. The court refused to vacate the default and on January 24, 1950, following a hearing, entered judgment for $2,500 compensatory damages and $5,000 punitive damages. This appeal followed.

"Defendant's first contention is that the award of $5,000 for *punitive* damages is void, since the only demand for relief in the complaint was for *compensatory* damages. Section 580, Code of Civil Procedure reads: 'The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint. * * *'

"Section 580 proceeds on the theory that a defaulting defendant must be given notice of the maximum relief sought in the action, since otherwise he would be deprived of his day in court. Plaintiff agrees with this but contends that for several reasons the complaint was sufficient to justify the relief that was granted.

[1] "With regard to the mandatory nature of section 580, it was said in Burt-

nett v. King [1949], 33 Cal.2d 805, 807 [205 P.2d 657, 12 A.L.R.2d 333]: 'It is equally clear that by reason of the mandatory language of the statute (the court *cannot* give a default judgment in excess of the demand), the court's jurisdiction to render default judgments can be *exercised only in the way authorized by statute.* It cannot act except in a particular manner, that is, by keeping the judgment within the bounds of the relief demanded.'

"In a default case we must look solely to the relief which plaintiff shall have demanded in his complaint. It differs from a contested case where the issues actually tried and determined may embrace those added by answer, or may be even broader than the pleadings. (Cf. Vaughn v. Jonas [1948], 31 Cal.2d 586, 605 [191 P.2d 432].) The holdings in the contested cases relied upon by plaintiff are beside the point.

"In his prayer for relief plaintiff asked for $100,000 damages, costs and such other relief as may seem proper. Plaintiff has several theories. He says the averments of the complaint were sufficient to apprise defendant that exemplary damages were sought; that the term 'damages' embraces both compensatory and punitive damages, and, that the damages awarded were less than those sought. The award of punitive damages may not be sustained for any of these reasons.

[2, 3] "Although the publication was alleged to have been made with malicious motives, and these allegations were sufficient to sustain an award of punitive damages had they been sought, we must look to the prayer for the relief that was demanded. It was contended in Brooks v. Forington [1897], 117 Cal. 219 [48 P. 1073], that in a default case any relief could be awarded consistent with the averments of the complaint, and that as the right to counsel fees in a foreclosure action was properly alleged an award of fees was authorized although not demanded in the prayer. The court said ([117 Cal. at] page 220 [48 P. 1073]): 'The position of respondent does not find support in the decisions of this court giving application to section 580. The relief "demanded in his complaint" is held to refer to the relief asked in the *prayer*—the feature of the pleading to which alone reference may be had in default cases, to ascertain what relief the plaintiff seeks; and the rule of the statute applies in its strictness to actions in foreclosure alike with those of any other character. [Citing cases.]' The scope of a prayer for specific relief may not be enlarged so as to include relief of a different nature by reference to allegations of the complaint which would have justified such additional relief had the same been demanded. In a default case a prayer for general relief will not support a damage award which is not contained in the prayer.

[4, 5] "The basic differences between compensatory and punitive damages refute the contention that defendant was given notice that punitive damages were sought by the complaint. The two differ in nature and purpose. One is given as compensation; the other purely as punishment and by way of example. (Civ.Code, § 3294.) A demand or prayer for one is not a demand legally, or otherwise, for the other, or for both. The court is without authority to grant relief of a kind essentially different from that which a defaulting defendant would reasonably anticipate from a reading of the complaint. Plaintiff contends correctly that the term 'damages' embraces both compensatory and punitive damages but this argument does not reach the problem. The allegation of the complaint which immediately precedes the prayer for relief states that plaintiff has been damaged in the sum of $100,000. This can mean only compensatory damages. We think a skilled or an unskilled reader would understand the prayer for compensation in this amount to be a demand for compensatory relief and nothing more.

"The fact that the damages awarded were less than those claimed is not an answer to defendant's contention that plaintiff sought only compensatory damages and was awarded in addition to that relief damages by way of punishment. [* * *]

[6] "An insufficient showing was made of a reason for relief from the default.

The affidavits of defendant and his attorney were vague and evasive. While each claimed to have been ill, the duration of the claimed illness was not stated in either affidavit. Defendant's attorney did not deny that he had been granted an extension from November 7th to November 17th, nor did he allege any facts which tended to show inability to file an answer within that time, nor any excuse for not filing it later, prior to the entry of the default. It was alleged in the affidavit of defendant that he was endeavoring to make a settlement with plaintiff, and offered plaintiff $350 in settlement, and it was shown by several affidavits filed on behalf of plaintiff that defendant endeavored to induce mutual friends to bring about a settlement. Defendant alleged that he had on two occasions been 'incarcerated' in a sanitarium, suffering from kidney trouble, but the dates when he was so confined were not stated. There were also affidavits to the effect that defendant, during the time in question, was seen in attendance at several social functions. He admitted having attended a dance but alleged he did not dance. There was no showing whatever that defendant was deceived or misled in any manner other than the claim that on December 13th defendant was granted a two-day extension, which claim was denied by affidavit. No other valid excuse was offered for the obvious negligence of the defendant and his attorney.

[7] "There was no sufficient affidavit of merits accompanying the motion. A verified answer was tendered and was to be considered in determining whether there was a showing of a meritorious defense. (Beard v. Beard [1940], 16 Cal.2d 645, 649 [107 P.2d 385.]) The proposed answer did not deny the fact or the contents of the publication, nor did it allege the truth of the publication. It denied that the publication was made with 'intent to injure, disgrace *and* defame plaintiff or to bring him to public disgrace or obliquy.' It was also denied that plaintiff had suffered any damage by reason of any act or acts of the defendant. The publication was manifestly libelous on its face. The only issues raised by the proposed answer would have been whether plaintiff should be awarded compensatory damages, and if so, the amount thereof. [* * *] Its insufficiency to set up a complete defense was to be taken into consideration by the court in ruling upon the motion. The court naturally would be less inclined to open a default for the filing of an answer which admitted liability but denied damage, than in a case where the proposed verified answer alleged a complete defense on the merits.

[8] "It is a rule as familiar as any to be found in the books that an application to vacate a default under section 473, Code of Civil Procedure, is addressed to the sound discretion of the court and will not be disturbed except in a case of manifest abuse of discretion.[1] Such long established rules should be consistently and impartially respected. Here the denial of the motion to vacate the default was [* * *] proper [* * *]."

The order denying the motion to vacate the default is reviewable on the appeal from the judgment (Code Civ.Proc., §§ 956, 963), and therefore the purported appeal from such order is dismissed. The judgment is modified by striking therefrom the provision awarding $5,000 as punitive damages and as so modified is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

1. See 14 Cal.Jur. 1072–1073 and cases there cited.

DE BURGH v. DE BURGH.*

Civ. 18581.

District Court of Appeal, Second District, Division 2, California.

Feb. 18, 1952.

Hearing Granted April 17, 1952.

Divorce proceeding by wife wherein husband filed cross-complaint. The Superior Court, Los Angeles County, Julius V. Patrosso, J., found each party guilty of cruelty and denied each a divorce. The wife appealed. The District Court of Appeal, Moore, P. J., held that judgment of trial court was valid although defense of recrimination was not pleaded.

Judgment affirmed.

1. Appeal and Error ⇐717

Trial judge's opinion and remarks are not competent to impeach his findings.

2. Appeal and Error ⇐1010(1)

Findings of trial court are final so long as there is any substantial evidence to support them.

3. Divorce ⇐184(6)

Where husband committed acts of cruelty toward wife and wife then sent accusatory letters regarding husband to his business associates, trial court was best qualified to determine in divorce proceeding whether husband's cruelties were sufficient to warrant wife's accusatory letters.

4. Divorce ⇐162

Where wife sued for divorce on grounds of cruelty and husband filed cross-complaint charging extreme cruelty and trial court, on valid pleadings and upon substantial evidence, found each party guilty of acts of cruelty toward the other, failure to plead defense of recrimination did not invalidate judgment that neither party was entitled to divorce.

5. Divorce ⇐55

Where both parties to divorce proceeding succeed in showing cruelty or other inequitable conduct on part of each other, relief is denied each as each is in court with unclean hands.

6. Action ⇐4
Contracts ⇐138(6)

Where court discovers facts indicating contract or status under investigation is illegal, court will of its own motion pursue inquiry and make appropriate orders as party guilty of wrongful conduct shall not be permitted advantage against his own wrongdoer.

7. Divorce ⇐235

Where wife was mature person, had known husband for two years prior to marriage, was married only 27 months, withdrew $4,700 from joint bank account prior to final separation, and was awarded $950 for costs and attorney's fees and $150 per month as alimony, denial of maintenance and support for wife was not abuse of trial court's discretion.

Max Fink, Jerry Rolston, Cyrus Levinthal and Leon E. Kent, all of Los Angeles, for plaintiff, cross-defendant and appellant.

Donald Armstrong, Torrance, for defendant, cross-complainant and respondent.

MOORE, Presiding Justice.

Plaintiff appeals from the judgment denying her a divorce; also from the order which denied her motion for a new trial. The latter is nonappealable.

The parties came to California in 1944 and resided together at Manhattan Beach until they separated on February 13, 1949. They were married October 27, 1946.

The basis of appellant's action is cruelty. Her complaint alleged and at the trial she testified to nine separate acts. The nature of the cruelties is gathered from appellant's brief wherein she enumerates the several misdeeds, namely: defendant knocked her down, bruised her face and cut her back, slapped her, struck her while on the train, smote her twice at home and slapped and punched her in 1948 and struck her in 1949. She testified that on divers occasions defendant referred to plaintiff's former suitor; continually referred to his former girl friends in the presence of other people; grieved her by the manner in which he referred to plaintiff's daughter and son-in-

* Subsequent opinion 250 P.2d 598.

law. Finally, she accused respondent of homosexual tendencies.

Defendant filed a cross-complaint in which he accused plaintiff of extreme cruelties inflicted upon him. On such issues the case was tried. From the evidence, the court determined that respondent was guilty of extreme cruelty toward appellant by the conduct charged and that appellant was likewise guilty by reason of her accusatory letters sent to respondent's associates, and concluded that neither was entitled to a divorce.

Appellant contends that (1) notwithstanding such findings respondent had not complained of any act of cruelty until the very end of the marriage; (2) he attempted to effect a reconciliation; (3) the trial court emphasized primarily that the cruelties respondent committed caused her to write certain letters to respondent's business associates accusing him of homosexual acts; (4) respondent failed to plead recrimination as a defense; (5) the overwhelming mass of testimony shows such a convincing accumulation of cruelty as to justify her writing the letters; (6) the court refused to hear evidence as to respondent's financial condition.

[1–3] Contentions one and two require no discussion. As to three, it is elemental that the opinion or remarks of the trial judge are not competent to impeach his findings. As to five, the findings of the trial court are final so long as there is any substantial evidence to support them. The court heard and saw the litigants testify and is best qualified to determine whether the respondent's cruelties were sufficient to warrant appellant's accusatory letters.

[4] It is argued that the defense of recrimination must be specially pleaded and that since it was not therefore it was not available to respondent because he had alleged no such affirmative defense. Such is not an accurate statement of the law. A judgment entered by a trial court on valid pleadings and upon substantial evidence submitted in open court cannot be upset upon such a claim. The court found that "each party has been guilty of acts of cruelty toward the other." The finding as to the acts of appellant are supported by the proof that she had made false charges of a serious nature against respondent. Mayo v. Mayo, 3 Cal.2d 51, 55, 43 P.2d 535.[1] It is not an arbitrary or meaningless finding that a wife accused her husband of homosexuality in letters to his business associates. It is a determination that she had cruelly aspersed his character and had attempted to make him appear loathsome to those who would require decent behavior in their friends.

The contention that respondent's pleadings did not furnish a basis for such finding is not sufficient to upset the judgment. Where one spouse sues for divorce on the ground of cruelty and the other files a cross-complaint charging extreme cruelty, although the word recrimination appears in neither pleading, the court may deny relief to both when convinced that both parties were equally guilty of inequitable conduct. Brenot v. Brenot, 102 Cal. 294, 296, 36 P. 672. It has been held that even though condonation is a special defense and should be pleaded affirmatively, yet if the evidence shows condonation it is the duty of the court to find according to the proof. Hamburger v. Hamburger, 60 Cal.App.2d 530, 537, 141 P.2d 453.

[5, 6] Springman v. Springman, 97 Cal. App. 768, 276 P. 351, is cited by appellant in support of her contention that recrimination must be pleaded. This authority has no application to a case where both parties demand a divorce on the ground of extreme cruelty. It is not unusual that both spouses in divorce proceedings make claims of cruelty or other inequitable conduct. In such event, if both succeed, relief is denied both because they have come to court with unclean hands. Divorce is a remedy for the innocent against the guilty, whereas if both parties are equally at fault, a divorce will not be granted. To serve as ground for divorce, cruelty must be unmerited and unprovoked. Popescu v. Popescu, 46 Cal.App.2d 44, 49, 115 P.2d 208. A court of equity does not allow it-

1. Overruled as to another point in Stitt v. Stitt, 8 Cal.2d 450, 65 P.2d 1297.

self to become the handmaid of iniquity. Intervention is justified not for the sake of either party who might be thereby benefited but in order to uphold the integrity of the law. Richman v. Bank of Perris, 102 Cal.App. 71, 86, 282 P. 801. When a court discovers a fact that indicates the contract under investigation to be illegal, it will of its own motion pursue the inquiry, Kreamer v. Earl, 91 Cal. 112, 117, 27 P. 735, and make appropriate orders. Such judgments are appropriate in investigations by the chancellor of any contract or status. No party to a contract who is guilty of wrongful conduct should be permitted any advantage against his own wrongdoer.

Popescu v. Popescu, supra, does not support appellant for the reason that the husband did not seek a divorce but merely defended against the action brought by his wife on the ground of recrimination. The court having found that the husband had provoked the acts of cruelty committed by the wife properly denied the defense of recrimination. In the instant action both parties committed acts of cruelty toward each other; both sued, alleging such cruelties; thereby each placed himself in the position to be denied all relief. The court did not abuse its discretion herein where cruelties on both sides were proved.

[7] Denial of maintenance and support was not error. Appellant contends that the denial of support and of the right of further inquiry into respondent's ability to pay was error. She contends at length that the court had no right in advance of hearing her proof as to respondent's financial condition to deny an order for support.

It is true that the major portion of the evidence received by the court was directed to the issue of cruelty, but the record discloses some outstanding features which reveal that the refusal to grant appellant support and maintenance was a fair and reasonable exercise of its discretion. Appellant appears to be a woman of advanced years—at least she was old enough to have a daughter married. She had ample opportunity to become familiar with the habits of respondent during the two years prior to the celebration of this marriage. The period of the marriage extended for only 27 months. Prior to their final separation appellant withdrew $4,700 from their joint bank account. At the hearing of the order to show cause the court awarded her $950 for costs and attorney's fees and $150 per month as alimony. At the time of the trial she had had the advantage of at least $4,800 out of the community gains. By denying further financial aid the court did not abuse its discretion. For a woman to live with a man 27 months does not necessarily entitle her to a life income. When such facts are before the court, and particularly when the plaintiff has been found guilty of cruelty, it cannot be said that the refusal to make an award constituted an abuse of discretion.

The appeal from the order denying the motion for a new trial is dismissed. Judgment affirmed.

McCOMB and FOX, JJ., concur.



WESTERN LOS ANGELES CITIZENS' COMMITTEE ON LIQUOR LICENSES et al. v. STATE BOARD OF EQUALIZATION et al.*

Civ. 18678.

District Court of Appeal, Second District, Division 3, California.

Feb. 15, 1952.

Rehearing Granted March 3, 1952.

Western Los Angeles Citizens' Committee on Liquor Licenses, a corporation, and others sued the State Board of Equalization of the State of California and another for a writ of mandate ordering named defendant to revoke an "on sale" liquor license. The Superior Court, Los Angeles County, Frank G. Swain, J., rendered judgment issuing a peremptory writ ordering the Board to revoke the license, and defendants appealed. The District Court of Appeal, Shinn, P. J., held, inter alia, that under the statute prohibiting the sale of liquor on premises within one and one-half miles of a home, retreat,

* Subsequent opinion 245 P.2d 571.

or asylum for veterans, the measurement of the distance between the premises in question and a certain Veterans Administration barracks should be measured to the nearest door of such barracks, although such door was locked and not used, rather than to the main entrance of the barracks.

Affirmed.

1. Intoxicating Liquors ⇐59(2)

A medical and surgical hospital where veterans remained only while undergoing treatment was not a "home," "retreat" or "asylum" within statute prohibiting sale of intoxicating liquor on premises within one and one-half miles of a building occupied as a home, retreat or asylum by veterans, since building referred to is one which provides residential facilities. Pen.Code, § 172, subd. 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Home", "Retreat" and "Asylum".

2. Intoxicating Liquors ⇐72

Whether measurement of distance between premises for which "on sale" liquor license was sought and Veterans Administration barracks was to be made to main entrance of barracks or to door closest to such premises was question of interpretation and application of statute prohibiting sale of liquor on premises within one and one-half miles of a home, retreat, or asylum for veterans, and therefore decision of Board of Equalization that premises were not within one and one-half miles of such barracks was not binding upon court. Pen. Code, §§ 172, subds. 1, 4.

3. Intoxicating Liquors ⇐59(2)

Statute prohibiting sale of intoxicating liquors on premises within one and one-half miles of any building occupied as home, retreat, or asylum by veterans is to be given literal interpretation, and therefore in determining whether premises for which "on sale" liquor license was sought was within one and one-half miles of Veterans Administration barracks, measurement was to be made to barracks door closest to such premises, though such door was locked and not used, rather than to the main entrance. Pen.Code, §§ 172, subds. 1, 4.

4. Limitation of Actions ⇐61
Time ⇐10(4)

Where "on sale" liquor license was issued on October 26, but decision of Board of Equalization ordering that application for such license be granted was not rendered until November 10, the 30-day period within which petition for mandate could be filed began to run not earlier than November 10, and therefore such petition filed on December 11 was timely, in view of fact that December 10 fell on Sunday. Government Code, §§ 11518, 11519, 11521, 11523.

Edmund G. Brown, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., for appellant, State Board of Equalization.

Louis L. Lasher, David P. Connelly, Beverly Hills, for appellant.

J. Henry Schweitzer, Los Angeles, for respondents.

SHINN, Presiding Justice.

Defendants Louis L. Lasher and the Board of Equalization appeal from a judgment ordering the Board to vacate and set aside its order granting a general "on sale" liquor license to Lasher for premises located at 1776 Westwood Boulevard, Los Angeles. The superior court granted a peremptory writ of mandate on the ground that Lasher's premises are within one and one-half miles of "a building actually occupied as a home, retreat, or asylum" for veterans, which would render any sale of intoxicating liquor on the premises a violation of Penal Code, section 172(1).

As assignee of an existing license, Lasher applied for a general "on sale" license for his cafe. There were existing "off sale" licenses at Harold's across the street, and Tony's next door. The application was opposed by plaintiffs on the ground it would be against public welfare and morals to license the premises for the reason that Y. M. C. A. and Y. W. C. A. buildings, schools and churches were in the immediate vicinity, and the further reason that the premises were within a mile and a half of Sawtelle Soldiers' Home Building (#215) and Wadsworth General Hos-

pital (Veterans Administration facilities). The examiner recommended denial of the application because of the churches and youth groups in the vicinity, and it was denied by the Board on October 9, 1950. Lasher's petition for reconsideration was granted and a hearing was held by the Board on October 26, 1950. Both the examiner and the Board found that sales at the location would not be in violation of section 172(1). The Board granted the license and plaintiffs petitioned for a writ of mandate. After a consideration of the transcript of the Board hearing the court rendered judgment issuing a peremptory writ ordering the Board to revoke the license.

[1] The court found that Wadsworth Hospital is a "retreat or aslyum" within the meaning of Penal Code, section 172. All the evidence was that it is exclusively a medical and surgical hospital where patients remain only while undergoing treatment. Under no tenable theory could it be regarded as a home, retreat or asylum. The type of building to which the code section relates is one which provides residential facilities. There are no such facilities for patients in the Wadsworth Hospital. When the Legislature specified "home, retreat or asylum" it did not also mean "hospital." The finding would appear to have been made inadvertently. It has no support in the evidence, and therefore cannot lend support to the judgment.

Building "215" is a barracks building of the Veterans Administration. It is not questioned that it is a building to which section 172(1) would apply if it is within the minimum distance. Appellants contend that as to building "215" the Board decided, on conflicting evidence, that it was distant more than one and one-half miles from the licensed premises, and the court was without power to overturn that determination.

It appears that the Board used one method for measurement of the distance and that the court adopted another. Section 172(4) provides that the distance is to be measured by "following the shortest road or roads connecting the points in question." Both routes here contended for use roads and sidewalk approaches. The Board adopted a measurement from the licensed premises to the main center entrance of building 215 and calculated the distance at 8022.22 feet (102.22 feet greater than a mile and a half); the court held the measurement should have been to a south end entrance of building "215" which gives a distance of 7835.36 feet (84.64 feet less than the required distance).

The evidence indicates the end entrance is at present locked and not used. It is argued that the Board reasonably decided that the main entrance, which is the one generally used, should be one terminus of the measurement. We might agree if the statute left any room for interpretation, but it does not. Section 172 mentions two points—the place of sale and the "building" described—making no provision for method of measurement other than that it is to be by "the shortest road or roads connecting the points in question." A literal reading indicates that the measurement here should be in straight lines along roads from those parts of the two buildings which are the shortest distance apart. Whether a pedestrian would naturally leave the barracks for the bar from one door or another, and would or could follow straight lines either going or returning, is not to be considered. The offense defined by section 172(1) relates to sales generally, and not merely to sales to inmates of a particular building. But if a door in the Veterans building should be taken as a terminus of the measurement, it should be the one which would first come within the minimum distance. This is the door at the south end of the building, which is upon an established road. It is not necessary to consider respondents' contention that the approach to the main entrance is a walkway, and not a road.

[2, 3] The decision of the Board rests upon an interpretation and application of the statute, and is not one of fact upon conflicting evidence. We are of the opinion that the method of measurement used by the trial court was the correct one.

Appellants contend the petition was filed after the 30-day limitation period of sec-

tion 11523 of the Government Code for review by mandamus. Section 11518 of the code provides that: "The [Board's] decision shall be in writing and shall contain findings of fact, a determination of the issues presented and the penalty, if any. * * * Copies of the decision shall be delivered to the parties personally or sent to them by registered mail." Section 11519 provides: "(a) The decision shall become effective 30 days after it is delivered or mailed to respondent unless: A reconsideration is ordered within that time, or the agency itself orders that the decision shall become effective sooner, or a stay of execution is granted." Section 11523 provides, in part: "Except as otherwise provided in this section any such petition [mandate] shall be filed within 30 days after the last day on which reconsideration can be ordered." Under section 11521, "The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent, or on the date set by the agency itself as the effective date of the decision if such date occurs prior to the expiration of the 30-day period." The court found the license was issued to Lasher October 26, 1950, and further, "that the decision of the Board [as defined in Government Code, sec. 11518] ordering that the application of respondent Louis L. Lasher for such license be granted was not rendered until November 10, 1950, and was not effective until November 13, 1950."

[4] On October 26th the Board adopted a resolution granting the license, but it did not render its decision in writing and findings until November 10th. These were mailed in Sacramento to the defendant at Los Angeles on November 10th. The Board contends that the 30-day period within which a petition for mandate could be filed commenced to run October 26th for the reason that the matter was actually decided and the license was issued on that date. We cannot agree. The resolution of the Board did not order the license to be issued at that time nor fix any date for its issuance. The decision of November 10, 1950, provided that it would be "effective on notice hereof." The time would commence to run not earlier than November 10th when the written decision and findings were filed. December 10th fell on Sunday, and the petition for mandate was filed on the following day, or within the 30-day period. This being true, it is unnecessary to determine whether the fixing of November 13th as the effective date of the order affected in any manner the element of time for filing a petition for writ of mandate. Neither is it material that November 11th and 12th were holidays, and, as implied by the court's finding, that notice of the order was not received by the defendant until November 13th.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



109 Cal.App.2d 203

PEOPLE v. KIRK et al.

Cr. 4733.

District Court of Appeal, Second District, Division 3, California.

Feb. 11, 1952.

Appeals from a judgment of the Superior Court of Los Angeles County, Charles W. Fricke, J., on convictions of grand theft, robbery, and a violation of the Vehicle Code, and an order denying appellant's motion to require the court clerk to prepare the record on appeal from the judgment. The District Court of Appeal, Vallée, J., held that the trial judge was warranted in concluding from appellant's and five deputy sheriffs' conflicting affidavits that notice of appeal was not delivered by appellant to officials of the county jail, in which he was confined, until the day after the Sunday on which the tenth day after rendition of the judgment fell and did not reach the Superior Court clerk within such time, as required by rule, because of appellant's failure to deliver it sooner, not because of the jail officials' negligence.

Judgment and order affirmed.

1. Criminal Law ⇐1081

The time for filing notice of appeal is mandatory and jurisdictional, and if notice is filed after expiration of statutory period, neither trial court nor reviewing court can afford relief to one filing notice.

2. Affidavits ⇐18

The rules that trial judge is not required to accept witness' sworn testimony, even in absence of evidence directly contradicting it, applies to affidavit.

3. Criminal Law ⇐1144(13)

Where issue is tried on affidavits, rule on appeal is that affidavits favoring prevailing party's contentions establish not only facts stated therein, but all facts which reasonably may be inferred therefrom.

4. Criminal Law ⇐1158(1)

Where there is substantial conflict in facts presented by affidavits, trial court's determination thereof will not be disturbed on appeal.

5. Affidavits ⇐18
Criminal Law ⇐1158(1)

The rules that trial judge is not required to accept affidavit as true, though not directly contradicted, that affidavits favoring prevailing party's contentions establish all facts reasonably inferrable therefrom on appeal, and that trial court's determination of controverted facts presented by affidavits will not be disturbed on appeal, are applicable in criminal case. Pen.Code, § 1102.

6. Criminal Law ⇐1081

Conflicting affidavits of defendant and five deputy sheriffs warranted trial judge's conclusion that defendant's notice of appeal from judgment on convictions of grand theft, robbery and violation of Vehicle Code, was not delivered by him to officials of jail, in which he was confined, until day after Sunday on which tenth day after rendition of judgment fell and did not reach court clerk within such time, as required by Rule on Appeal, because of defendant's failure to deliver it sooner, not because of jail officials' negligence, so that defendant's motion to require clerk to prepare record on appeal was properly denied. Code Civ.Proc. § 12a(a); Pen.Code, § 1102; Vehicle Code, § 503; Rules on Appeal, rule 31.

7. Criminal Law ⇐1144(19)

On appeal from order denying defendant's motion to require superior court clerk to prepare record on appeal from judgment on conviction of felonies, District Court of Appeal must assume that notice of appeal was not filed in time, not because of negligence of officials of jail in which defendant was confined, but through his own fault, as impliedly found by trial judge on conflicting affidavits in denying motion. Rules on Appeal, rule 31.

8. Motions ⇐25

Affidavits are properly used on a motion. Code Civ.Proc. § 2009.

9. Motions ⇐25

Whether oral evidence shall be received and examination of affiant permitted on a motion rests solely in trial judge's discretion.

10. Criminal Law ⇐1081

Defendant's lack of opportunity to cross-examine deputy sheriffs, filing affidavits in opposition to defendant's motion to require court clerk to prepare record on appeal from judgment on conviction of felonies, was not ground for reversal of judgment and order denying motion on ground that notice of appeal was not filed with court clerk within ten days after rendition of judgment. Rules on Appeal, rule 31.

Ronald Lloyd Barker, in pro. per.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

On June 15, 1950, judgment was rendered adjudging that defendant be punished by imprisonment in the state prison. He had previously been charged with and convicted of three felonies: grand theft, robbery, and a violation of section 503 of the Vehicle Code. In a letter dated June 23, 1950, sent by mail, defendant gave notice of appeal from the judgment. The notice of

appeal was received by the clerk of the superior court on June 27, 1950. The envelope containing the notice of appeal was postmarked June 26, 1950, at 12:30 p. m. During the period between June 15 and June 27, 1950, defendant was confined in the county jail of Los Angeles County.

On June 28, 1951, defendant made a motion that the court require the clerk to prepare the record on appeal. The motion was denied on the ground the notice of appeal had not been filed with the clerk within ten days after rendition of the judgment, as required by rule 31 of the Rules on Appeal. 36 Cal.2d 1, 26. Defendant appeals from the order denying the motion.

The tenth day after the rendition of the judgment fell on Sunday, June 25, 1950. The ten-day period was thus extended to Monday, June 26, 1950. Code Civ.Proc. § 12a(a).

[1] The rule is that the time for filing a notice of appeal is mandatory and jurisdictional; and if the notice is filed after the expiration of the statutory period, neither the trial court nor a reviewing court can afford relief. People v. Behrmann, 34 Cal.2d 459, 461, 211 P.2d 575.

The motion was submitted to the court below on an affidavit of defendant in support of the motion and affidavits of five deputy sheriffs filed in opposition to the motion. The affidavit of defendant averred that on June 23, 1950, he wrote and signed a proper notice of appeal and placed it in a "stamped covered envelope which was left unsealed subject to censorship rules" of the jail. The letter, so he averred, was addressed to "County Clerk, Division 43 [the department in which defendant was convicted and sentenced], Los Angeles County Court." He stated that in accordance with the rules of the jail, he placed the letter in and upon and between the bars of the entering door of the cell in which he was confined on June 23, 1950, "to be picked up by the Los Angeles County Deputy Sheriff in charge, and that he did pick up said letter on the 23rd day of June 1950 to be censored according to the rules of said County Jail and then placed into the United States Mail."

The affidavits in opposition to the motion were made by all the deputy sheriffs who were in charge of, and who participated in, reading, censoring, and mailing letters and correspondence proffered by prisoners on June 23 to June 26, 1950, both inclusive, between 4:00 p. m. and 12:00 p. m. Taken together they averred: all mail emanating from cells and cell blocks, and proffered by prisoners for mailing, is picked up by deputy sheriffs having supervision over prisoners in the cells, and by such deputies is put in a prescribed place in the office of the sheriff to which prisoners do not have access; all mail and correspondence proffered by prisoners is read, examined, and censored by deputies, assigned to such work, between 6:00 p. m. and 9:00 p. m. of each day; all mail and correspondence which has passed censorship is placed in the United States mail by use of a mail chute which is connected with a pickup mail box on the second floor of the Hall of Justice in which the jail is located; no mail proffered by prisoners is held over past 9:30 p. m.; all mail not passing censorship is returned to the prisoners who proffer it; no record was kept of any correspondence or documents which were examined and censored on any of the days in question; no incident of holding over any mail proffered by a prisoner occurred in July, 1950; defendant had the privilege to use the mails; if any document or letter, such as described by defendant in his affidavit, had been proffered by him, it "would have been mailable under the rules of and in accordance with the practice of the Sheriff's Office of Los Angeles County and would have been mailed in the United States mails in the manner above described not later than 9:30 p.m., of the date on which this same was proffered by the prisoner for mailing"; all letters, documents, and correspondence examined, censored, and passed by them for mailing, were mailed before or at 9:30 p. m. on the date they were examined; all outgoing mail from prisoners in the jail on each of said days was censored and mailed. None of the deputy sheriffs had any recollection as to whether defendant, during the days mentioned, proffered for mailing, or that there was mailed for him under the

rules of the jail, any document such as that referred to by him in his affidavit.

In passing on the motion, the trial judge stated he did not believe the affidavit of defendant. As reasons for his unbelief he stated: defendant did not name the deputy sheriff when he said in his affidavit that the document had been picked up on June 23, 1950; defendant must have known the name of the deputy because he was in jail from February 21, 1950, to the time he was transferred to San Quentin; defendant's affidavit was not corroborated; notwithstanding defendant, at all times up to the time of sentence, was represented by Mr. Noel Martin of the Public Defender's office, an exceptionally able lawyer, he did not discuss the question of appeal with Mr. Martin or ask him to prepare a notice of appeal. The trial judge also said that: because the notice of appeal filed on June 27, 1950, contained the following in the handwriting of defendant, "My case was finished June the 15th 1950 and I have given my notice of appeal within the required ten days," defendant "was trying to put something into the record, knowing at that time that he was not within the time—with the hope through the lapse of time something would occur which might give him an advantage to which he was not entitled"; the fact defendant made no inquiry as to the status of his appeal until April 16, 1951, and did not file his notice of motion until more than a year after he was sentenced, "indicates that there was a distinct little plan and scheme on the part of the defendant to delay the matter for about a year so that the matter could be placed in a position where evidence would not be as readily available to the People as if he had acted promptly," and "if he honestly believed that he had a meritorious appeal pending, [he] wouldn't have waited a period of fully ten months before starting to do something about it"; and if defendant had proffered the notice of appeal on June 23, 1950, as he averred he had done, it would have been mailed on that date. The court concluded that the notice of appeal had not been timely filed.

[2–5] The rule that a trial judge is not required to accept as true the sworn testimony of a witness, even in the absence of evidence directly contradicting it, applies to an affidavit. Berg v. Journeymen's P. & G. F. Union, 5 Cal.App.2d 582, 42 P.2d 1091. In a matter in which an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contentions of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom. Wolfson v. Haddan, 105 Cal.App.2d 147, 149, 233 P.2d 145. Where there is a substantial conflict in the facts presented by affidavits, the determination of the controverted facts by the trial court will not be disturbed on appeal. Deyl v. Deyl, 88 Cal.App.2d 536, 543, 199 P.2d 424. These rules are applicable in a criminal matter. Pen.Code, § 1102. See People v. Sullivan, 129 Cal. 557, 561–563, 62 P. 101; People v. Tucker, 117 Cal. 229, 49 P. 134. Applying these rules to the present case, we cannot say, as a matter of fact or law, that defendant filed his notice of appeal in time.

[6] As we have said, the envelope in which the notice of appeal was mailed was postmarked "Jun 26—12.30 P.M.—1950." Defendant argues that this fact conclusively establishes it was mailed on June 25, 1950, in time to have reached the clerk within the statutory time. The clerk received the notice June 27, 1950, one day too late. The trial judge was warranted in concluding from the affidavits that the notice was not delivered by defendant to the jail officials until June 25, 1950, the day it was mailed, and that it did not reach the clerk within the statutory time due to defendant's failure to deliver it sooner and not because of any negligence on the part of the jail officials.

Defendant claims the facts of the case bring it within the exception to the general rule declared in People v. Slobodion, 30 Cal.2d 362, 181 P.2d 868; People v. Aresen, 91 Cal.App.2d 26, 204 P.2d 389, 957; People v. Stinchcomb, 92 Cal.App.2d 741, 208 P.2d 396; and People v. Graff, 104 Cal.App.2d 32, 230 P.2d 654. These cases are distinguishable. The result in each case of this nature depends on its own facts. In Slobodion the fact that the defendant had delivered his notice of appeal to the prison officials six days prior to the expiration

date for the taking of the appeal, with the request that they mail it, was not contradicted, as it is here. Through no fault of the defendant, but solely because of the negligence of the prison officials, the notice of appeal was not filed in time. The court held the delivery to the prison officials under the peculiar facts of the case constituted a constructive filing of the notice of appeal within the prescribed time limit and satisfied the jurisdiction requirements. In Aresen it was conceded that the defendant delivered the notice of appeal to the prison officials on the seventh day after rendition of the judgment, well within time to reach the clerk within the statutory time. The court followed the Slobodion case. In Stinchcomb the defendant was in the penitentiary at the time his petition for a writ of error *coram nobis* was filed and at the time it was denied on October 11, 1948. Notice of appeal was filed October 25, 1948. The defendant stated the first notice he had of the ruling on his petition was on October 20, 1948. The court held, 92 Cal. App.2d at pages 742–743, 208 P.2d at page 397: "[I]f a defendant in the state penitentiary has taken every step he possibly could to perfect his appeal he will not be deprived of the right of appeal because of the failure of some one in official position to forward a notice of appeal so that it might have been filed within the time required by the rules." In Graff the judgment was rendered on March 8, 1950. The notice of appeal, dated March 16, 1950, was filed March 20, 1950. The attorney general argued that the appeal should be dismissed. The defendant represented himself and had prepared the notice of appeal while confined in the county jail. He stated in his brief that the notice of appeal was prepared and signed on March 16, 1950. Nothing further appeared. The court did not dismiss the appeal but considered the case on its merits. The failure of the court to dismiss the appeal cannot be justified on the record in that case. Apparently the court felt the ends of justice would be served by considering the case on the merits rather than by dismissing the appeal, for it said, 104 Cal.App.2d at page 34, 230 P.2d at page 656, "this Court is of the opinion it would be better to consider and pass upon the contentions made by defendant."

[7] In all of the cases relied on by defendant, the question whether the defendant, who was incarcerated, had filed his notice of appeal in time, was decided by the reviewing court on its own determination of the facts as the trier of fact. In none of them was the reviewing court confronted with the situation we have here, where a trial judge, on conflicting affidavits, has determined that the defendant had not delivered the notice of appeal to the officials within sufficient time to have it deposited in the mail so as to reach the clerk within the ten-day period. The conclusions in Slobodion, Aresen, and Stinchcomb were predicated on the fact that the defendant, through no fault of his own but because of the negligence of the prison officials, failed to file his notice of appeal within the prescribed time limit. Here we must assume the notice was not filed in time through the fault of the defendant himself, and not because of the negligence of the prison officials, as the trial judge, on conflicting affidavits, impliedly so found in denying the motion.

[8–10] Defendant assigns as ground for reversal the fact that he did not have an opportunity to cross-examine the deputy sheriffs. Affidavits are properly used upon a motion. Code Civ.Proc. § 2009. Whether oral evidence shall be received and whether examination of an affiant shall be permitted upon a motion, rests solely in the discretion of the trial judge. People v. Sullivan, 129 Cal. 557, 561–563, 62 P. 101; People v. Ferguson, 124 Cal.App. 221, 227–230, 12 P.2d 158, 960. The point is without merit.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

109 Cal.App.2d 286

SHIVERS et al. v. VAN LOBENSELS et al.

Civ. 18564.

District Court of Appeal, Second District, Division 3, California.

Feb. 15, 1952.

Rehearing Denied March 11, 1952.

Hearing Denied April 14, 1952.

Personal injury and wrongful death action by Yvonne Shivers, and others, against W. E. Van Lobensels, and others, arising from collision of truck and automobile at intersection. The Superior Court of Los Angeles County, Frank G. Swain, J., entered judgment on verdict for defendants and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that defendant truck driver was not guilty of negligence as a matter of law.

Affirmed.

1. Appeal and Error ⇐989

A reviewing court will not weigh evidence.

2. Appeal and Error ⇐1001(1)

Negligence ⇐136(2, 25)

Questions of negligence and proximate cause are ordinarily questions of fact, determination of which will not be disturbed if there is any substantial evidence to support the verdict.

3. Appeal and Error ⇐930(1)

On appeal, facts will be stated in light most favorable to prevailing parties.

4. Automobiles ⇐171(13)

Where driver of truck which was in good condition was traveling at lawful speed on through highway protected by stop signs, driver had right to assume that another driver on street intersecting through highway would obey stop signs and yield right of way.

5. Automobiles ⇐171(13)

Where driver of truck which was in good condition was traveling at lawful speed on through highway protected by stop sign and assumed that driver of automobile on street intersecting through highway would obey stop signs and yield right of way, and where other driver did not do so, truck driver could be charged with negligence only if he failed to use care of ordinary prudent person from time he knew, or in exercise of due care should have known, what other driver would do.

6. Automobiles ⇐245(14)

In actions for personal injuries sustained by or death of automobile passengers against driver and owners of truck upon collision of vehicles in intersection, where truck driver, traveling on street favored by stop sign, first saw automobile on intersecting street when 30 to 35 feet away, whether truck driver was guilty of negligence was for jury.

7. Action ⇐59

In actions for personal injuries and death of passengers in automobile against driver and owner of truck arising from collision of these vehicles, where cases were consolidated and jury found for defendants, instructions regarding contributory negligence, which were applicable only to case of deceased automobile driver, could not have misled jury in automobile passengers' cases.

8. Trial ⇐260(1)

Where subject was covered by another instruction given at their request, court did not err in refusing instruction requested by plaintiffs.

Melvin Simon, Los Angeles, Jacob Chaitkin, Pasadena, for appellants.

Schell & Delamer, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiffs from a judgment entered on a verdict for defendants in an action for damages 1) for personal injuries sustained by Yvonne Shivers, a minor, and 2) for the wrongful deaths of Roberta Shivers, Appolis Lindsay and Odee Lindsay, children of plaintiffs Norman E. Shivers and Jairlean Lindsay, respectively, as a result of a collision between a truck and trailer driven by defendant White and a Pontiac driven by Roscoe J. Shivers. Yvonne Shivers and the three

decedents were guests in the Pontiac. Plaintiff moved for a new trial, which was denied.

The driver of the Pontiac, Roscoe J. Shivers, was also killed in the accident and an action for damages for his wrongful death was also filed against defendants. It was consolidated for trial with appellants' action, and likewise resulted in a verdict for defendants. No appeal was taken in that action.

The accident occurred on February 22, 1949, about 3:45 p. m., on Highway 138 where it is intersected by 132nd Street East. The intersection lies approximately one-fourth of a mile east of Pear Blossom, California, between Palmdale and Victorville. Highway 138 runs approximately in an easterly-westerly direction, is 22 feet wide, and is a through highway. Vehicle Code, § 82.5. 132nd Street East runs in a northerly-southerly direction, starts to fork to the north about 180 feet south of, and ends at, Highway 138. The easterly fork continues in a straight course and intersects 138 at right angles. The westerly fork curves northwesterly for about 240 feet until it intersects 138 at a point approximately 140 feet west of the eastern fork. The two forks and 138 form a triangle. A boulevard stop sign is located on each of the forks of 132nd Street East, just south of where they intersect 138.

Appellants' principal contention is with respect to the sufficiency of the evidence to support the implied finding of the jury that defendant White was not guilty of negligence proximately contributing to the happening of the accident and, in effect, they seek to have this court declare that under the evidence White was guilty of negligence as a matter of law.

[1–3] Having in mind the familiar principles that a reviewing court will not weigh the evidence and that questions of negligence and proximate cause are ordinarily questions of fact, the determination of which will not be disturbed if there is any substantial evidence to support the verdict, we state the facts in the light most favorable to the prevailing parties.

Defendant White was operating an empty tractor, semi-trailer and pull trailer, owned by defendant Van Loben Sels, in an easterly direction on 138. The vehicles were equipped with air brakes in good condition. White knew he was traveling on a through highway protected by stop signs. He had traveled over this highway but three weeks before the accident. It was a clear day and visibility was good. There was no traffic on 138. As he neared the outskirts of Pear Blossom, White shifted his equipment into fourth direct gear and remained so up to the time of the accident. His maximum speed in fourth direct gear was 32 to 34 miles an hour. White testified he was traveling at this rate of speed when he was about 600 feet west of the point of the accident, although "it may have dropped down some" because of a small grade in the highway, and that he maintained this speed until the time of the collision. He also testified that when he was about 600 feet from the intersection he knew he was approaching an intersection because of road signs, but he did not actually see the pavement of the intersecting road nor did he make any observation as to traffic on it until he was about 30 to 35 feet west of its westerly edge. At the time White saw the pavement of the intersecting road he saw the Pontiac for the first time. It was traveling in a northerly direction on the westerly fork of 132nd Street East, about 60 to 80 feet south of the south line of 138, and was traveling at a speed of 35 to 40 miles an hour. He testified that the Pontiac did not stop before entering the highway, but, contrary to the testimony of plaintiff Yvonne Shivers, swerved to its right off the paved portion of 132nd Street East and cut across the northwesterly end of the triangle; he was about 20 to 25 feet from the Pontiac when he realized he was going to hit it, and immediately applied his brakes; the Pontiac was practically "right in front" of him when it was hit broadside on its left. It was "just a matter of seconds" from the time White first saw the Pontiac until the time of the collision.

There is a conflict as to the actual point of the impact. There was evidence which placed it somewhat east of the easterly boundary of the westerly fork of 132nd Street. Since the jury must have determined that this was the point of impact, and in view of the fact that the Pontiac was hit broadside, it was justified in concluding that the driver of the Pontiac cut across the northwesterly end of the triangle to the point of impact, and without any regard whatsoever for any eastbound traffic upon 138 failed to make the required stop; and that the collision and the resultant injuries and deaths were solely and proximately caused by the negligence of the driver of the Pontiac.

[4–6] White was driving his equipment at a lawful rate of speed. The brakes on his equipment were in good condition. He knew he was traveling on a through highway protected by stop signs. Under these circumstances, he had a right to assume that a driver on a street intersecting the through highway would obey the stop signs and yield the right of way. In making such assumption, White was acting wholly within his rights, and he cannot be charged with negligence in acting thereon. He can only be charged with negligence under such circumstances from the time he had knowledge, or in the exercise of ordinary care should have known, that the Pontiac was going to disregard the stop sign and enter the highway. After such knowledge, he was bound to use the care of an ordinary prudent person. Ambra v. Woolsey, 55 Cal.App.2d 104, 106, 130 P.2d 152; Flannery v. Koch, 103 Cal.App.2d 55, 59, 228 P.2d 580; Gritsch v. Pickwick Stages System, 131 Cal.App. 774, 781, 22 P.2d 554; Silva v. Market St. Ry. Co., 50 Cal. App.2d 796, 800, 123 P.2d 904; Inouye v. McCall, 35 Cal.App.2d 634, 638, 96 P.2d 386. Whether a person exercises the required degree of care is ordinarily one for the jury. Whether White, as an ordinary prudent person, should have reduced his speed, should have seen the Pontiac before he did and realized sooner that it was not going to make the required stop, or should have done any other act that an ordinary prudent person would have done under the circumstances, were questions addressed to the jury. It was but a matter of seconds from the time White first saw the Pontiac and realized it was not going to stop to the time of the collision. He immediately applied his brakes in an effort to avoid hitting the Pontiac. It cannot be said under the circumstances that White was guilty of negligence as a matter of law.

[7, 8] Appellants claim that certain instructions were confusing and erroneous. The court gave a total of 67 instructions—35 at the request of appellants, 17 at the request of defendants, 8 at the request of both appellants and defendants, 1 on its own motion, and 6 at the separate request of the plaintiff in the consolidated case. No doubt the principles of law applicable to each of the consolidated cases could well have been stated in a few, simple, readily understandable instructions. All principles of law applicable to the case were fully covered. It cannot be said that because appellants' case was consolidated with that of the deceased driver of the Pontiac, the jury was misled with respect to the instructions on contributory negligence applicable only to the latter. By its verdict the jury impliedly found that White was not negligent and that the sole and proximate cause of the accident was the negligence of the driver of the Pontiac. Plaintiffs also claim the court erred in not giving an instruction requested by them on the subject of concurrent negligence of two or more persons. Calif. Jury Instructions (Civil) 104–B. There was no error. The subject was covered by another instruction given at the request of plaintiffs. Calif.Jury Instructions (Civil) 104–A.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

109 Cal.App.2d 253

BEMIS et al. v. PEOPLE (three cases).

Civ. 14771–14773.

District Court of Appeal, First District, Division 1, California.

Feb. 15, 1952.

Hearing Denied April 14, 1952.

Consolidated actions by K. E. Bemis and another, Fred L. Bemis and others and K. E. Bemis and others, as individuals and as partners, etc., against People of the State of California, successor to California Employment Stabilization Commission, etc., to recover unemployment compensation contributions paid under protest. The Superior Court, Alameda County, S. Victor Wagler, J., rendered judgments for defendant on its cross-complaints and plaintiffs appealed. The District Court of Appeal, Peters, P. J., held that finding that subtenants operating restaurants leased by plaintiffs were employees for whom plaintiffs must pay unemployment compensation contributions was supported by the record.

Judgments affirmed.

1. Taxation ⇐111.20

The common-law distinction between a servant and independent contractor based upon the right of control is the proper test in determining whether contributions are payable under Unemployment Insurance Act on account of alleged employees. Gen. Laws, Act 8780d, § 1 et seq.

2. Taxation ⇐111.9, 111.20

The employee-employer relationship is the basis of the requirement for contributions under Unemployment Insurance Act, and a principal for whom services are rendered by an independent contractor does not come within the act. Gen.Laws, Act 8780d, § 1 et seq.

3. Taxation ⇐111.10

Whether lessees of restaurants operated by subtenants were liable for unemployment compenation contributions for such subtenants depended upon existence of employer-employee relationship and motives of lessees in working out plan of operation of restaurants were immaterial. Gen.Laws, Act 8780d, § 1 et seq.

4. Taxation ⇐543(7)

The party questioning existence of employment relationship within tax provisions of Unemployment Insurance Act generally has the burden of proving nonexistence of such relationship, particularly where a prima facie case of employment has been established. Gen.Laws, Act 8780d, § 1 et seq.

5. Master and Servant ⇐5

Whether a person is an employee or independent contractor is primarily a question of fact, but where uniformity of decision is important and the essential facts are not in conflict, the question may become one of law.

6. Taxation ⇐543(7)

Finding that former employees and others, who, individually or as partners, operated individual restaurants as subtenants of lessees of a chain of restaurants under sublessees, equipment leases, and trust, accounting and service agreements, under which lessees could maintain control over operation of restaurants and gross receipts, were employees of lessees for whom lessees must make unemployment compensation contributions and not independent contractors, was supported by the record, in absence of evidence that such control was not in fact exercised and that the parties acted under and interpreted contracts so as not to give lessees the right of control. Gen. Laws, Act 8780d, § 1 et seq.

7. Taxation ⇐111.20

The substance and not the form of arrangement under which a person performs services for another must control in determining whether he is an employee for whom unemployment compensation contributions must be made or an independent contractor. Gen.Laws, Act 8780d, § 1 et seq.

Joseph A. Murphy, Breed, Robinson & Stewart, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, William L. Shaw, Deputy Attys. Gen., for respondent.

PETERS, Presiding Justice.

Prior to December 31, 1937, appellants as partners, under identical master leases, operated a chain of twenty-eight restaurants in the bay area under the name "White Log Coffee Shops." After that date the appellants sublet each of their locations to individuals or groups of individuals, who, for the most part, had been prior employees of appellants. Other contracts, hereafter described, were entered into by the sublessees. The question arose whether these sublessees were employees of the appellants, and so subject to the terms of the Unemployment Insurance Act, or were independent contractors. The department ultimately ruled that the sublessees were, in fact, employees of appellants, and so subject to the terms of the act. The appellants, under protest, paid the taxes, without interest or penalties, and then instituted three separate actions to recover them. The respondent state cross-complained for the unpaid interest, having waived the penalties. The three actions were consolidated, tried upon stipulations of facts, and the introduction of some evidence. It was also stipulated that, for the purposes of briefs and arguments, appellants in all three actions should be called "Bemis Enterprise." The trial court determined that an employer-employee relationship existed, that appellants were subject to the tax, and the state was entitled to interest. Bemis Enterprise appeals, contending that the finding of employment is unsupported and that the evidence demonstrates, as a matter of law, that the sublessees were independent contractors and not employees. No point is made as to the computation of the taxes or interest, it being stipulated that the tax period and the amount of the tax and interest as computed by the state is correct.

Detailed Facts.

Prior to December 31, 1937, Bemis Enterprise operated, under three partnerships, twenty-eight restaurants known as White Log Coffee Shops. One group was run under the name of White Log Systems, the individual partners being K. E. Bemis and R. L. Bemis; another group was run under the name of National Restaurant System, the individual partners being K. E. Bemis, R. L. Bemis, Fred L. Bemis, K. W. Bemis and B. Bemis Bilyeu; while the third group was operated under the name of Concord Company, the individual partners being Fred L. Bemis, K. W. Bemis and B. Bemis Bilyeu. These partnerships leased the various premises on which restaurants were located under identical leases referred to by the parties as "master leases." The rental, under the master lease, was a percentage of sales with a fixed minimum and maximum. The lessees—Bemis Enterprise—were required to keep the premises in good condition and repair, maintain them in a clean and sanitary condition, to operate the restaurants with a fixed customer capacity, a fixed number of hours per week, to offer for sale its regular line of beverages and sandwiches and other foods, to install a standard type of cash register and use diligence to cause the employees to ring up all sales, to keep accurate records of sales, and to furnish monthly statements to the landlord, and to allow the lessor to examine the books and records of sales of the lessees. These master leases gave the lessees, any time after one year from their respective dates, the conditional option to terminate the lease upon sixty days' notice, and gave the lessor the conditional right to terminate upon ninety days' notice.

Prior to January 1, 1938, Bemis Enterprise began negotiating with their employees in reference to these restaurants, and ultimately negotiated, in respect to each location, a series of agreements. These agreements became effective January 1, 1938, and thereafter. In negotiating these agreements it is stipulated that "preference * * * was given to former employees" of Bemis Enterprise. How many of these agreements, if any, were negotiated with persons not formerly employees does not appear. As to each location a series of agreements were entered into.

The first is a lease between Bemis Enterprise, as lessor, and former employees, or others, as lessees. It is referred to as the "Sub-Lease." It covers only the premises involved and does not cover the build-

ing or its equipment. This document requires the leased premises to be maintained by the sublessees as a coffee shop, requires the sublessees to secure and pay for public liability insurance of the type and in the amount approved by the lessor, and had similar provisions to those contained in the master lease as to hours of operation, food to be sold, cash register, keeping and inspection of records, etc. The rental under the sublease was a fixed proportion of sales on a sliding scale. The sublessees agreed to keep the premises in a clean and sanitary condition, to keep the equipment in repair and to replace lost, broken or damaged equipment, and to require each partner or employee to be courteous to customers and to serve them efficiently. Either the sublessees or the lessor could terminate on thirty days' written notice. Bemis Enterprise was given a right of entry at all times. The sublease was expressly made subject to the performance of the master lease, and the sublessees covenanted not to do any act that would constitute a breach of the master lease, and were expressly prohibited from recording the sublease. The sublessees were prohibited from assigning or transferring the sublease without the consent of the lessor. It was also provided that if any of the partner lessees should withdraw from the partnership "then no leasehold interest herein granted shall inure to the individual benefit of any of the above named partners and this lease shall then be of no further force or effect."

If more than one former employee became the sublessee, a partnership agreement between the sublessees was entered into by a form agreement printed and furnished by Bemis Enterprise. The form provides for a capital contribution by the partners. It was stipulated "that from time to time lessees entered into partnership agreements and executed leases with lessors and commenced operation of a coffee shop without making any capital contribution to the partnership, other than required license fees; and * * * that from time to time partnership operating such coffee shops and existing between the lessees were dissolved without the formality of a written agreement so to do, and on some occasions were dissolved by remaining partners where one partner would abandon the enterprise, without notice." The reporter's transcript also shows that the parties stipulated that the sublessees also advanced the amount of change kept in the cash registers. These are the only "capital contributions" shown by the record.

Simultaneously with the execution of the sublease, an equipment lease was also executed between National Restaurant System as lessor and the sublessees. This constituted a lease of the log cabin building and all of the equipment contained therein. The equipment lease provides for a percentage rental dependent upon sales, and a fixed charge for all utilities. This equipment lease also contained most of the provisions above summarized that were contained in the sublease.

After the execution of the sublease and the equipment lease, and, where applicable, the partnership agreement, the sublessees at each location entered into three other agreements.

The first of these was a "Trust Agreement," in which one George Hazlett was appointed trustee. Prior to January 1, 1938, Hazlett had been an employee of Pacific States Wholesale Company, and one of its original incorporators. That company had been incorporated in July, 1936, and prior to January 1, 1938, served only those restaurants operated by National Restaurant System. When incorporated, K. E. and Ruth L. Bemis owned the controlling interest. On January 1, 1940, these interests were transferred to N. J. Kirk as trustee for W. E. and Georgia E. Bemis.

The trust argeement provides that title to all gross receipts from sales made in each of the coffee shops (excepting wages paid to employees of the sublessees) is vested and shall remain in the trustee. It required such receipts to be delivered daily to the trustee to be held by him for the use and benefit of the sublessees, subject to certain conditions. These conditions included the payment of taxes, insurance, bills, rentals provided by the sublease and

equipment lease and other expenses of the operating lessees. The receipts were banked by the trustee under his name. The agreement further required that each Saturday the trustee should pay to each of the sublessees a fixed sum, designated as an advance on anticipated profits. The trust agreement contemplated that the sublessees would have an accountant service, and that such accountant would render periodical profit and loss statements. It provided that within ten days of the receipt of such statement the trustee should pay to the sublessees the net profit shown on such statement, less the amounts already paid to them, and less any obligations shown to exist. The trustee was to receive a stipulated fee for his services. The trust was made irrevocable, and terminable upon dissolution of any of the partnerships. Hazlett had his office in the same building that housed the National Restaurant System and the Pacific States Wholesale Company, where he paid but a nominal rent for one room.

The second agreement executed by all sublessees was an "Accounting Agreement" with G. L. Hornstein Company, which was G. L. Hornstein doing business as a C.P.A. under that name. It was stipulated that "practically all" of Hornstein's income was derived from the fees provided for in the accounting agreement with the sublessees, and fees paid him by National Restaurant System and Pacific States Wholesale Company. He had his office in the same building as did Hazlett where he, too, paid nominal rent for one room. Under the terms of this accounting agreement Hornstein, for a fixed fee of $4.75 per week, agreed with the sublessees at each location to furnish all necessary forms and books, to check all charges, to prepare government reports, and, in short, to render a full accounting service. As already pointed out, on the basis of Hornstein's reports, the trustee disbursed the gross receipts received by him.

The third contract executed by all sublessees was a so-called "Service Agreement" entered into with Pacific States Wholesale Company, referred to as "wholesaler," whereby that company, for a fee, agreed to render certain services to the subtenants. Among other things, the service agreement provided that the wholesaler would furnish painted advertising posters and signs at designated periods, furnish menus, and maintain a food and equipment warehouse which stocked commodities used in the coffee shops, excepting dairy and bakery products and some meat products. The wholesaler also agreed to assist the partnership, by means of advice and recommendations in the preparation and handling of foods, to negotiate for best prices obtainable on products not maintained in the warehouse and to repurchase unused supplies, in good and saleable condition. On the other hand, the partnerships were not bound to buy all or any of their merchandise from or through the wholesaler, but could buy elsewhere if desired. The wholesaler also agreed to have its trained experts make frequent calls at the coffee shops to advise and assist. The stipulation states that, pursuant to the service agreement, service men who were employees of wholesaler, performed the following services under the agreement during the existence of the lease operation:

(1) Visited each of the leased locations at least once in each twenty-four hour period, and often twice during such period. Such visits were not at any fixed time;

(2) visited the leased locations during rush hours from time to time to observe the manner in which service was rendered, and thereafter made comments and suggestions in reference to improvement of same;

(3) discussed with the partners and their employees the appearance of their hands and aprons and commented upon the fact that cleanliness was an important element of salesmanship in a coffee shop;

(4) tasted food and made suggestions on appearance of such on service plates, and on seasoning of food;

(5) during the latter part of 1940 and early 1941, when the labor supply became acute, these service men would assist the partners in obtaining help, and in training new help. Frequently the service men would anticipate the need for help and would bring replacements to the coffee

shops without the solicitation of the partners;

(6) the service men would frequently demonstrate to new employees of the partners the technique of serving food and meeting the public, etc.;

(7) the service men commented upon the appearance of the pots, pans, cutlery and ranges in the coffee shops, and discussed with the partners the best way of cleaning and polishing them;

(8) the service men were frequently requested by the partners to secure substitute partners for those who were about to leave, or had left the individual partnerships, and frequently produced men as substitute partners who proved to be satisfactory to the remainder of the partners on the lease; and the

(9) service men would frequently be called upon by the partners for the purpose of aid in solving the "change" problem in the cash registers.

These, then, were the documents executed by the various parties. Bemis Enterprise, as such, was a party to the master lease and to the sublease. The equipment lease was between the sublessees and the National Restaurant System, a Bemis controlled company. The service agreement was between the sublessees and Pacific States Wholesale Company, a Bemis controlled company. The trust agreement was between the sublessees and Hazlett, a former employee of Pacific States Wholesale Company, and who maintained his office, paying but a nominal rent, in the same building as Pacific and the National Restaurant System. The accounting agreement was between the sublessees and Hornstein, the latter deriving practically his entire income from fees paid by the sublessees and the Pacific and National companies. He had an office in the same building as did Hazlett, and he, too, paid but a nominal rent. The partnership agreements were executed on forms supplied by Bemis Enterprise, and were between the respective sublessees at each location where there was more than one sublessee.

There are some other facts to which reference should be made. It was stipulated that Bemis Enterprise furnished the sublessees with printed form certificates required to qualify a partnership under California law, and that Bemis Enterprise furnished the subtenants, when available, a standard type of cap and apron. It was further stipulated that the same type of service was continued at each location sublet, except that at some locations the subtenants added new items of food, candy or soft drinks. After the subleases were executed, neither the exterior nor the interior of the buildings was changed, and each building carried the name "White Log Coffee Shop." Each location had a small sign on the cash register which contained the names of the subtenants who operated that location, and the state and city licenses issued to the subtenants.

After operations had commenced under these agreements a question arose with the State Department of Employment as to whether the sublessees were employees of Bemis Enterprise or were independent contractors within the meaning of the California Unemployment Insurance Act. Copies of the various contracts were submitted to that Department. Under date of February 2, 1939, the Executive Director of the Department wrote a letter to K. E. Bemis analyzing each agreement and the entire operation. The letter concludes that each of the "White Log Coffee Shops is operated by a bona fide partnership. The partners, therefore, would not be employees of any of the related corporations or partnerships in which you are interested, but would themselves be employing units * * *. Although there appears to be some measure of control and direction exercised over each of the partnerships through the medium of the several agreements, we believe that such control and direction as may exist relates more to the obtaining of a result rather than the manner and means of its accomplishment.

"Many of the provisions of the various agreements which ostensibly delegate the right to control the operation of the coffee shops in reality are satisfactorily explained by the circumstances that the co-partners are not required to conduct themselves in a certain manner but do so because of the

mutual advantages to be gained from the arrangements."

The letter specifically states that the ruling is conditional, and that the right to reconsider is reserved, in case any individual affected by the opinion files a claim and proves that he is entitled to recover under the Unemployment Reserves Act, or in the event that the Bureau of Internal Revenue should make a ruling different to the one made by the state.

The federal government, subsequently, did make a ruling contrary to that of the state by a letter dated October 27, 1941, and signed by a deputy commissioner of the treasury department. This letter discusses the background of the agreements and analyzes each of them. The essence of the analysis is that Bemis Enterprise retains sufficient control to make the sublessees employees. It is pointed out that, although there is no contractual obligation to enter into the trust, accounting and service agreements, all of the sublessees entered into such agreements, and that, although the sublessees are not required by the service agreement to purchase their supplies through Pacific States Wholesale Company, and are not required by any contract to execute the accounting or trust agreements, all of the sublessees have uniformly purchased through Pacific and have executed the trust and accounting agreements. The letter also points out that the provision in the printed partnership agreement for capital contributions by the partners is purely formal, as no substantial capital was put up by any partner. The letter analyzes the relationship that Hornstein and Hazlett bore to Bemis Enterprise, and also points out that all subleases are terminable by the Bemis Enterprise. The letter concludes: "It is held, on the basis of the foregoing facts, that the 'lessees' of White Log Coffee Shops are employees of the National Restaurant System and its predecessor organization for purposes of * * * the Social Security Act * * *. Accordingly, the System and the predecessor organization have incurred liability for the taxes imposed * * * with respect to the wages of the 'lessees' * * * in the operation of the restaurants."

On November 18, 1941, or prior thereto, the supervising auditor of the State Department of Employment notified a representative of Bemis Enterprise that he was of the opinion that Bemis Enterprise was subject to the state tax. He stated, however, that he would recommend an abatement of penalties, and also stated that the opinion contained in the letter from the department that Bemis Enterprise was not subject to the tax was "practically ridiculous." These conversations were subsequent to the federal ruling of October 27, 1941, but prior to the date that the state had notice of the federal ruling, which notice the state did not receive until January, 1942.

On this evidence the trial court found that the persons operating the restaurants were not lessees of Bemis Enterprise, but were employees; that the sublease and equipment lease were not bona fide leases that created a leasehold interest between the parties, but that they were so interpreted and applied between the parties so that an employment relationship existed between them; that the trust, accounting and service agreements were, in intent and effect, designed to apply the control of Bemis Enterprise over the personnel operating the coffee shops; that the service men provided for in the service agreement were employees of Bemis Enterprise and inspected and supervised, on a daily basis, the premises and personnel operating the shops for the purpose of applying the control existing in Bemis Enterprise over such personnel.

The Finding that Bemis Enterprise Was the Employer of Those Operating the Restaurants is Supported by the Record.

Before directly discussing the facts, reference should be made to several legal principles that are applicable to the problem presented.

[1, 2] The statute involved is the Unemployment Insurance Act. Deering's Gen.Laws, Act 8780d, Stats. of 1935, p. 1226, Chap. 352, as amended. That statute contains no direct definition of the term "employee," but the cases have discussed this problem. Although some of

the cases seem to have adopted an interpretation that goes beyond the common law definition of the term, B. P. Schulberg Productions v. California Emp. Comm., 66 Cal.App.2d 831, 153 P.2d 404; California Employment Stabilization Comm. v. Sacramento, etc., Ass'n, 68 Cal.App.2d 173, 156 P. 2d 274, the cases decided by the Supreme Court have adopted the rule that the common law distinction between a servant and an independent contractor, namely, the distinction based upon the right of control, is the test under the act. The leading case on this subject is Empire Star Mines Co. v. California Employment Comm., 28 Cal.2d 33, 168 P.2d 686. At page 43 of 28 Cal.2d at page 692 of 168 P.2d the court stated: "The relationship contemplated by the legislation as the basis of the requirement for contributions is that of employer and employee; a principal for whom services are rendered by an independent contractor does not come within the scope of its provisions. [Citing cases.] In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. [Citing cases.]

"Other factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. Rest., Agency, § 220; Cal.Ann. § 220." See, also, Briggs v. California Emp. Comm., 28 Cal.2d 50, 168 P. 2d 696; Twentieth Century Lites v. California Dept. of Employment, 28 Cal.2d 56, 168 P.2d 699; California Employment Stabilization Comm. v. Lund, 76 Cal.App. 2d 567, 173 P.2d 379; Tomlin v. California Emp. Comm., 30 Cal.2d 118, 180 P.2d 342.

[3] Several other legal principles should be mentioned. The motives of Bemis Enterprise in working out the challenged plan of operation are immaterial, the only question being whether there is or is not an employer-employee relationship. California Employment Stabilization Comm. v. Lund, 76 Cal.App.2d 567, 173 P. 2d 379.

[4] It is also the law that, generally speaking, the burden of proof is on the party attacking the employment relationship, Isenberg v. California Emp. Stab. Comm., 30 Cal.2d 34, 180 P.2d 11, or, at least, when a prima facie case of employment has been established, the burden shifts to the one claiming that the so-called employee was in fact an independent contractor. Robinson v. George, 16 Cal.2d 238, 105 P.2d 914.

[5] The problem of whether a person is an employee or an independent contractor is primarily one of fact, but, where uniformity of decision is important, and the essential facts are not in conflict, the question may become one of law. Isenberg v. California Emp. Stab. Comm., 30 Cal.2d 34, 180 P.2d 11.

[6] In the instant case all of the relevant evidence was introduced by stipulation. There is no conflict in the facts, but there is a conflict in the reasonable inferences that may be drawn from those facts. Certainly it is a permissible and reasonable inference that such contracts were carefully drawn by Bemis Enterprise so that it could maintain complete and almost absolute control over the operators of the restaurants. The nature and provisions of the series of contracts, when considered together, are such that control by Bemis En-

terprise seems to be the primary purpose and intent. The state, by such evidence, established a prima facie case of employment. This placed the burden of establishing an independent contractor relationship on Bemis Enterprise. This burden it could have met by showing that in actual practice no control was in fact exercised, and that the parties acted under the contracts and interpreted them so as not to give Bemis Enterprise the right of control. But no such evidence was offered. This being so, the finding of employment is supported.

Appellants consider each of the contracts and attempt to establish that that particular contract does not create an employer-employee relationship. They make their strongest argument in reference to the sublease. They point out that in Empire Star Mines v. California Employment Comm., 28 Cal.2d 33, 168 P.2d 686, the trial court held that a lease very similar to the sublease here involved did not create the employer-employee relationship, and that this holding was affirmed by the Supreme Court. While the lease there involved was quite similar to the sublease here involved, and in fact contained stronger provisions indicating an employment relationship than does the instant case, there are certain very important distinctions between the two cases.

The Empire case involved a leasing arrangement between a mine owner and various miners to whom portions of the mine were leased. On its face the type of lease there executed appeared, even more clearly than the subleases here involved, to create an employer-employee relationship. In the Empire case, as in the instant case, rental was based upon a percentage of gross recovery, the leases were terminable by either party, and the lessees agreed to take care of the leased property and to mine the premises in a satisfactory manner. In addition, the lessees agreed to purchase explosives and fuses from the lessor at cost; the lessees agreed to discharge any of their workmen if the lessor's superintendent found them to be objectionable, although the lessor had no right to select lessees' workmen in the first instance; the lessor stored and shipped the bullion bars for each of the lessees separately and rendered accounts. Other provisions of the leases were very similar to those contained in the subleases here involved. Undoubtedly, the leases in the Empire case, standing alone, would have supported a finding of employment. But the leases did not stand alone. The type of contract there used, and the operations under such contracts, had a long history in the mining industry. The Supreme Court commented upon the fact that, 28 Cal.2d at page 36, 168 P.2d at page 688: "Such contracts were an old practice in the Grass Valley Mining District, the custom having been brought over from Cornwall many years ago", and also pointed out that such leasing arrangements could not have been created to avoid the tax, because they long antedated the statute in question. In addition, there was evidence in the Empire case as to how the parties operated under and interpreted the leases. The trial court found, and the Supreme Court quoted the findings, 28 Cal.2d at page 40, 168 P.2d at page 690, that, as a "matter of practice, the leasers at all times have been entirely independent from any supervision, direction or control by the plaintiff [mining company] of the method, manner or details of the leaser's operations in the leased areas"; that the provisions of the lease authorizing the lessor to enter the leased areas and "to inspect work done in both underground and milling operations * * * did not give the plaintiff [lessor] the right to direct or control the means or methods by which the leasers conduct their mining operations"; that those conditions were imposed to prevent ore stealing, to assure compliance with safety regulations; to assure the lessor that the lessees kept within the leasing boundaries, and to ascertain the direction of ore bodies uncovered; that the lessor "had no right to control, nor has it exercised any control, of the means, details or methods by which the various lease groups conduct sorting and milling operations"; that other provisions of the leases, as mutually interpreted by the lessor and lessees were not construed as giving to the lessor the control of, or the right to control, the details, manner or methods by

which the lessor conducted these operations. The Supreme Court commented on these and other findings at some length, pointed out that the state did not challenge the sufficiency of the evidence to support these findings, and concluded, 28 Cal.2d at page 45, 168 P.2d at page 693: "The testimony concerning the conduct of the parties directly negatives an employment relationship, and taken as a whole, the evidence substantially, if not conclusively, supports the determination of the trial court that the leasers were independent contractors."

[7] These factors serve to distinguish the Empire case from the instant one. Here the trial court has found that the sub and equipment leases were not bona fide; that the trust, accounting and service agreements, furnished by Bemis Enterprise, were "in intent and effect, designed to apply the control in the plaintiffs [Bemis Enterprise] over the said White Log Coffee Shops employee's personnel." There was but little evidence contained in the various stipulations as to actual operations under the contracts, but what evidence appears supports the inference that Bemis Enterprise, under the contracts, not only could but did exercise control. While it is true that Bemis Enterprise was not a party to the partnership agreements, it furnished the forms in all cases where more than one person became the subtenant, and, in all such cases, partnership agreements on these forms were executed. The evidence shows no substantial capital contribution of any of these "partners." While there was no contractual provision compelling the subtenants to enter into the trust, accounting and service agreements, every subtenant did enter into them. The inference is clear that this was done pursuant to an implied understanding between the parties. Although the stipulations do not state that Hazlett, the trustee, and Hornstein, the accountant, were members of Bemis Enterprise, the inference, from their background and source of income, is clear that they were controlled by and part and parcel of that organization. Thus, Bemis Enterprise maintained complete control over the form and methods of accounting, and control over the gross receipts, even having such receipts banked in the name of the trustee. Although under the sublease and the service agreement only "suggestions" could be made by Bemis Enterprise as to the details of operation, and although the stipulations of fact, do not affirmatively state that control was exercised, it being stated that the service men "visited," "observed," "discussed," "suggested," "assisted," "demonstrated," "commented," "inspected," "gave impressions" and the like, it is quite apparent that the inference that the service men, in fact, exercised control over the most minute details of the operations of the coffee shop, is amply supported. They visited each location at least once a day and often twice a day; they "commented" on the conditions they saw and "recommended" how food should be prepared and served, and seasoned, etc. Moreover, it was stipulated that these service men produced new partners and employees, frequently without any request therefor. While the contracts, and the stipulated facts, do not, in so many words, state that Bemis Enterprise had the right to control the operations of the sublessees, the activity and control by Bemis Enterprise of the service organization, its prior and present connections with Hazlett and Hornstein, and the other factors already mentioned, raise more than a mere suspicion that the whole arrangement was conceived by Bemis Enterprise as a method of completely controlling its sublessees while giving the appearance that such sublessees were independent contractors. The record supports a reasonable inference that this was so. It is not form but substance that must control. The whole arrangement is impregnated with factors of control. The record and the reasonable inferences therefrom fully support the finding that these sublessees were the employees of Bemis Enterprise. That organization knew how the parties operated under the contracts and how they interpreted them. If Bemis Enterprise had not in fact controlled the subtenants, it is reasonable to suppose that such evidence would have been produced. No such evidence to rebut the prima facie case established by the state was introduced. This being so, it must be held that

the findings are supported. See, generally, Tomlin v. California Emp. Comm., 30 Cal. 2d 118, 180 P.2d 342; Twentieth Century Lites v. California Dept. of Employment, 28 Cal.2d 56, 168 P.2d 699.

The judgments appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.



SIMPSON et al. v. CITY OF LOS ANGELES et al.*

Civ. 18529.

District Court of Appeal, Second District, Division 1, California.

Feb. 13, 1952.

Rehearing Denied March 3, 1952.

Hearing Granted April 7, 1952

Action by Eva Simpson, and others, individually and as taxpayers and on behalf of all other taxpayers of the City of Los Angeles, and another, against the City of Los Angeles and others, to restrain the enforcement of a city ordinance relating to the regulation of the surrender of unclaimed impounded animals for purposes of medical research. Medical Research Association of California and others intervened. The Superior Court of Los Angeles County, Clarence M. Hanson, J., sustained demurrers to complaint and supplemental complaint and entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Doran, J., held that facts alleged in the complaint were sufficient to state a cause of action.

Judgment reversed and cause remanded with directions.

1. Pleading ⇐214(2)

On demurrer all of the allegations of the complaint which are well pleaded must be taken as true.

* Subsequent opinion 253 P.2d 464.

2. Municipal Corporations ⇐122(1)

Complaint alleging that ordinance relating to regulation of the surrender of unclaimed impounded dogs for purpose of medical research was unfair and confiscatory in that it took private property without compensation and without proper notice to plaintiffs, who identified themselves as taxpayers and owners of licensed dogs which had without owners' fault became estrays and subject to such ordinance, and that health officer had uncontroverted discretion therein was sufficient to state a cause of action. Pen.Code, § 491.

3. Municipal Corporations ⇐604

Proper and reasonable regulation of dogs and other animals by municipality is within the police power.

4. Municipal Corporations ⇐628

A municipality is not unlimited in its legislative authority and the police power cannot be made an excuse for arbitrary interference with or confiscation of private property.

5. Constitutional Law ⇐309(1)

Before a person can be deprived of property some sort of adequate notice and opportunity to be heard must be given.

6. Constitutional Law ⇐70(3)

Judicial tribunals are concerned not with the wisdom of legislation but with its validity.

Brooks Gifford, Pasadena, for appellants.

Ray L. Chesebro, City Atty., William H. Neal, Bourke Jones, Asst. City Attys., Alan G. Campbell, Deputy City Atty., Los Angeles, for defendants and respondents.

Musick & Burrell, Howard Burrell, James E. Bednar, Los Angeles, for intervenor and respondent College of Medical Evangelists.

Stephens, Jones & LaFever, Raymond W. Stephens, Los Angeles, for intervenor and respondent, University of Southern California.

McGinley & Hanson, John P. McGinley, Los Angeles, for intervenor and respondent, Medical Research Ass'n of California.

DORAN, Justice.

This action arose out of the enactment on November 7, 1950 by the electors of the City of Los Angeles of "An Ordinance Adding Subsection (h) to Section 53.11 of the Los Angeles Municipal Code Relating to the Regulation of the Surrender of Unclaimed Impounded Animals for Purposes of Medical Research". The ordinance provides for the surrender of such animals to "reputable institutions of learning, hospitals, research laboratories or their allied institutes in the City of Los Angeles" which have been certified by the Health Officer, and "which he is satisfied will use animals humanely", for the "good of mankind and the increase of knowledge relating to the cause, prevention, control and cure of disease". The ordinance further provides that such unclaimed, impounded animals are to be so surrendered only when applied for by such institutions, and that "In order to give the owners of impounded animals time within which to reclaim the same, no animal shall be surrendered for such use until it has been impounded for a period of at least five days".

The action herein was brought on November 21, 1950, to restrain the City and officers thereof from enforcing said provisions claimed to be unconstitutional and void. After the filing of the original complaint, and on December 18, 1950, a supplemental complaint was filed, alleging that the City Council, on November 29, 1950, had declared the proposed ordinance enacted by the people, to be in full force and effect. Demurrers were sustained to the complaint and supplemental complaint, plaintiffs declined to amend, and judgment was entered for the defendants. The present appeal is from that judgment.

Alleging that the ordinance in question is "unconstitutional and void in that its enforcement will deprive plaintiffs, and others similarly situated, of property without due process of law", the complaint pleads that "the plaintiffs, as the owners of dogs, holding valid licenses, which dogs had become estrayed without fault on the part of their respective owners, were threatened by action planned to be taken by City officials * * *; that said threatened action would take the form of turning over of plaintiffs' property to such institutions of learning, hospitals, research laboratories and their allied institutes, including those organized for profit".

Answering the contention that the ordinance is a valid exercise of the "police power", appellants assert that "It is a police regulation in guise only and the end it seeks is to benefit certain institutions at plaintiffs' expense both as to the owners of dogs and as taxpayers". In this connection it is alleged that in place of being obliged to purchase animals for laboratory experimentation, as was formerly the case, the approved institutions will now receive such material from the city without cost, and thus deprive the city of a considerable income.

The complaint also alleges that the ordinance clothes the Health Officer with "arbitrary and uncontrolled discretion as to which institutions * * * he shall certify * * * as qualified to receive impounded animals", and "fails to prescribe any ascertainable standard by which said Health Officer shall act in the exercise of his power of selection". The only requirement is that the Health Officer shall be satisfied that a particular institution will use the animals "humanely". In re Porterfield, 28 Cal.2d 91, 168 P.2d 706, 167 A.L.R. 675, is here cited, holding that an ordinance which authorizes the granting or withholding of a license in the discretion of a city official, without prescribing an ascertainable standard by which the official is to act, is unconstitutional and void.

Other allegations are that the ordinance violates the penal laws of the state relating to the prevention of cruelty to animals, and Section 155 of the Los Angeles City Charter which enjoins upon the Department of Animal Regulation the duty of enforcing such laws. Irregularities in presenting the proposed ordinance to the voters, are also charged. It is appellants' contention that a cause of action has been stated, and that therefore the "cause should not be decided on the pleadings but on the facts", brought out on a trial of the action.

[1, 2] The judgment in respondents' favor, entered after the sustaining of a

demurrer to the complaint and appellants' refusal to amend, must be reversed. While it may be that some of the allegations in the complaint are immaterial and without merit, enough remains to state a cause of action. As stated in appellants' brief, "The judgment * * * must be reviewed in view of the well-settled rule that, on demurrer, all of the allegations of a complaint which are well pleaded must be taken as true". Whether appellants will be able to prove the alleged material facts is quite another matter, and beside the point.

The ordinance in question, in its present form, is a distinct and radical departure from the previous enactment. Appellants, having identified themselves as taxpayers and as the owners of *licensed* dogs which have, without the owners' fault, become estrays and hence subject to the ordinance, are clearly entitled to question its validity, if any person is so entitled. Respondents' argument that appellants have no standing since it does not appear that any animal belonging to appellants is directly affected, is untenable. As appellants aver, "one of the primary functions of equitable jurisdiction is to restrain the commission of a threatened wrong". This the complaint sought to accomplish at the earliest possible moment, and rightly so.

That dogs are personal property has long been recognized in this state. Section 491 of the Penal Code declares: "Dogs are personal property, and their value is to be ascertained in the same manner as the value of other property." In Roos v. Loeser, 41 Cal.App. 782, 183 P. 204, the court says: "But that day has passed, and dogs now have a well-established status before the law. Considerable sums of money are invested in dogs, and they are the subject of extensive trade. Aside from their pecuniary value their worth is recognized by writers and jurists."

Had the City attempted by ordinance or otherwise to summarily deprive an owner of some other variety of property, or perhaps to confiscate some duly licensed business, such owner's right to question the validity of the regulation cannot be doubted. There is no plausible reason why the owners of licensed dogs should not be entitled to the same privilege and to test the matter on its merits by a trial before the proper court. This the appellants have not been permitted to do.

[3, 4] The complaint and supplementary complaint, whatever their shortcomings, undoubtedly present the question of the validity of the ordinance. It is unnecessary to point out that a municipality is not unlimited in its legislative authority. Notwithstanding the admitted elasticity of the so-called "police power", this cannot be made an excuse for arbitrary interference with or confiscation of private property. Proper and reasonable regulation of dogs and other animals is necessarily well within that power. Whether the present ordinance falls within the category, or whether by its terms it is arbitrary, unfair and confiscatory in that it takes private property without compensation and without proper notice and then gives away the same to private institutions without cost, which institutions are to be arbitrarily approved by the Health Officer, are important questions presented by the complaint.

As stated in appellants' brief, the names and addresses of all owners of licensed dogs are listed with the Department. The ordinance in question prescribes no notice to such owners that the dogs are about to be surrendered for vivisection purposes, but merely provides that "In order to give the owners of impounded animals time within which to reclaim the same, no animal shall be surrendered for such uses until it has been impounded for a period of at least five days". Bearing in mind the fact that in a city of such territorial extent as Los Angeles, there are several animal shelters widely separated and that much time might be spent by an owner in attempting to get trace of a lost dog, it may well be questioned whether five days is an adequate period for search. Again, an owner might be absent from the city for a considerable space of time, well beyond the five-day period, without knowledge that the dog had strayed, only to return and find that, without notice of any kind, the dog, a valuable animal and esteemed household pet, had been turned over to some favored laboratory.

[5] As the owner of valuable property, appellants are entitled to the benefit of the due process constitutional provisions. Without entering into a lengthy discussion of what does or does not constitute "due process", it is axiomatic that before a person can be deprived of property, some sort of adequate notice and opportunity to be heard, are indispensable. Unless the present ordinance can be said to afford such notice or provide reasonable opportunity to reclaim the lost animal, it must be deemed fatally defective. This, indeed, is a crucial question presented by appellants' complaint, and one on which appellants are entitled to a plenary trial.

The complaint presents other equally important questions concerning validity of the ordinance. As hereinbefore mentioned, the ordinance provides for the surrender of animals to "reputable institutions of learning, hospitals, research laboratories or their allied institutes in the City of Los Angeles" which have been certified by the Health Officer, and "which he is satisfied will use animals humanely". The question is raised whether this terminology does not clothe the Health Officer with an uncontrolled discretion, prescribing no standard by which such officer shall act. The ordinance, appellants point out, makes no distinction between public and private laboratories, those organized for profit and non-profit institutions. The only stated requirement is the Health Officer's certificate that a particular institution is deemed "humane" in character. Such an institution is then to be placed in the favored position of being able to obtain laboratory material without cost, whereas under the previous law animals required for experimentation were required to be purchased. From the sale of impounded animals the city derived a substantial income.

A reading of the ordinance as presented in appellants' complaint suggests that it would hardly be possible to make a more general and indefinite designation as to qualifications of the institutions which are to receive this bounty. It is likewise suggested that it would be impossible to conceive of a situation in which an official is clothed with greater latitude or as appellants' phrase it, a more "uncontrolled discretion" than is the Health Officer under the present ordinance.

A legislative trend, of which there are numerous examples, towards clothing some official with quite arbitrary and almost unlimited discretion in determining highly important matters, and usurping both judicial and legislative functions, is to be deplored. The effect of such legislation is to render the judgment, however good or bad, of some one non-judicial officer, supreme and inviolate. Such a theory is un-American in spirit and unauthorized by constitutional law.

Appellants, taxpayers as well as dog owners, are also entitled to raise the question whether the ordinance is not invalid in thus giving away to these approved institutions, public property, (assuming that unclaimed, impounded animals can be deemed public property). The giving away of public property is prohibited by the City Charter.

[6] It is deemed neither necessary nor proper to here enter into a discussion of the merits or demerits of vivisection. Striking examples have been mentioned by appellants of laboratory experimentation which might be classified as cruel and thus violative of Section 597, prohibiting cruelty to animals. Respondents have likewise detailed many examples of highly beneficial medical discoveries made possible by experimentation on animals. Judicial tribunals, however, are concerned, not with the wisdom of legislation but with its validity.

Nothing said herein is intended to intimate or express a view in respect to the ultimate decision to be reached after a plenary trial on the merits of the case. Obviously the result of such a trial must depend upon the evidentiary aspect at that time and the presentation of law and fact to the trial court. All that is decided herein is that adopting a reasonable interpretation of the complaint, a cause of action has been sufficiently stated to entitle appellants to test the validity of the ordinance in question.

The judgment is reversed and the cause remanded, with directions to the court below to overrule the demurrers and allow defendants a reasonable time to answer if they be so advised.

WHITE, P. J., and DRAPEAU, J., concur.



ATKINSON et al. v. PACIFIC FIRE EXTINGUISHER CO.*

Civ. 14796.

District Court of Appeal, First District, Division 2, California.

Feb. 15, 1952.

Rehearing Denied March 15, 1952.

Hearing Granted April 14, 1952.

Action by Hal M. Atkinson and others against Pacific Fire Extinguisher Company for damages sustained when plaintiff's planing mill was destroyed by fire after failure of automatic fire detection system installed by defendant. The Superior Court, County of Alameda, Victor Wagler, J., entered judgment on verdict for plaintiff, and defendant appealed. The District Court of Appeal, Patterson, J. pro tem., held that provision of contract setting liquidated damages at $25.00 in event of loss from failure of service manifested no reasonable endeavor by parties to estimate fair compensation in event of loss and was void.

Judgment affirmed.

1. Contracts ⇐318

Where time is not essence of contract, mere failure to pay or otherwise perform within time stipulated is not ground for forfeiture, and even though time is made essence of contract for payment of rent or other payment of money, when such covenant has been waived by acceptance of rent or other moneys after same is due and with knowledge of fact, such conduct will be regarded as creating temporary suspension of right of forfeiture which can only be restored by giving definite notice of intention to enforce it.

2. Contracts ⇐318

Where contract by which defendant had installed automatic fire detection system in plaintiff's planing mill provided for annual rental payable in monthly installments, acceptance by defendant of overdue payments constituted waiver of strict performance by plaintiff, and precluded assertion by defendant of nonliability, on ground of default of plaintiff in monthly rental installments, for loss from fire when detection system failed to operate.

3. Damages ⇐76

A provision in contract for "limitation of liability" is agreement that liability shall be limited to certain amount without regard to amount of damage actually sustained, while provision for "liquidated damages" is endeavor by parties to agree in advance upon fair compensation for loss which it is anticipated will be sustained by breach.

See publication Words and Phrases, for other judicial constructions and definitions of "Limitation of Liability" and "Liquidated Damages".

4. Damages ⇐78(1)

Provision in contract pursuant to which defendant had installed automatic fire detection system in plaintiff's planing mill that in event of failure of device to perform detection service and resulting loss, defendant's liability should be limited to sum of $25.00 as liquidated damages, and not as penalty, and that such liability should be exclusive, was clear and unambiguous provision for liquidated damages and not limitation of liability. Civ.Code, §§ 1670, 1671.

5. Damages ⇐163(3)

Person who seeks to rely upon liquidated damages provision of contract has burden of showing that at time contract was entered into it was impracticable or extremely difficult to fix damages in event of breach. Civ.Code, §§ 1670, 1671.

* Subsequent opinion 253 P.2d 18.

6. Damages ⇐80(1)

Where defendant contracted to install and maintain automatic fire detection system in plaintiff's planing mill which contained large stock of highly combustible and well vented material, liquidated damages provision of contract which provided sum of $25.00 as damages agreed upon in advance by parties in event of failure of service manifested no reasonable endeavor by parties to estimate fair compensation in event of loss, and was void. Civ.Code, §§ 1670, 1671.

7. Damages ⇐85

Where provision for liquidated damages in event of failure of operation of fire detection system installed by defendant in plaintiff's planing mill was void, plaintiff, upon failure of system and resulting loss from fire, might maintain action for actual damages. Civ.Code, §§ 1670, 1671.

Fitzgerald, Abbott & Beardsley, Oakland, for appellant.

Clark & Heafy, Oakland, Thornton & Taylor, San Francisco, Augustin Donovan, Oakland, for respondents.

PATTERSON, Justice pro tem.

Appeal from judgment for plaintiffs in an action for breach of contract.

Plaintiffs own and operate a planing mill in Oakland, California. On June 5, 1939, they entered into a written contract with defendant company whereby defendant agreed to install and maintain in plaintiffs' mill an automatic fire detection system the purpose of which was to assure the early detection of fires and automatic transmission of fire alarm signals to the Oakland Municipal Fire Alarm System. All equipment necessary for the operation of said system was to be leased to plaintiffs for a period of ten years at an annual rental of $180.00 payable in monthly installments of $15.00. Paragraph 11 of this lease provides, "It is agreed by and between the parties hereto that the lessor is not an insurer, and that the payments hereinbefore named are based solely on the value of the service in the operation of the system described, and in case of failure to perform such service and a resulting loss its liability hereunder shall be limited to and fixed at the sum of $25.00 as liquidated damages, and not as a penalty, and this liability shall be exclusive."

On July 8, 1948, plaintiffs' mill was destroyed by fire. The fire was first discovered shortly after 7 a. m. The flames at that time leaping six to nine feet toward the ceiling. At this time the automatic signal had not operated and the first alarm to the fire department was manually transmitted by one of the plaintiffs' employees. The fire house was close to the location of the plant and there was evidence that the fire department reached the scene of the fire within two minutes after receiving the manual alarm.

The plaintiffs filed a breach of contract action against the defendant company for damages resulting from the fire. Trial was had before a jury which returned a verdict in favor of the plaintiffs and assessing damages at $97,437.00. This appeal is from a judgment entered on the verdict.

Defendant concedes that the question of whether or not it properly maintained the detection system as required by the contract was a question of fact and that the jury, upon a conflict in the evidence, impliedly found in favor of plaintiffs. The defendant, however, raises two questions on appeal: first that there was no liability because the plaintiffs at the time of the fire were in default in two monthly rental installments, and secondly that the liability was fixed by the contract at $25.00.

Defendant's first contention is that there is no liability because at the time of the fire plaintiffs were in default in the payment of the monthly rental installments for June and July of 1948 as called for in the agreement. Plaintiffs admit these payments had not been made but claimed a waiver of strict performance. The only provision in the contract covering default in payments provided that in such case the defendant should have the right to enter the premises and remove the fire detection system. In support of the claim of waiver, evidence was introduced without objection to show that over a period of years the

plaintiffs on a number of occasions were late in their payments. On these occasions the defendant did not remove the system or discontinue the service nor was there any demand for strict performance. There was also testimony that it was the custom for the defendant to bill the plaintiffs each month and generally payments were made after receipt of the statement. Plaintiffs testified they did not receive statements for either June or July although defendant claimed they had been mailed. During the trial the plaintiffs tendered the unpaid installments for the months in question and they were accepted by the defendant.

Defendant complains that excuse for default cannot be relied upon unless pleaded. However, the case was tried upon the theory that excuse was an issue and considerable testimony was received, without objection, upon that point. The defendant itself offered an instruction to the effect that failure to mail the statements would be a valid excuse for such defaults but that the burden of proof for this issue was on plaintiffs. As stated in Vaughn v. Jonas, 31 Cal.2d 586, 191 P.2d 432, 444, "A party cannot permit an issue to be litigated and on appeal escape the consequences by claiming that such issue was not pleaded."

[1, 2] Where, as here, time is not made of the essence of the contract mere failure to pay or otherwise perform within the time stipulated is not ground for forfeiture. Forgay v. Plum, 99 Cal.App. 524, 279 P. 177; 25 Cal.Jur. 608. It is well settled in this state that even "where time is made of the essence of the contract for the payment of rent or other payments of money, and this covenant has been waived by the acceptance of rent or other moneys after they are due, and with knowledge of the facts, such conduct will be regarded as creating 'such a temporary suspension of the right of forfeiture as could only be restored by giving a definite and specific notice of intention to enforce it.'" Stevinson v. Joy, 164 Cal. 279, 285, 128 P. 751, 753; Boone v. Templeman, 158 Cal. 290, 110 P. 947; Miller v. Modern Motor Co., 107 Cal.App. 38, 290 P. 122; Chin Ott Wong v. Title Ins. & Trust Co., 89 Cal.App.2d 183, 200 P.2d 541. The acceptance of overdue payments constituted a waiver of strict performance and the defendant's contention in this respect is without merit.

[3, 4] Defendant pleaded in its answer and now contends that paragraph 11 of the contract is a valid provision for liquidated damages and is also an agreement limiting liability. However a provision for liquidated damages and an agreement limiting liability are different things and are inconsistent with each other. Seid Pak Sing v. Barker, 197 Cal. 321, 240 P. 765. Limitation of liability is an agreement that the liability shall be limited to a certain amount without regard to the amount of damage actually sustained, while a provision for liquidated damages is an endeavor by the parties to agree in advance upon a fair compensation for the loss which it is anticipated will be sustained. It is therefore necessary to determine which classification this agreement falls within. From the plain language of the parties if loss occurred the defendant's liability should be "fixed in the sum of $25.00 *as liquidated damages* and not as a penalty and this liability shall be exclusive." This language is clear and unambiguous. The intent of the parties as stated by them should govern in the absence of something to indicate that a different meaning was intended. Defendant urges that by leaving out the words "as liquidated damages" and the words "and not as a penalty" the agreement would read, "In case of failure to perform such service and a resulting loss its liability hereunder shall be limited to * * * the sum of $25.00 * * *" and the provision becomes a limitation of liability. Such an interpretation would require a rewriting of the contract which the court cannot do. If the provision is to be interpreted as a limitation of liability the words "as liquidated damages" would be entirely unnecessary and ineffectual. It would appear that this is a provision for liquidated damages and not a limitation of liability.

[5] Under the provisions of Civil Code, §§ 1670 and 1671 an agreement which attempts to fix the amount of damages in

the event of breach of an obligation is void except "when from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." Defendant contends that at the time the contract was entered into it was impracticable and extremely difficult to fix the damage and this is a valid provision for liquidated damages. Plaintiffs claim that it was neither impracticable nor difficult to assess the damages. This is a question of fact. Rice v. Schmid, 18 Cal.2d 382, 115 P.2d 498, 138 A.L.R. 589; Petrovich v. City of Arcadia, 36 Cal.2d 78, 222 P.2d 231; City of Los Angeles v. Shafer, 53 Cal.App. 458, 200 P. 384; Consolidated L. Co. v. Los Angeles, 33 Cal.App. 698, 166 P. 385. The burden of showing that at the time the contract was entered into it would be impracticable or extremely difficult to fix damages in the event of a breach is upon the person seeking to rely upon the provision. Rice v. Schmid, supra; Robert Marsh & Co. Inc. v. Tremper, 210 Cal. 572, 292 P. 950; Hanlon Drydock, etc., Co. v. McNear, 70 Cal.App. 204, 232 P. 1002; Sherman v. Gray, 11 Cal.App. 348, 104 P. 1004. This issue was submitted to the jury under proper instructions and the jury impliedly found against the defendants.

[6] Furthermore, as stated in Rice v. Schmid, supra [18 Cal.2d 382, 115 P.2d 500], "A valid liquidated damage clause must, of course, represent a reasonable endeavor by the parties to estimate fair compensation for the loss sustained." Dyer Bros. Iron Works v. Central Iron Works, 182 Cal. 588, 189 P. 445; 3 Williston Contracts, 1936 p. 2192, sec. 779; Restatement of Contracts, sec. 339; 10 Cal. Law Review 8. Under the facts in this case where a large stock of highly combustible and well vented material like piles of lumber are involved and where the damages might run as high as it did in this case there was obviously no reasonable endeavor made to estimate fair compensation in the event of loss. The provision falls short of the requirements of the law.

[7] Where the provision for liquidated damages is found to be void the plaintiff may maintain an action for his actual damages. Los Angeles Olive Growers Assoc. v. Pacific Surety Co., 24 Cal.App. 95, 140 P. 295.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.



109 Cal.App.2d 363

HAEUSSLER v. DE LORETTO.

Civ. 18729.

District Court of Appeal, Second District, Division 3, California.

Feb. 19, 1952.

Action by Harold J. Haeussler against Emil De Loretto, Jr., for damages for assault and battery. The Superior Court of Santa Barbara County, Ernest D. Wagner, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Vallee, J., held that evidence sustained findings that argument had been precipitated by plaintiff, and that defendant had acted in defense of himself and had used reasonable force to such end.

Judgment affirmed.

1. Appeal and Error ⇐1010(1)

In action for damages for assault and battery, wherein defendant pleaded self-defense, determination of which of two parties precipitated fight, whether defendant acted in self-defense, and whether in so doing he used more force than was reasonably necessary under circumstances, was for trier of fact.

2. Appeal and Error ⇐1010(1)
Assault and Battery ⇐13

One who is involved in an altercation with another has right to use such force as is necessary to protect himself from bodily injury, and question of amount of force justifiable under circumstances of particu-

lar case is one for trier of fact. Civ.Code, § 50.

3. Assault and Battery ⇐35

In action for damages for assault and battery committed when plaintiff had gone to home of defendant to inquire about missing dog which had frequently gone to defendant's home, wherein it appeared that altercation ensued in which defendant struck plaintiff, evidence sustained findings that defendant had acted in self-defense as result of argument precipitated by plaintiff, and that defendant had used reasonable force in defense of himself. Civ.Code, § 50.

Canfield & Westwick, George Westwick, Santa Barbara, for appellant.

James M. DeLoreto, Santa Barbara, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment for defendant in an action for damages for assault and battery. The cause was tried by the court without a jury.

The evidence, stated in the light most favorable to the prevailing litigant, discloses that on May 21, 1950, about 10:30 p. m., plaintiff went to the home of defendant, a neighbor, to inquire about his dog which was missing and which frequently had gone to defendant's home. The dog had been the subject of disagreement between the wives of the parties on several previous occasions. When defendant, in response to plaintiff's knock, opened the door, the dog ran out from inside the house. Defendant testified that plaintiff immediately started talking in a loud tone of voice, told him he did not want defendant or his wife to feed the dog or keep it at their house; that plaintiff kept "waving his hands, and while he talked, his face was pretty flushed and he was pretty excited, like he had been drinking, and he kept arguing with me and one word led to another, and I don't know the man, but I do know of him. I know he had trouble with the Teamster's Union and Frowiss and him beat up a couple of friends of mine, and I got a little afraid, and towards the end, after I had asked him to go three times, and he kept waving his hands, I thought he was going to strike me, and I struck him or pushed him, and I went in and closed the door." Plaintiff called the police but no arrest was made nor was any criminal action had.

The court found that plaintiff precipitated the argument; defendant ordered plaintiff to leave his premises; plaintiff advanced threateningly toward defendant; defendant struck him once; two of plaintiff's teeth were loosened, necessitating dental care; defendant used reasonable force in defense of himself and in removing plaintiff from his premises; plaintiff failed to prove by a preponderance of evidence that defendant used or attempted to use wilful and unlawful force upon the person of plaintiff.

[1–3] The issue of self defense was pleaded by defendant and litigated. The determination of which of the two parties precipitated the fight, and whether defendant acted in self defense, and whether in so doing he used more force than was reasonably necessary under the circumstances, were questions for the trier of fact. Landegren v. Quilici, 52 Cal.App.2d 213, 216, 126 P.2d 141. One who is involved in an altercation with another has the right to use such force as is necessary to protect himself from bodily injury, and the question of the amount of force justifiable under the circumstances of a particular case is also one for the trier of fact. Civ.Code, § 50; Ballew v. Davis, 76 Cal.App.2d 418, 420, 173 P.2d 317; McLean v. Colf, 179 Cal. 237, 238–239, 176 P. 169; Fawkes v. Reynolds, 190 Cal. 204, 212, 211 P. 449. As the court found that defendant used reasonable force in defense of himself, it necessarily follows the force used was not wilful or unlawful and that plaintiff failed to sustain the burden of proof. Since the conflicts in the evidence were resolved in defendant's favor, and the foregoing narration of the evidence supports the findings, this court may not disturb the judgment.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

WESTERN SURGICAL SUPPLY CO., Ltd. v. AFFLECK et al.

Civ. 7941.

District Court of Appeal, Third District, California.

Feb. 8, 1952.

Rehearing Granted March 7, 1952.

See 242 P.2d 929.

Proceeding for a writ of mandate to restrain the members of the State Board of Pharmacy, a public agency of the Department of Professional and Vocational Standards, from enforcing certain alleged orders and regulations of the Board. The District Court of Appeal, Schottky, J. pro tem., held that proceedings brought by the Board in various municipal courts for alleged violations of certain sections of the Health and Safety Code and the Business and Professions Code by petitioner were not for judicial enforcement of administrative regulations or orders of the Board, but for enforcement of statutory penal provisions, so as to preclude issuance of the writ.

Peremptory writ denied, and alternative writ discharged.

1. Mandamus ⇐99

While mandate is proper proceeding to test validity of regulations adopted by administrative board not exercising judicial functions, proceedings brought by state Board of Pharmacy in municipal courts by filing notices of, and, complaints charging, violations of certain sections of Health and Safety Code and Business and Professions Code by wholesale surgical supply company, were not for judicial enforcement of Board's administrative regulations or orders, but for enforcement of statutory penal provisions, so as to preclude issuance of writ of mandate to restrain such proceedings. Business and Professions Code; Health and Safety Code.

2. Criminal Law ⇐210

The Penal Code section, providing for commencement of prosecution for misdemeanor by complaint under oath, does not restrict making of complaint to any certain person or official, but it may be made by any person having knowledge of facts constituting offense charged. Pen.Code, § 1426.

3. Criminal Law ⇐216

Whether complaint charging misdemeanor is sufficient and whether warrant of arrest will issue are matters resting with court, as are proceedings and ultimate disposition of case. Pen.Code, § 1427.

4. Estoppel ⇐62(2)

The state Board of Pharmacy's failure to inform surgical supply company, at meetings with wholesale drug dealers, that law required company to sell dangerous drugs and other supplies used by physicians, dentists, etc., only through registered pharmacists, did not estop Board from bringing proceedings against company in municipal courts for violations of such requirement, as state agencies or officials cannot waive penal laws of state. Business and Professions Code; Health and Safety Code.

5. Estoppel ⇐62(2)

A board or official has no power to waive or consent to violation of penal provisions in Health and Safety Code and Business and Professions Code. Business and Professions Code; Health and Safety Code.

6. Estoppel ⇐62(2)

State officers' failure to enforce any law never estops People from enforcing such law.

7. Mandamus ⇐172

Whether wholesale surgical supply company violated Pharmacy Act, Dangerous Drug Act, and Poison Act by selling dangerous drugs and poisons to professional classes through others than registered pharmacists, and whether such acts are unconstitutional, cannot be considered by District Court of Appeal in proceeding for writ of mandate to restrain members of state Board of Pharmacy from enforcing alleged orders and regulations thereof by criminal proceedings in municipal courts for violations of Health and Safety Code and Business and Professions Code. Business and Professions Code; Dangerous Drug Act; Health and Safety Code; Pharmacy Act; Poison Act.

8. Prohibition ⇐28

Generally, question whether act of one petitioning for writ of prohibition constituted violation of statutes must be raised on trial of issues.

9. Prohibition ⇐10(1)

Where normal remedies are inadequate, constitutionality of statute or ordinance may be tested by prohibition on ground that invalidity of legislation goes to court's jurisdiction to try case.

10. Prohibition ⇐10(1)

Where prohibition is proper to test validity of statute, trial court must appear to have passed on its own jurisdiction.

11. Courts ⇐39

A court has jurisdiction to determine its own jurisdiction, for basic issue in any case before court is its power to act.

12. Abatement and Revival ⇐3

A trial court's jurisdiction must be challenged in that court by demurrer, motion, plea, or other objection of some kind, so that court may preliminarily decide whether it has jurisdiction to proceed.

13. Prohibition ⇐10(1)

A higher court cannot prohibit lower court from acting under invalid statute, unless a party shows that lower tribunal, after first determining that it has jurisdiction, is proceeding to excercise it.

Sheppard, Mullin, Richter & Balthis, Los Angeles, Mull & Pierce, Sacramento, for appellant.

Carl W. Wynkoop, Deputy Atty. Gen., for respondents.

SCHOTTKY, Justice pro tem.

Petitioner seeks a writ of mandate to restrain the respondents, as members of the State Board of Pharmacy from enforcing certain orders and regulations which petitioner alleges are unlawful and void. This court accepted jurisdiction over the issues raised by the petition and the return, and restrained respondents from further enforcement of the orders pending final determination of this proceeding. The order also provided for the appointment of a Referee to take evidence and make findings. Following the taking of testimony the Referee made and filed his Findings of Fact which are supported by the record and which we adopt.

Petitioner is a corporation whose central office is in Los Angeles with branch places of business in Pasadena, Long Beach, San Bernardino, San Diego, Sacramento and San Francisco. It is engaged in the business of wholesale distribution of certain drugs defined as "dangerous drugs" in the Health and Safety Code, and other supplies and equipment used by physicians, surgeons, dentists, hospitals, chiropodists, veterinarians, laboratories and chiropractors. Between June 9 and July 11, 1950 the respondent Board of Pharmacy served on petitioner notices of violation and simultaneously filed thirty-three complaints containing a total of seventy-six counts in the various municipal courts charging violations of certain sections of the Health and Safety Code and of the Business and Professions Code. The acts charged were:

1. That petitioner sold a drug classified as a dangerous drug to a person or persons who were registered pharmacists without a prescription;

2. That it had, without acting through an employee who was a registered pharmacist, sold iodoform gauze, sterile water, zinc oxide ointment, tannic acid ointment, soda bicarbonate to a person who was a registered pharmacist without a prescription;

3. That it had sold schedule "A" poisons without registering the sale thereof;

4. That it had sold to a person who is a registered pharmacist a hypodermic needle, without recording the sale in a book.

Each of these acts with which petitioner is charged involved transactions between petitioner and certain inspectors employed by respondent Board. All of the inspectors are registered pharmacists. It was unknown to petitioner that these men were agents of respondent Board.

The above proceedings were an outgrowth of a policy decision by the respondent Board in October 1949, to require

registered wholesalers to have registered pharmacists on duty at all times.

Petitioner makes five contentions in support of the petition:

1. The action of respondent Board in prosecuting petitioner is illegal and immoral and the Board is estopped by its conduct from giving effect to such a construction of the Pharmacy Law.

2. The chapter of the Business and Professions Code dealing with pharmacy is ambiguous.

3. A proper construction of the Pharmacy Act leads to the conclusion that wholesalers are not required to conduct sales to the professional classes through registered pharmacists.

4. To give the Pharmacy Law the interpretation advocated by respondent would make it unconstitutional.

5. That the action of the Pharmacy Board amounts to an amendment of the Statutes involved by administrative fiat.

We granted the alternative writ of mandate because it appeared that serious questions were presented concerning the validity of certain regulations and orders purportedly adopted by the Pharmacy Board, and to also determine whether the respondent Board was estopped to assert such regulations and orders against petitioner. These questions are now eliminated by the Findings adopted by the Referee. The Referee has found that the respondent Board has not adopted rules, regulations, or orders respecting the matters here in dispute. It also is clear that there has been no proceeding before the Pharmacy Board charging petitioner with the violation of its regulations or orders.

[1–3] While mandate is a proper proceeding to test the validity of regulations adopted by an administrative Board not exercising judicial functions, the action taken by the respondent Board and its individual members does not fall within this category. It is true that respondent Board has asserted that petitioner violated certain sections of the Health and Safety Code and Business and Professions Code. Pursuant to this belief, notices of violations were served upon petitioner, and the Board, through its employees, has caused various criminal complaints to be filed against the petitioner which charge a violation of these sections. The respondent Board has taken no administrative action against the petitioner, i. e. proceedings to revoke licenses, etc.

The various criminal proceedings now pending in the municipal courts charge violations of certain sections of the Health and Safety Code and the Business and Professions Code. Such violations are denominated misdemeanors under these Codes. Under Section 1426 of the Penal Code, the prosecution of misdemeanor cases is commenced by complaint under oath. This section does not restrict the making of a complaint to any certain person or official; It may be made by any person having knowledge of the facts constituting the offense charged. Whether the complaint is sufficient, or whether a warrant of arrest will issue are matters resting with the court as are the proceedings and the ultimate disposition of the case. Penal Code, Section 1427; People v. Barnhart, 37 Cal. App.2d Supp. 748, 94 P.2d 411. In any event, the Pharmacy Board, or its employees who signed the complaints, are not exercising judicial functions in respect to the proceedings pending in the municipal courts, and such proceedings are not the judicial enforcement of administrative regulations or orders, but rather the enforcement of penal provisions adopted by the legislature.

[4–6] The petitioner contends that the action of respondent Board is estopped by its conduct from giving effect to such a construction of the pharmacy law. In support of this contention petitioner refers to various conferences at which wholesale dealers and members of respondent Board were present, and that at such meetings the Board or its members or employees did not inform petitioner that the law required it to sell only through registered pharmacists, and that the Board by its conduct sanctioned the method of petitioner's operation. Petitioner relies upon Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323. It was there held that

the filing of a claim against a county or other governmental agency is a condition precedent to his cause of action, but that the time requirement of the claim statute is procedural and may be executed by estoppel.

Petitioner's contention on estoppel amounts to an assertion that state agencies or state officials may waive the penal laws of this state. We find nothing in the Farrell case, supra, or other cases cited by petitioner which would support this contention. The Penal provisions contained in the Health and Safety Code and the Business and Professions Code were enacted by the legislature, and it is beyond the power of any Board or official to waive or consent to a violation of such provisions. In Caminetti v. State Mut. Life Ins. Co., 52 Cal.App.2d 321, 126 P.2d 165, the appellant insurance company contended that the Insurance Commissioner was estopped to take over the company because the Commissioner and his predecessors in office knew of the practices of the company in previous years and had failed to take action against it. The court stated in 52 Cal.App.2d at page 326, 126 P.2d at page 168: "To state the contention is to state its impossibility. To govern themselves, the people act through their instrumentality which we call the State of California. The State of California functions through persons who are for the time being its officers. The failure of any of these persons to enforce any law may never estop the people to enforce that law either then or at any future time. It would be as logical to argue that the people may not proceed to convict a defendant of burglary because the sheriff perhaps saw him and failed to stop him or arrest him for another burglary committed the night before. State ex rel. Fishback v. Glove [Globe] Casket & Undertaking Co., 82 Wash. 124, 143 P. 878, L.R.A.1915B, 976; Department of Insurance v. Church Members R. Assn., 217 Ind. 58, 26 N.E.2d 51, 52, 128 A.L.R. 635; Mullan v. State, 114 Cal. 578, 587, 46 P. 670, 34 L.R.A. 262." See also Magruder v. City of Redwood, 203 Cal. 665, 675, 265 P. 806; Fleming v. Miller, D.C., 47 F.Supp. 1004, 1008.

[7–13] The petitioner contends that a proper construction of the Pharmacy Act, the Dangerous Drug Act, and the Poison Act, does not require wholesalers to have a registered pharmacist when selling to the professional classes. It is also contended that the various acts as construed by the respondent Board are unconstitutional for numerous reasons.

Whether petitioner has violated the various acts, or whether those acts are unconstitutional, are questions beyond the scope of this proceeding. As previously observed, we granted the alternative writ of mandate to ascertain if the Pharmacy Board had adopted regulations or orders respecting the subject matter here involved, and to pass upon the validity of such regulations. Upon the conclusion that the Pharmacy Board is not asserting its regulations against petitioner, a determination as to the validity of the statutes involved would amount to an unwarranted interference with the criminal proceedings now pending in the municipal courts. Our conclusion would be the same if we consider the petition one for prohibition rather than mandate. As a general rule, the question of whether petitioner's acts constitute a violation of the statutes must be raised upon the trial of the issues. Walsh v. Railroad Commission, 16 Cal.2d 691, 694, 107 P.2d 611. Where normal remedies are inadequate "the constitutionality of a statute or ordinance may be tested by prohibition on the ground that invalidity of the legislation goes to the jurisdiction of the court to proceed to try the case." Rescue Army v. Municipal Court, 28 Cal. 2d 460, 462, 171 P.2d 8, 10. Such proceeding in prohibition are directed against the court attempting to act under the invalid statute. In the proceeding before us, the municipal courts are not parties. Where prohibition is proper to test the validity of a statute, it must appear that the trial court has passed upon its own jurisdiction. In Rescue Army v. Municipal Court, supra, the record showed that the petitioner had been tried twice for violation of a statute and the case had been set for trial a third time. Under those facts it

sufficiently appeared that the trial court had passed upon its own jurisdiction. The court stated 28 Cal.2d at page 464, 171 P.2d at page 11: "A court has jurisdiction to determine its own jurisdiction, for a basic issue in any case before a tribunal is its power to act, and it must have authority to decide that question in the first instance. It is necessary, therefore, to challenge the jurisdiction of the trial court *in that court,* by demurrer, motion, plea or other objection of some kind, so that *that court* may preliminarily decide the question whether it has jurisdiction to proceed. And unless a party can show that a lower tribunal, *after first determining that it has jurisdiction, is proceeding to exercise it,* there is nothing for a higher court to prohibit. This obvious principle is one of the cornerstones of our system of lower and higher tribunals."

In view of the foregoing we conclude that the peremptory writ should be and it is hereby denied, and that the alternative writ heretofore issued is discharged.

PEEK, and VAN DYKE, JJ., concur.



109 Cal.App.2d 291

DE ROSIER v. VIERRA.

Civ. 8017.

District Court of Appeal, Third District, California.

Feb. 15, 1952.

Action by Del DeRosier against John Vierra for value of services rendered and upon an open book account for the same amount, wherein defendant filed a cross-complaint. The Superior Court, Sutter County, Arthur Coats, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Schottky, J., held that the evidence sustained finding that there was an implied promise on part of defendant to pay for services rendered.

Affirmed.

1. Appeal and Error ⇐996, 1010(1)

Before an appellate court is justified in reversing a judgment upon ground of insufficiency of evidence, it must appear from record that, accepting full force of evidence adduced, together with every inference favorable to prevailing party which may reasonably be drawn therefrom, the law precludes prevailing party from recovering a judgment.

2. Work and Labor ⇐28(2)

In action for value of services rendered in leveling tract of land which plaintiff had previously leveled for defendant and had been compensated therefor, evidence sustained finding that there was an implied promise on part of defendant to pay for second job.

3. Work and Labor ⇐4(2)

When work is done by one for benefit of another, with latter's knowledge or approbation, the law will imply a promise to pay for work done, unless it appear that there was an understanding that no compensation should be given.

4. Work and Labor ⇐28(6)

In action for services rendered in leveling tract of land which plaintiff had previously leveled for defendant and had been compensated therefor, evidence sustained finding that work done on second job was not materially defective.

5. Appeal and Error ⇐989

When a judgment is attacked as being unsupported by evidence, power of appellate court begins and ends with a determination as to whether there is substantial evidence, contradicted or uncontradicted, which will support conclusion reached by trial court.

Goldstein, Barceloux & Goldstein, Chico, for appellant.

Hewitt & McBride, Yuba City, for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff and respondent commenced an action against defendant and appellant, the complaint containing two counts: (1) for $1688.80 as the reasonable value of work, labor and services in the nature of land planing, scraping, ripping and surveying, at the special instance and request of defendant; and (2) upon an open book account for the same amount.

Defendant filed an answer denying the material allegations of the complaint, and also filed a cross-complaint in which he alleged that plaintiff agreed to level a 52 acre tract of land for defendant in such a good workmanlike manner that the entire tract could be irrigated by water poured thereon at a point designated by defendant previous to beginning the work; that plaintiff so negligently performed the work that defendant was unable to irrigate the land from said predesignated point; that after the work was done, defendant planted a bean crop but because of being unable to irrigate defendant was deprived of a bean crop which would have yielded 891 sacks more than were actually yielded, the sacks being worth $4.00 each, and the total profit would have been $3,564.00; that thereafter defendant planted the tract to barley, and while the barley was growing and immature, plaintiff offered to come in and level the land on condition that plaintiff be allowed to do so without delay and that defendant should, and he did, plow under the growing barley; that the plaintiff entered and so negligently performed the leveling that the defendant was unable to irrigate from the predesignated point; that as a result defendant lost 900 sacks of barley at $1.25 a sack and a total of $1125.00; that as a result of the excessive plowing, working and leveling of the land caused by plaintiff's negligence, defendant suffered damage to his land in the sum of $100.00 an acre and total of $5200.00; that by reason of defendant's being unable to irrigate he was unable to raise crops in 1948 and 1949 at a profit of $3500.00 for each of those two years, and therefore he was damaged in the sum of $7000.00. Defendant prayed judgment for $16,889.00 upon his cross-complaint.

Plaintiff denied all of the material allegations of the cross-complaint, and, following a trial before the court without a jury, the court found that the allegations of the complaint were true and those of the cross-complaint were untrue. Judgment was entered for plaintiff in the sum of $1688.80, interest and costs, as prayed for in the complaint. Defendant's motion for a new trial was denied, and defendant has appealed from the judgment.

Appellant bases his argument for a reversal of the judgment upon the following points: (1) There is no substantial evidence from which an implied promise to pay for the work done in May and June, 1949, may be deduced; and (2) The work done in May and June, 1949, was itself materially defective, there being no substantial evidence to the contrary, and therefore defendant did not become bound to pay the reasonable value thereof.

[1] It is a rule too well established to require the citation of authorities that before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may reasonably be drawn therefrom, it still appears that the law precludes the prevailing party from recovering a judgment. The evidence must be construed most strongly against the losing party. Every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. The prevailing party's evidence must ordinarily be accepted as true, and evidence which is contradictory to it must be disregarded.

Bearing in mind this familiar rule, which, we are constrained to state, is too often disregarded by counsel who insist upon arguing conflicting evidence before an appellate tribunal, we shall summarize briefly the evidence as shown by the record.

The controversy arose out of the fact that plaintiff, a land leveler by occupation, had leveled several pieces of land for defendant. In the fall of 1947 defendant

asked plaintiff to level a 70 acre tract which he did and defendant paid therefor without complaint. Adjoining the 70 acre tract, defendant owned a 52 acre tract and asked plaintiff to level that tract and to grade it for irrigation from a pipe line located at the north end of the track. According to the testimony of plaintiff, he viewed the 52 acre tract and advised defendant it could not be leveled for irrigation due to so much vegetation that would result in settling and causing low spots. That despite his advice, defendant insisted that plaintiff try to accomplish the leveling and grading. Plaintiff told defendant the tract was not in shape to survey, due to roughness, and again repeated that the tract was not susceptible to grading, whereupon defendant agreed to and did attempt to improve the tract himself so it could be surveyed for grading and leveling. Thereafter, and at defendant's insistence, plaintiff leveled and graded the tract as best he could and defendant paid for the job, without apparent complaint.

We come now to the precise controversy involved in this appeal. According to plaintiff, defendant, in the month of May, 1949, asked plaintiff to return to the 52 acre tract and again level and grade it. Again plaintiff told defendant the land could not be leveled and graded due to vegetation that would surely result in settling, and that the job would not be satisfactory. But defendant insisted and so plaintiff worked over the same 52 acre tract again.

Defendant claimed plaintiff did the job over to correct his defective first job for which defendant paid without complaint, and therefore defendant should not be required to pay for the corrective second job. Plaintiff denied that he ever agreed to do the work over again to correct the first job. He admitted that when he started the second job nothing was said about the cost thereof or whether defendant would pay for it, but he argues that there was an implied promise on defendant's part to pay for the second job.

[2, 3] As hereinbefore stated the trial court found in favor of plaintiff on all of the issues and this necessarily included a finding that there was an implied promise on the part of defendant to pay for the second job. Defendant and appellant argues that there was no substantial evidence from which an implied promise to pay for the second job could be deduced. We are unable to agree with this contention. Furthermore, even in the absence of an express agreement, the rule is as stated in the early and frequently approved case of Moulin v. Columbet, 22 Cal. 508, at page 510: "When work is done by one for the benefit of another, with his knowledge or approbation, the law will imply a promise to pay for it, unless it appear that there was an understanding that no compensation should be given."

And in Lloyd v. Kleefisch, 48 Cal.App.2d 408, 412, 120 P.2d 97, 99, the court said: "'* * * When services are rendered by one person, from which another derives a benefit, although there is no express contract or agreement to pay for the services, there is a "presumption of law which arises from the proof of services rendered, that the person enjoying the benefit of the same is bound to pay what they are reasonably worth." Moulin v. Columbet, 22 Cal. 508, 509.'"

[4] As to appellant's contention that the work done in May and June, 1949, was materially defective and that there was no substantial evidence to the contrary, it suffices to say that the trial court found against this contention and that there is ample evidence in the record to sustain the finding. The trial judge heard the testimony and observed the witnesses, and while it is apparent from a reading of the transcript of 235 pages that the case was hotly contested and that the evidence was highly conflicting, we are convinced that there is substantial evidence to support the conclusion of the trial court on all of the issues of the case.

[5] It is elementary that when a judgment is attacked as being unsupported by the evidence, the power of an appellate court begins and ends with a determination as to whether there is substantial evidence,

contradicted or uncontradicted, which will support the conclusion reached by the trial court. Juchert v. California Water Service Co., 16 Cal.2d 500, 503, 106 P.2d 886.

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.



109 Cal.App.2d 352

SIERRAVILLE COMMUNITY CHURCH v. McKENZIE et al.

Civ. 7989.

Sac. 6167.

District Court of Appeal, Third District, California.

Feb. 18, 1952.

The Sierraville Community Church, a non-profit corporation, brought action against Elizabeth McKenzie and others to establish ownership of church property, and the defendants filed a cross-complaint claiming to be the owner of the church property. The Superior Court of Sierra County, McIntosh, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Van Dyke, J., held that those who executed deed of church property to plaintiff were not trustees of corporation and that their deed was ineffective to transfer to plaintiff any interest in the property.

Judgment reversed.

1. Religious Societies ⇐34

Mere fact that nine months after organization of church a lay corporation of similar name was organized, did not result in a merger of the church and the corporation, and the two continued to coexist.

2. Religious Societies ⇐25

Evidence established that persons who executed deed conveying church property, purporting to act as trustees of defunct corporation, were not trustees and that their deed was ineffective to transfer church property.

Lowell & Lowell and John R. Couzens, all of Auburn, for appellants.

John L. LaRue, Nevada City, for respondent.

VAN DYKE, Justice.

This action was brought by Sierraville Community Church, a non-profit corporation, against "Pilgrim Congregational Church of Sierraville, by its trustees" and others. By the complaint it was alleged that the plaintiff was interested in certain real property located in Sierra County which it claimed to own by virtue of a written instrument, and that a controversy existed between it and the defendants in the action; that the defendant Pilgrim Congregational Church of Sierraville was founded and incorporated on or about the 20th day of May, 1885 as a California corporation with a term of existence of 50 years, which expired May 19, 1935; that the alleged written instrument, a deed, dated October 21, 1948, had been executed by trustees of the defendant corporation; that just prior to the execution of the deed and on October 21, 1948 a certificate of revivor of the defunct corporation whose term of existence had so expired was issued by the Secretary of State, but that the revivor proceedings were null and void. An answer denying ownership by plaintiff was filed by "Pilgrim Congregational Church of Sierra Valley by its Trustees". Notwithstanding the slight difference in name it appears from the allegations of both the complaint and the answer that the same corporation was intended. By a cross-complaint the said defendant alleged itself to be a non-profit corporation and in this respect, apparently depending upon the validity of certain revivorship proceedings, claimed to be the owner of the real property involved and asked that its title thereto be quieted against the claims of plaintiff. It appears that the property involved consists of ap-

proximately an acre of ground upon which there is a church and parsonage. The trial court found in favor of plaintiff and in respect of said revivorship proceedings found that the same were null and void. It was found that the plaintiff owned the property by virtue of the alleged deed and that the deed had been executed by trustees of the defunct corporation, which trustees had been elected at a meeting of the members of that corporation and that the trustees so elected were authorized to execute the conveyance. Judgment was accordingly given in favor of plaintiff, adjudging it to be the owner of the property involved and by virtue of the deed the successor in interest to the defunct corporation. From that judgment this appeal was taken. Elizabeth McKenzie and Gertrude Seabury were joined as defendants and joined in the answer and cross-complaint. They alleged themselves to be members of the defunct corporation and trustees thereof and interested in the subject of the action and they prayed that the alleged deed be canceled. It appears that the plaintiff and respondent relies upon the theory that the title to the property had vested in the non-profit corporation, that the corporate term of existence had expired, that thereafter proceedings were taken to appoint trustees of the defunct corporation and that these trustees had conveyed the property to respondent. It appears that it is the theory of appellants that the proceedings for the election of trustees of the defunct corporation were invalid and hence that the persons purporting to act as trustees and to convey the property to respondent were without authority so to do. We think that the contentions of appellants must be sustained and that this is made clear when the record is considered, even though all intendments in support of the trial court's judgment are indulged, as on appeal they must be.

There was received in evidence a book entitled "Record of Pilgrim Cong'l. Church. Sierra Valley, Cal." wherein is set forth under date of August 17, 1884 the proceedings taken in organization of a Congregational church in Sierra Valley. At that meeting the church's confession of faith, the covenant, and the constitution were adopted. There appears to be no doubt that by the proceedings taken at that meeting there was formed an unincorporated association, religious in character, and constituting a Congregational church. The constitution so adopted provides that the name of the church shall be the "Pilgrim Congregational Church of Christ in Sierra Valley". Its government was fixed "in the body of believers who compose it" and it was declared to be "amenable to no other ecclesiastical body". It was declared that the church would control its own affairs, but would recognize the obligation and privilege of the communion of churches. It was provided that all persons might become members of the church who gave evidence of piety and who assented to the confession of faith and covenant. A proceeding was established for induction into the church, for the trial of offenders, their punishment, and for dismission from the church. Its officers were declared to be the pastor, deacons, clerk, treasurer, superintendent of the Sabbath school and trustees. The various duties of the officers were outlined. The church so organized was an unincorporated religious association.

Under date of May 11, 1885 one Buxton, as grantor, executed a grant deed to the "Pilgrim Congregational Church of Sierra Valley, Sierra Co. Cal", stated to be "the *corporate* party of the second part". (Emphasis ours.) This deed conveyed to the grantee the real property in dispute. The deed was recorded May 18, 1885. On May 18, 1885 there was filed in the office of the County Clerk of Sierra County the articles of incorporation of the "Pilgrim Congregational Church of Sierra Valley", the defendant-appellant herein. The declared purpose of the corporation was the promotion of religious worship in Sierra Valley, the owning of not more than 20 acres of land and the building of churches and parsonages thereon. Its term of existence was fixed at 50 years from incorporation. On May 20, 1885 the Secretary of State issued his certificate certifying that a copy of the articles of incor-

poration had been filed in his office on that date. The record does not contain any by-laws that may have been adopted by the corporation, nor any other corporate records save the articles referred to.

It appeared from the testimony taken that church activities were regularly carried on by the church for a very long time and some witnesses testified that these activities continued to some extent without cessation. It is not denied that during all of the time here involved there were members of the church; and while there was dispute as to whether some persons were or were not members and as to when they became members, there is none that the church ever ceased to have members and that it still has them.

[1] While the witnesses who testified seemed to have been somewhat confused as to the relationship between the corporation and the church, we think that from the whole record it is clear as a matter of law that there never was any merging of the church with the corporation and that each continued its separate existence, the church to the present time, the corporation until May 20, 1935, at which date by the expiration of its term of existence it ceased to exist as a corporation. The evidence discloses a record of church activity as a church without reference to the corporation; and of course the corporation was in no wise necessary to church existence and activity. Even the names of the two organizations differ, the one being "The Pilgrim Congregational Church of Christ in Sierra Valley", the other being the "Pilgrim Congregational Church of Sierra Valley". The church organization was undoubtedly a part of that system of church organization which for centuries has been known as "Congregational", distinguished because it customarily "vests all ecclesiastical power in the assembled brotherhood of each local church" (Webster's Int. Dict.); and it cannot be held, merely because some nine months after its organization a lay corporation of similar name was organized, that there was in any sense any merger of the two organizations and it must result that the two continued to coexist.

It appears that long ago there was erected upon the subject property a church and parsonage and that this property and the improvements were continuously used for church purposes by the church. The minutes of church meetings show the raising and expending of church money for construction, maintenance, repair of the church and parsonage and the insurance of the buildings against damage by fire. There is nothing in the record as to any activity by the corporation, save only its incorporation and its taking of title, up to and for long after the corporation's term of existence had expired. The church records nowhere mention the corporation and as to corporation records we have said that other than the articles there are none.

It further appears that at least some of the officers of the church were active in the creation of the corporation. At the meeting which organized the church Aaron Davis, William Tait, Thomas West, William Arms and Jacob Knuthsen were elected trustees of the church property. When, nine months later, the corporation was organized we find that those who were to act as the first directors included William Tait, Aaron Davis and William Arms. We think nothing more can be gleaned from the record on appeal respecting the interrelationship of the church and the corporation. It appears altogether likely that the title taken by the corporation through the deed from Buxton to it was merely a naked title taken by it as trustee for the church for the more convenient handling of the property and the temporal activities in connection therewith. But while this appears to be likely, yet the proof is not sufficient to warrant a finding to that effect and from the whole record it must be concluded that the title rested wholly in the corporation.

Turning again to the theory of respondent that the deed under which it claims title to the subject property was validly executed by duly elected and authorized trustees of the defunct corporation, we find that the meeting actually noticed and held, at which meeting respondent claims these trustees were elected, was a meeting of the members of the church and not a meet-

ing of the members of the defunct corporation. Every witness who attended that meeting declared in effect that it was a meeting of the members of the church. Thus Mr. Diltz, one of the two who purported to execute the deed in controversy as a trustee of the defunct corporation, said that at the meeting he was made "a Trustee of the Pilgrim Congregational Church of Sierra Valley * * *; that the purpose of the meeting was to reorganize the Pilgrim Church"; that he became a member of the Pilgrim Church at the first part of the meeting and later on at the same meeting the name was changed; that he was voted into the Pilgrim Church and then the name was changed. He testified that there were nine or ten persons present. A Mr. Strang attended the meeting. He said that his wife and others had worked nearly all winter to find out who the members of the Pilgrim Congregational Church were and that at the meeting it was voted to revive the old Pilgrim Church; that it was then resolved that the name of the church be changed. He testified that he became a member of the Pilgrim Church at the meeting, being accepted by a vote of the congregation at that time and that he ceased to be a member of the church at the same meeting. Mrs. Carrie Diltz testified that she attended the meeting; that she was not a member of the church until the meeting, but belonged to the Community Church in Loyalton. Mrs. Turner testified that she, too, had attended the meeting and became a member of the Pilgrim Church thereat, ceasing to be a member on the same day because of the change of name of the church. Mr. Church, who also as a trustee executed the deed in question, testified that he attended the meeting, becoming a member of the church thereat. Appellant Elizabeth McKenzie testified and through her there was introduced in evidence the records of the church. She did not attend the meeting and testified she had no knowledge of the deed until after it had been made and delivered. Ruth Avignone testified that she had been a member of the church since 1910 or 1912; that she first learned of the deed in December, 1948, and had no notice of the meeting. Erma Strang, a witness for respondent, testified that at the time of what she referred to as "the reorganization" she had contacted older people in the community to find out the names of the members of the church and that such persons as they were informed were members were sent letters. She gave the names of some to which she had written and testified that there were others she did not write to because she did not believe them to be members of the church; that persons who were notified of the proposed meeting were sent proxy forms whereby they could authorize another person to vote their "membership at a reorganization meeting". Mrs. Strang also testified that she joined the Pilgrim Church at the meeting and thereafter and at the same meeting ceased to be a member thereof "when the Pilgrim Church was voted to become the Community Church". She testified that the letters which she sent concerning the proposed meeting did not state what the nature of the reorganization would be.

[2] We have said that while the record discloses the formation of a Congregational church antecedent to the formation of the appellant corporation, with the adoption of a constitution and by-laws providing for membership and government, there is in the record nothing as to who were or could become members of the corporation. It must be concluded that the meeting at which it is claimed there were elected trustees of the defunct corporation who were authorized to execute the deed in question cannot be considered to have been a meeting of members of the defunct corporation, but on the contrary affirmatively appears to have been a meeting, or at least an attempt to hold a meeting, of the members of the church. But there is nothing in the record to justify a conclusion that a meeting of the members of the church, even if validly held, could in any way take any action whatsoever concerning the affairs of the defunct corporation and it results that it affirmatively appears from the record the persons who executed the

deed purporting to act as trustees of the defunct corporation were not such and their deed was ineffective to transfer to the respondent any interest in the subject property.

The judgment is reversed.

ADAMS, P. J., and PEEK, J., concur.



109 Cal.App.2d 244

MANTONYA v. BRATLIE et al.

Civ. 4170.

District Court of Appeal, Fourth District, California.

Feb. 14, 1952.

Hearing Denied April 3, 1952.

Action by Alfred W. Mantonya against John Louis Bratlie, and another, for injuries sustained while plaintiff was driving defendants' tractor on defendants' premises allegedly in scope of plaintiff's employment. The Superior Court of Riverside County, John G. Gabbert, J., granted judgment on verdict for plaintiff. Defendants appealed. The District Court of Appeal, Barnard, P. J., held that trial court's instructions were confusing and failed to leave question of contributory negligence to jury.

Judgment reversed.

1. Master and Servant ⇐286(11)

In action by employee against employers for injuries sustained while operating employers' tractor which was defective and could not make sharp turn to left, negligence of employers was for jury.

2. Appeal and Error ⇐1048(1)

Witnesses ⇐275(6)

In action by employee against employers for injuries sustained while operating employers' tractor, where on prior appeal court had held that employers' liability if any, was not under Workmen's Compensation Act, and employers had not elected to come under act, requiring one of employers to testify as to whether he had taken out Workmen's Compensation insurance and whether he had given notice to industrial accident commission that he had elected to come under act was prejudicial error. Labor Code, § 3201 et seq.

3. Negligence ⇐138(4)

In action by employee against employers for injuries sustained while operating employers' tractor and allegedly caused by defective condition of employers' tractor, trial court should have instructed jury in regard to situation where there is equal or greater negligence on part of employee than on part of employer. Labor Code, § 2801.

4. Negligence ⇐97

Provision of comparative negligence statute for proportionate reduction of damages bars recovery by employee where his negligence equals or exceeds that of employer although statute does not abolish contributory negligence. Labor Code, § 2801.

5. Appeal and Error ⇐1064(2)

Trial ⇐193(3)

In action by employee against employers for injuries sustained while operating employers' defective tractor, instruction that if employers had violated safety devices statute they were negligent and employee must be presumed not contributorily negligent, erroneously took question of contributory negligence from jury and error was prejudicial in view of close questions of fact presented. Labor Code, §§ 2800, 6401, 6403.

Wallace P. Rouse, Indio, for appellants.

Shaw & Roberts, Riverside, for respondent.

BARNARD, Presiding Justice.

This is an action for damages based on the theory that plaintiff's injuries were caused by the defective condition of a caterpillar tractor, and that the defendants had failed to use due care in keeping the tractor in repair. The answer alleged that plaintiff's injuries were caused solely by his own negligence and also that he was guilty

of contributory negligence, which was the proximate cause of his injuries.

The plaintiff was employed on a ranch owned by the defendants, and was required to use this tractor in his work. The main defect in the tractor was that, while it would make a sharp turn to the right, it would require a radius of 10 feet or more in making a turn to the left. There was also evidence that the gear shift lever would lock at times so that the driver could not stop when he wanted to. These defective conditions were known to both parties. On the occasion in question, the plaintiff attempted to drive the tractor down a steep road or trail into a wash. In doing so, he made a right turn onto a steep descent about 25 or 30 feet long and to a bench where it was necessary to make a left turn to follow the bench to the bottom of the wash. He was unable to make this left turn or to stop, and the tractor toppled over the caving edge of the bench, dropping down some 12 or 14 feet, and caught the plaintiff's leg, causing the injuries complained of.

On a prior appeal, Mantonya v. Bratlie, 33 Cal.2d 120, 199 P.2d 677, 679, a judgment for the plaintiff was reversed because the jury had been instructed in accordance with the provisions of the Workmen's Compensation Act, Labor Code, Div. IV, including those of section 3708, and because the question of whether any liability was under Division III or under Division IV had been improperly submitted to the jury as a question of fact. In practical effect, the instructions as given had deprived the defendants of the defense of contributory negligence. The court there pointed out that the evidence was in sharp conflict, both as to negligence and as to contributory negligence, and held that "defendants' liability, if any, is not under the Workmen's Compensation Act (Div. IV) but under Division III of the Labor Code."

The action was retried on the theory that defendants' liability, if any, was under Division III of the Labor Code and that they had failed to use due care in keeping the tractor in repair. During the trial, the complaint was amended by alleging that the defendants had not accepted or in any manner become subject to the compensation provisions of Division IV of the Labor Code, and that at all times in question the parties to the action were not subject to these compensation provisions and plaintiff's employment was excluded therefrom. A jury returned a verdict in favor of the plaintiff, a motion for a new trial was denied, and the defendants have appealed from the judgment.

[1] It is first contended that the evidence is not sufficient to support the verdict and judgment. The evidence here, as at the former trial, was conflicting with respect to negligence on the part of the defendants and also contributory negligence on the part of the plaintiff. There was some evidence that the plaintiff was drunk at the time of the accident. The accident happened on Sunday and the plaintiff testified that he drove the tractor down into the wash for the purpose of obtaining sand needed in repairing some irrigation pipes. From the evidence as a whole, it appears extremely doubtful that he went into the wash for this purpose, or for any other purpose in connection with his work. The plaintiff had been hired because he had represented himself to be a mechanic and he had agreed in writing "to keep all equipment in repair and in good condition." It conclusively appears that the defective conditions of the tractor were well known to him, and his own testimony would amply justify a factual finding that he was extremely negligent in attempting to drive this tractor down this steep embankment knowing that it could not make the required left turn on the narrow bench, and that he might not even be able to stop. The trial court could well have granted a new trial on the ground of the insufficiency of the evidence, but different rules prevail here. While it cannot be held, as a matter of law, that the evidence is insufficient to support the judgment the nature of the evidence is such as to emphasize the importance of correct and fair instructions to guide the jury in passing upon the questions of negligence, and the amount thereof, on the part of the respective parties.

[2] It is next contended that the court erred in requiring the defendant Bratlie,

over objections, to answer plaintiff's questions as to whether or not he had taken out Workmen's Compensation insurance against liability, and whether or not he had ever given notice to the Industrial Accident Commission that he had elected to come within the compensation provisions of the Labor Code. It is argued that this testimony was inadmissible and that it was highly prejudicial to the defendants, as shown by the fact that the plaintiff later argued to the jury "that defendants could have protected themselves if they had wanted to." The plaintiff argues that since it was necessary for him to show that the compensation provisions of Division IV of the Labor Code had not been accepted by the defendants, and since one manner of electing to come within those provisions is by taking out compensation insurance, "it was perfectly proper to inquire if such insurance had been procured by defendants." The Supreme Court had held on the prior appeal that the defendants' liability, if any, was not under Division IV of the Labor Code, but under Division III of that code. This was accepted and the case was being retried on that theory, and during the trial the complaint was amended accordingly. The facts were well known to all the parties, it was not necessary to make any showing in this regard, and this evidence should not have been admitted. Its prejudicial effect may have been considerable.

[3] The final contention is that the court committed reversible error in giving and refusing certain instructions. A number of such assignments of error are made which need not be separately considered. So far as material here, the court gave the following instructions:

"No. 13. You are instructed that contributory negligence is negligence on the part of a person injured which cooperating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.

"No. 14. You are instructed that Section 2800 of the Labor Code of the State of California provides as follows: 'An employer shall in all cases indemnify his employee for losses caused by the employer's want of ordinary care.'

"You are instructed that Section 2801 of the Labor Code of the State of California provides in part as follows: 'In any action to recover damages for personal injury sustained within this State by an employee while engaged in the line of his duty or in the course of his employment as such, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employee has been guilty of contributory negligence shall not bar a recovery therein when his contributory negligence was slight and that of his employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee.

" 'It shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any law enacted for the safety of employees contributed to such employee's injury.

" 'It shall not be a defense that:

" '(a) The employee either expressly or impliedly assumed the risk of the hazard complained of.

" 'No contract, or regulation, shall except the employer from any provisions of this section.'

"No. 15. (This instruction repeats the identical language of Instruction No. 14.)

"No. 17. If you find from the evidence that the plaintiff was guilty of contributory negligence in only a slight degree and that of the employer was gross, in comparison, then, in rendering a verdict, you shall diminish any award to the plaintiff in proportion to the amount of negligence attributable to the plaintiff as employee.

"No. 25. You are instructed that an employer is under the duty to furnish and use safety devices and safeguards and to do every other thing reasonably necessary to protect the life and safety of his employee. This duty requires the employer to exercise ordinary care and to make a reasonably careful inspection at reasonable intervals to learn of dangers not apparent to the eye.

"It is for you to determine under all the facts and circumstances of this case whether or not defendants complied with this duty.

"No. 27. You are instructed that in order to provide for the safety of employees the Legislature of the State of California has enacted certain safety regulations provided for in the Labor Code of the State of California, as follows:

"Section 6310: 'Safe' and 'Safety' as applied to an employment or a place of employment mean such freedom from danger to the life or safety of employees as the nature of the employment reasonably permits.

"Section 6311: 'Safety devise' and 'Safeguard' shall be given a broad interpretation so as to include any practicable method of mitigating or preventing a specific danger.

"Section 6401: Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes, which are reasonably adequate to render such employment and place of employment safe. Every employer shall do every other thing reasonably necessary to protect the life and safety of employees.

"Section 6403: No employer shall fail or neglect: (a) (Safety devices and safeguards.) To provide and use safety devices and safeguards. (b) (Adequate methods and processes.) To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe. (c) (Other things.) To do every other thing reasonably necessary to protect the life and safety of employees.

"No. 28. If you should find from the evidence that a party to this action has conducted himself in violation of any of the statutes just read to you, you are instructed that such conduct constituted negligence as a matter of law."

Other than as quoted above, the court gave no instruction on the effect of contributory negligence or on the subject of comparing any negligence of the plaintiff with that of the defendants. The court modified some of the instructions above quoted, and some of the others which were given, by striking therefrom all reference to a situation where the plaintiff was guilty of contributory negligence amounting to more than slight negligence in comparison with the negligence of the defendants, if any. The court also refused two instructions offered by the defendants. One of these would have told the jury that if it found that the plaintiff "was guilty of contributory negligence that equalled any negligence on the part of the defendant" it must render a verdict in favor of the defendants. The other would have told the jury that if it found that "the plaintiff and the defendants were both negligent, but the negligence of the plaintiff exceeded that of the defendants, or equalled it, then the plaintiff could not recover." The plaintiff argues that these instructions omitted the element of proximate cause. However, the court had included that element in its definition of contributory negligence, as given in the instruction first above quoted. In any event, the court, while deleting all reference to equal or greater negligence on the part of the plaintiff from the instructions given, and refusing others on that subject, failed to cover that element or situation, in any of the instructions which were given.

[4] Section 2801 of the Labor Code has the effect of qualifying but not abolishing the defense of contributory negligence, in cases coming under it. It provides that contributory negligence shall not bar a recovery where it is slight in comparison to that of the employer, but that in such a case the damages may be proportionately reduced. In Hontz v. San Pedro etc. R. R. Co., 173 Cal. 750, 161 P. 971, the court said that this provision, then in the Roseberry Act, could have no application where the employer's negligence, if any, was slight as compared with the negligence of the employee. In Tubbs v. Stone & Webster C. Co., 30 Cal.App. 705, 159 P. 242, in discussing a similar provision, the court stated that the jury could not give a verdict for the defendants unless the plaintiff's negligence was found to be more than slight in comparison with that of the defendant. Construed literally, Section 2801 of the Labor Code seems to provide that contributory negligence will bar a recovery where

such negligence is more than slight and that of the employer is less than gross in comparison. Whether or not that meaning was intended, the provision for a proportionate reduction in damages would have the effect of barring a recovery where the negligence of the plaintiff equalled or exceeded that of the defendants. In all fairness, some further guidance should have been given to the jury in applying this statutory provision to the close factual questions which were here presented.

[5] In Instructions 14 and 15 the jury was told that it was to conclusively presume that an employee was not guilty of contributory negligence if the violation of any law enacted for the safety of employees had contributed to his injury. In No. 25 the jury was told that it was the employer's duty to furnish safety devices and safeguards and to do anything else reasonably necessary to protect the safety of the employee. The jury was then told, in No. 27, that in order to provide for the safety of employees the legislature has enacted certain safety regulations. The court then read Section 6401 and 6403 of the Labor Code as enacted "for the safety of employees" and providing that the employer must provide "safety devices and safeguards", must use methods reasonably adequate to render the employment safe, and must "do every other thing reasonably necessary to protect the life and safety of employees." These instructions, read together, told the jury that if the defendants had violated these statutes they were guilty of negligence as a matter of law, and that it must be conclusively presumed that the plaintiff was not guilty of contributory negligence. We think the provision in Section 2801 of the Labor Code, for conclusive presumption against contributory negligence, was not intended to apply under such circumstances as here appear and that the statutes set forth in Instruction No. 27 were not applicable. Those statutes are found in a chapter devoted to safety devices and safeguards, and refer to matters which are under the control of the Industrial Accident Commission. Sec. 60, Lab.Code. In commenting on a similar situation the court, in Weddle v. Heath, 211 Cal. 445, 295 P. 832, 835, said:

"It is manifest that this instruction is intended to apply that portion of section 1 of the Roseberry Act, relating to a violation of a statute providing for the safety of employees, to sections 34 and 35 of the Workmen's Compensation, Insurance and Safety Act, which provide generally that the employer may not allow the employee to be in a place of employment which is not safe, but must furnish for the use of the employee safety devices and safeguards, and must adopt all methods and processes reasonably adequate to make the place of employment safe and must do every other thing reasonably necessary to protect the life and safety of the employee. The instruction does not set forth any specific requirement of any section of the law that might be here involved. It simply leaves the question to the jury as to whether or not the defendant did everything reasonably necessary to protect the life and safety of his employees, or, putting it in other language, the defendant is denied the right to rely to any extent upon the contributory negligence of plaintiff if the jury believed, for any cause, known or unknown, that the place where plaintiff performed his work was unsafe.

"We cannot come to any other conclusion than that the giving of this instruction was serious and far-reaching error. The Workmen's Compensation Act followed and did not precede the Roseberry Act, and its provisions are largely a restatement of the general common-law principles applicable to the law of negligence. It has always been the duty of the employer to exercise ordinary care in providing a safe place for the servant to work and in providing all reasonable safeguards for him while engaged in such work. These sections of the Workmen's Compensation Act do little more than codify said principles. We think it must be held that the provisions of section 1 of the Roseberry Act are intended to apply to concrete and specific requirements set forth by statute entailing specific duties upon an employer. Any other construction would for all practical purposes destroy the right to rely to any extent upon the contributory negligence of the servant."

The instructions were somewhat conflicting in that the jury was told that contributory negligence, if slight, might be considered for the purpose of reducing the damages, and was also told that it was not to be considered at all if the defendants had failed to do everything reasonably necessary to protect the plaintiff's safety. The jury may well have thought that the defendants were negligent in not keeping this tractor in repair and that the plaintiff was guilty of equal or greater negligence in going down this steep bank with knowledge that the tractor could not make the turn required, but may also have thought that the matter of contributory negligence should not be considered since the defendants had violated a safety law in that they had failed to do everything necessary to protect the safety of the plaintiff. The practical effect of the instructions, as a whole, was to take the issue of contributory negligence away from the jury and pass upon it as a matter of law.

Close questions of fact were here presented and it cannot be told what the result would have been had those issues been clearly and correctly left to the jury. Prejudicial error appears and the defendants are entitled to a new trial.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; CARTER, J., dissenting.



109 Cal.App.2d 232

BAZZOLI v. NANCE'S SANITARIUM, Inc. et al.

Civ. 7951.

District Court of Appeal, Third District, California.

Feb. 14, 1952.

Action by Nilo Bazzoli against Nance's Sanitarium, Incorporated, etc., and others for injuries suffered by cement contractor when his foot went through floor of named defendant's building and was plunged into tank of scalding water. The Superior Court, Napa County, Mervin C. Bernhart, J., entered judgment on a verdict for plaintiff and named defendant appealed. The District Court of Appeal, Schottky, J. pro tem., held that res ipsa loquitur doctrine was applicable.

Judgment affirmed.

1. Appeal and Error ⇐930(1)

On appeal from judgment entered on a verdict, all conflicts in the evidence must be resolved in favor of respondent and all reasonable inferences must be indulged in to support the verdict.

2. Negligence ⇐32(2.10)

A contractor employed to pour concrete floor in building was a "business invitee" toward whom owner in possession of premises and servants through whom it was acting in altering the premises were obliged to exercise ordinary care to keep the premises in a reasonably safe condition or to warn of danger, and such duty extended to conditions which might have been found dangerous by exercise of reasonable care.

See publication Words and Phrases, for other judicial constructions and definitions of "Business Invitee".

3. Negligence ⇐32(2.10)

Even if workman employed to chip concrete floor in building was an independent contractor, owner in possession of building would not thereby be relieved from its duty to maintain premises in reasonably safe condition for business invitees.

4. Negligence ⇐29

The duty which a possessor of land owes to others to put and maintain premises in reasonably safe condition is nondelegable.

5. Master and Servant ⇐320

If independent contractor is employed to perform duty to put and maintain land in a reasonably safe condition, the possessor is answerable for harm caused by negligent failure of contractor to put or maintain buildings and structures in reasonably safe condition, regardless of whether contractor's negligence lies in his incompetence, carelessness, inattention or delay.

6. Negligence ⇐134(5), 135(4)

In action against owner in possession for injuries sustained by contractor employed to pour a new layer of concrete on floor of building damaged by fire, when his foot went through old floor and was plunged into tank of hot water, records supported implied finding that defendant realized or should have realized that floor of building involved an unreasonable risk to business visitors and that contractor did not have knowledge of such risk.

7. Negligence ⇐136(26)

Record did not establish as a matter of law that contractor employed to pour a new layer of concrete on floor of building damaged by fire assumed the risk of having his foot plunge through old floor into a tank of hot water.

8. Negligence ⇐105

One "assumes a risk" when he voluntarily and knowingly manifests his assent to dangerous conduct or to creation or maintenance of dangerous condition and voluntarily exposes himself to such danger, or when he knows, or in exercise of ordinary care should know, that a danger exists in either conduct or condition of another or in condition, use or operation of property and voluntarily places himself or remains within the area of danger.

See publication Words and Phrases, for other judicial constructions and definitions of "Assume a Risk".

9. Negligence ⇐105

One who assumes a risk cannot recover for damage which results from the dangerous condition or conduct to which he thus exposes himself.

10. Negligence ⇐134(5, 11)

Record was sufficient to support a finding that owner in possession of building damaged by fire was negligent and that such negligence was a proximate cause of injuries sustained by contractor employed to pour a new layer of concrete on floor of building, when his foot went through old concrete floor and was plunged into tank of scalding water.

11. Negligence ⇐121(3)

"Res ipsa loquitur" doctrine was applicable in action against owner in possession of building damaged by fire for injuries sustained by contractor employed to pour a new layer of concrete on floor, when his foot went through old concrete floor and was immersed in tank of scalding water.

See publication Words and Phrases, for other judicial constructions and definitions of "Res Ipsa Loquitur".

12. Negligence ⇐121(2)

"Res ipsa loquitur" doctrine is applicable only if accident was of a kind which ordinarily does not occur in absence of negligence, was caused by agency or instrumentality within exclusive control of defendant, and was not due to any voluntary action or contribution by plaintiff.

13. Negligence ⇐138(2)
Trial ⇐243

Instruction that plaintiff was not entitled to a verdict merely because an accident happened and instruction on res ipsa loquitur that from certain facts an inference arose that proximate cause of accident was negligent conduct of defendant were not objectionable as being inconsistent and necessarily confusing the jury.

14. Trial ⇐295(1)

All instructions must be read and considered together.

15. Trial ⇐295(6)

Giving res ipsa loquitur instruction that under the facts as established by the evidence, an inference arose that proximate cause of accident was some negligent conduct of defendant was not error prejudicial to defendant as compelling the inference of negligence, in view of the evidence and other instructions given.

16. New Trial ⇐163(2)

Denial of motion for new trial based in part on contention that amount of damages awarded was excessive constituted a determination by trial court that award was not excessive.

17. New Trial ⇐76(1), 162(1)

Trial judge in passing on motion for new trial on ground of excessive award of damages has power to weigh the evidence and judge the credibility of witnesses and if he believes the damages awarded to be excessive, he must reduce them.

18. Appeal and Error ⇐994(2), 1003

Appellate court cannot weigh the evidence or pass on credibility of witnesses.

19. Appeal and Error ⇐1004(1)

Appellate court may not hold an award of damages excessive unless it is so large as to indicate passion or prejudice on the part of jurors.

20. Appeal and Error ⇐1004(1)
Damages ⇐96

What amount of money will be adequate compensation for injuries and incident pain rests largely within sound discretion of jury, which will not be disturbed by reviewing court unless it clearly appears that award is so grossly excessive as to shock the conscience and compel conclusion that verdict was the result of passion and prejudice.

21. Damages ⇐132(6)

Award of $15,000 to cement contractor, who earned $750 per month, was prevented from working at his trade for six weeks and incurred medical and hospital expenses of approximately $300, for past and future pain and permanent limitation in movement of ankle and shortening of leg as a result of severe burns to right leg was not excessive in view of current economic conditions and depreciated value of money.

Geary, Spridgen & Moskowitz, Santa Rosa, for appellant.

Brown, Smith & Ferguson, Oakland, King & Ghidella, Napa, for respondent.

SCHOTTKY, Justice pro tem.

Respondent, admittedly a business invitee on premises owned and operated by appellant corporation, suffered personal injuries when his foot went through the floor and was plunged into a tank of hot water beneath it. He commenced an action for damages against appellant, and a jury rendered a verdict in his favor for the sum of $15,000. This appeal is from the judgment entered upon the verdict.

In arguing for a reversal of the judgment appellant makes four main contentions: (1) The evidence is insufficient to support a finding of negligence in appellant; (2) The trial court erred in applying the doctrine of "res ipsa loquitur" to the evidence in this case, and in instructing the jury thereupon; (3) The language of the res ipsa loquitur instructions given did not state the law, or was otherwise defective, to appellant's prejudice; (4) The amount of damages awarded to respondent is excessive.

[1] Before discussing these contentions we shall summarize briefly the factual situation as disclosed by the record, bearing in mind the familiar rule that all conflicts must be resolved in favor of respondent and all reasonable inferences must be indulged in to support the verdict.

The defendant and appellant, Nance's Sanitarium, Incorporated (sued herein as Nance's Sanitorium, Inc.), owned and was in possession of a building in Calistoga, Napa County, California. The portion of the building which is concerned in this case was floored with cement and divided, by partitions, into separate rooms. One such room was called, and is referred to in the evidence and herein as, the "laundry room." It adjoined a hall space and was connected therewith by a doorway two feet, eight inches in width.

Prior to May, 1949, a fire had destroyed the roof and most of the walls of the laundry room, and, in May, it was exposed to the sky and to view from outdoors. From the hall space to the floor of the laundry room proper, through the aforementioned doorway, the concrete floor was continuous and descended in a slight slope, also referred to as a "ramp." Originally the floor was of planks. Later concrete was poured over the planks. There had been a fire in the building. Then defendant contracted with plaintiff, a licensed cement contractor, to pour another layer over the first layer of cement. To do that, plaintiff said it was necessary to chip or scarify the first cement so that the next layer would stick. It was agreed that defendant would build the forms and do the chipping. It hired a man from the city of Calistoga and that city's jackhammer to do the chipping. This man took his orders from defendant.

This man was Kenneth Grimsley, and on May 9, 1949, he was sent to do some work at the sanitarium. He took his compressor and jackhammer with him, and when he arrived at the job he met Mr. Johnson, admittedly a carpenter employed by defendant. Johnson instructed Grimsley where to work and the chipping he was to do. Then Mr. Hughes, president, and Nance, vice president, of defendant appeared and instructed him to "break up some more cement along in here for a vent of some kind or other, a trough that went along in through there and over around the area of the door here was to be scarified, and also to take out a piece of pipe that was all the way across here * * * and I was to break that out of there." The jackhammer went on through the floor and almost lost the hammer, and he asked what was under the floor and was told there was a reservoir there and he saw steam coming through where he bored through the floor.

Respondent testified that he and his two helpers went to the laundry room about 8:10 a. m. to pour the cement, and the accident happened at 8:15 a. m.; he looked through the hole made by the jackhammer and saw and knew there was a water reservoir or tank under the floor and saw steam coming up from the water; his foot did not go through any hole made by the jackhammer; his leg went through the floor up to three inches above his knee, and he felt the hot water burning his leg.

Other material facts will be hereinafter set forth.

Appellant's first two contentions that the evidence is insufficient to support a finding of negligence in defendant and that the trial court erred in applying the doctrine of "res ipsa loquitur" to the evidence in the case will be discussed together as they are to a certain extent interrelated.

[2] The evidence shows without conflict that respondent was a business invitee upon the premises of appellant. And as stated in the recent case of Raber v. Tumin, 36 Cal.2d 654, at page 658, 226 P.2d 574, at page 576: "Plaintiff was a business visitor toward whom Tumin, together with the servant through whom he was acting in altering the premises, 'was obliged to exercise ordinary care to keep the premises in a reasonably safe condition, or to warn * * * of danger. The duty was not limited to conditions actually known * * to be dangerous, but extended also to conditions which might have been found dangerous by the exercise of reasonable care. [Citations.]' (Blumberg v. M. & T. Incorporated (1949), supra, 34 Cal.2d 226, 229, 209 P.2d 1.)"

[3–5] Appellant contends that Grimsley, who did the actual work of chipping the floor with the jackhammer, was the agent of respondent. However, the record shows that appellant arranged with the city of Calistoga to have the chipping done and that the city sent Grimsley to appellant's premises to do the work, and that Grimsley was told what to do by appellant's officers and employee. Even though we were able to agree with appellant's contention that Grimsley was an independent contractor, this would not relieve appellant from its obligation and duty toward an invitee as hereinbefore set forth. The following language of our Supreme Court in Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 260, 143 P.2d 929, 930, is applicable: "The general rule is set forth in the Restatement of the Law of Torts, Negligence, page 1138, section 422, as follows: 'The duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is non-delegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition, irrespective of whether the contractor's negligence lies in his incompetence, carelessness, inattention or delay.'"

[6] The jury impliedly found that appellant realized or should have realized that the floor of its building on May 10th involved an unreasonable risk to business visitors and that respondent did not have the knowledge thereof. There is ample support in the record for this finding.

[7–9] Nor can we agree with appellant's contention that upon the record here, if there was a risk, respondent as a matter of law assumed it. At appellant's request the court correctly instructed the jury:

"One is said to assume a risk when he freely, voluntarily and knowingly manifests his assent to dangerous conduct or to the creation or maintenance of a dangerous condition, and voluntarily exposes himself to that danger or when he knows, or in the exercise of ordinary care would know, that a danger exists in either the conduct or condition of another, or in the condition, use or operation of property, and voluntarily places himself, or remains, within the area of danger.

"One who thus assumed a risk is not entitled to recover for damage which resulted from the dangerous condition or conduct to which he thus exposed himself."

The implied finding of the jury was that respondent did not assume the risk and that the chipped floor did not, of itself, demonstrate that the floor was a dangerous instrumentality, and also that appellant had no reason to believe that respondent would realize the risk involved.

The record shows that the condition of the floor made it dangerous, that appellant and its employees were aware of it, that they did not warn respondent of such dangerous condition and that respondent was not aware of it.

[10–12] We believe that the record would support a finding that defendant was negligent and that such negligence was a proximate cause of the injuries to plaintiff, even without the application of the doctrine of res ipsa loquitur. But we believe also the doctrine was clearly applicable to the instant case.

In Raber v. Tumin, supra, the court said, 36 Cal.2d at page 659, 226 P.2d at page 577: "As declared in Ybarra v. Spangard (1944), supra, 25 Cal.2d 486, at page 489, 154 P.2d 687 [162 A.L.R. 1258], 'The doctrine of res ipsa loquitur has three conditions: "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." (Prosser, Torts, p. 295.)' A more detailed explanation of the applications, limitations and effects of the doctrine may be found in Dierman v. Providence Hospital (1947), 31 Cal.2d 290, 295, 188 P.2d 12. It has also been more specifically pointed out that 'the applicability of the doctrine of res ipsa loquitur depends on whether it can be said, in the light of common experience, that the accident was more likely than not the result of their [defendants'] negligence. [Citations.] "Where no such balance of probabilities in favor of negligence can be found, res ipsa loquitur does not apply." (Prosser on Torts [1941], p. 297.)' (La Porte v. Houston (1948), 33 Cal.2d 167, 169, 199 P.2d 665.)

"We are satisfied that a permissible view of the evidence here meets the several elements of the doctrine of res ipsa loquitur as above depicted. Certainly the accident appears to satisfy the first requirement: an invitee in a showroom is not ordinarily, in the absence of someone's negligence, struck on the head by a falling ship's ladder; secondly, the evidence tends to show that the instrumentality—the ladder on the slippery floor in the showroom—was within the exclusive control of defendants."

We think it is clear that when respondent was precipitated through the concrete floor and his foot immersed in scalding water, it was the kind of an accident which ordinarily does not occur unless someone is negligent. We think it is clear also that the floor of the room was exclusively in the control of the defendant. The jury was fully instructed on the subject of contributory negligence and was told specifically: "Whenever these instructions, ladies and gentlemen of the jury, say the facts may warrant recovery for plaintiff, that of course is subject to all the instructions of the court. That means and includes the absence of contributory negligence, which is a defense."

Thus the jury impliedly found that respondent was not guilty of any contributory negligence, or that "the accident was not

due to any voluntary action or contribution on the part of plaintiff."

Appellant's next main contention is that the language of the res ipsa loquitur instructions given did not state the law, or was otherwise defective, to appellant's prejudice.

The court gave the following instructions relating to the doctrine of res ipsa loquitur, the first two being at the request of respondent, and the third at the request of appellant:

Plaintiff's Instruction No. 8.

"From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendants. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendants to rebut the inference by showing that they did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty on their part."

Plaintiff's Instruction No. 9.

"The instruction just given may appear to constitute an exception to the general rule that the mere happening of an accident does not support an inference of negligence. The instruction, however, is based on a special doctrine of the law which may be applied only under special circumstances, they being as follows:

"First: The fact that some certain instrumentality, by which injury to the plaintiff was proximately caused, was in the possession and under the exclusive control of the defendants at the time the cause of injury was set in motion, it appearing on the face of the event that the injury was caused by some act or ommission incident to defendants' management.

"Second: The fact that the accident was one of such nature as does not happen in the ordinary course of things, if those who have control of the instrumentality use ordinary care.

"Third: The fact that the circumstances surrounding the causing of the accident were such that the plaintiff is not in a position to know what specific conduct was the cause, whereas the one in charge of the instrumentality may reasonably be expected to know, and be able to explain, the precise cause of the accident.

"When all these conditions are found to have existed, the inference of negligence to which they give birth will support a verdict for the plaintiff, in the absence of a showing by defendants that offsets the inference."

Defendant's Instruction No. 54.

"In making such a showing, it is not necessary for a defendant to overcome the inference by a preponderance of the evidence. Plaintiff's burden of proving negligence by a preponderance of the evidence is not changed by the rule just mentioned. It follows, therefore, that in order to hold the defendant liable, the inference of negligence must have greater weight, more convincing force in the mind of the jury, than the opposing explanation offered by the defendant.

"If such a preponderance in plaintiff's favor exists, then it must be found that some negligent conduct on the part of defendant was a proximate cause of the injury; but if it does not exist, if the evidence preponderates in defendant's favor, or if in the jury's mind there is an even balance as between the weight of the inference and the weight of the contrary explanation, neither having the more convincing force, then the verdict must be for the defendant."

Earlier in its instructions the court, at the request of appellant, instructed the jury that "The mere fact that an accident happened to plaintiff does not entitle plaintiff to a verdict."

[13, 14] Appellant argues: "It is submitted that the trial court committed prejudicial error in giving these two instructions in the same case, for the reason that they are inconsistent and necessarily confused

the jury. Under the former, an inference of negligence from the mere occurrence of the accident is precluded. Under the latter, the jury was instructed that such inference 'arises.' The pronouncement of a fact followed its disclaimer." We see no necessary inconsistency in these instructions and do not believe that they necessarily confused the jury. One states that plaintiff is not entitled to a verdict merely because an accident happened, and the others state that from certain facts an inference arises that there was negligent conduct on the part of defendant. All instructions must be read and considered together, and in the instant case appellant was entitled to have the instruction offered by it given, and respondent was certainly entitled to an instruction on the doctrine of res ipsa loquitur.

The most serious contention urged by appellant is that "the res ipsa loquitur instructions erroneously compelled the inference of negligence, which is properly permissive."

Appellant objects particularly to the language: "From the happening of the accident * * * there arises an inference that the proximate cause * * * was some negligent conduct on the part of the defendants," and argues that "The jury, thus, is instructed, not that it is permitted to, or may, draw an inference, but that one 'arises,' or is 'given birth' by a finding of the existence of certain conditions. This entirely arrests the discretion of the jury to reject the existence of either the conditions or the inference."

[15] As hereinbefore stated, all instructions must be considered together as a whole. In the instant case the instructions were lengthy, covering 35 pages of the Reporter's Transcript, and, in addition to the general instructions usually given in negligence cases, were full and correct on negligence, contributory negligence, duty toward invitees, res ipsa loquitur, assumption of risk and other subjects. The instructions on res ipsa loquitur were taken verbatim from California Civil Jury Instructions (B.A.J.I.) and while, as suggested by Dean Prosser in his very thorough and informative article on "Res Ipsa Loquitur in California" (37 Cal.Law Rev. 231), the instruction approved in Juchert v. California Water Service Co., 16 Cal.2d 500, 513, 106 P.2d 886, 893, would as a general rule be a better and simpler instruction, we are convinced that, upon the record here, no prejudice resulted to appellant from the statement that under the facts of the instant case an inference of negligent conduct arises. The instruction approved in the Juchert case read: "I instruct you that when a thing which causes injury is under control and management of a defendant and the accident is such as in the ordinary course of things does not happen if those who have the management use ordinary care, it affords reasonable evidence in the absence of explanation by the defendant, that the accident arose from want of ordinary care. Therefore if you find that the defendant water company had exclusive control and management of its water pipe, and that water was permitted to escape therefrom, then I instruct you that the escaping of said water from said pipe affords evidence in the absence of explanations, that it arose from a want of ordinary care on the part of said water company in the control and management of said pipe."

Certainly it is clear that the thing which caused the injury here was under the control and management of appellant and that the accident was one that in the ordinary course of things does not happen if those who have the management use ordinary care.

We have read and analyzed all the instructions. They are unusually complete and singularly free from error. It would be strange, indeed, if so many instructions on so many subjects would not tend to be confusing to at least some of the jurors. It is apparent that the trial judge endeavored to so instruct the jury that all issues would be fairly presented to them. It was made clear to the jury by a number of appropriate instructions, following those on res ipsa loquitur, that contributory negligence was a defense and that if respondent failed to use ordinary care to observe what was obvious, or if he was aware, or should have been aware of an existing danger, and that these things or any other negligence on his part contrib-

uted in the slightest degree to the accident, the verdict must be for the defendant.

[16] Appellant's final contention is that the amount of damages, $15,000, awarded to respondent is excessive. This was one of the grounds of a motion for a new trial, and the ruling of the trial court denying the motion was a determination by it that the damages were not excessive.

[17–19] As was stated in Holmes v. Southern California Edison Co., 78 Cal. App.2d 43, at page 51, 177 P.2d 32, at page 36: "The powers and duties of a trial judge in ruling on a motion for new trial and of an appellate court on an appeal from a judgment are very different when the question of an excessive award of damages arises. The trial judge sits as a thirteenth juror with the power to weigh the evidence and judge the credibility of the witnesses. If he believes the damages awarded by the jury to be excessive and the question is presented, it becomes his duty to reduce them. Fisher v. Zimmerman, 23 Cal.App.2d 696, 73 P.2d 1243; Sassano v. Roullard, 27 Cal. App.2d 372, 81 P.2d 213. When the question is raised his denial of a motion for new trial is an indication that he approves the amount of the award. An appellate court has no such powers. It cannot weigh the evidence and pass on the credibility of the witnesses as a juror does. To hold an award excessive it must be so large as to indicate passion or prejudice on the part of the jurors. Generally speaking, in cases of this kind, when damages are recovered for the destruction of property, if there is substantial evidence in the record supporting the damages awarded by the jury and it is inferentially approved by the trial judge by his denial of a motion for new trial without reducing the damages, we are powerless to reduce them or to hold the award excessive."

[20] The evidence as to the extent of respondent's injuries and the probable duration of their injurious effects was conflicting. However, the record shows that respondent suffered very severe burns to his right leg from a few inches above the knee down to his foot; that he incurred a medical and hospital bill of approximately $300; that he could not work at his trade for six weeks, and that he was earning $750 per month; that a doctor testified that there would be a 20% limitation in the movement of his ankle joint, and a shrinkage of right leg 5/16 of an inch as compared to the left; that he had permanent scars covering the foot, ankle and lower portion of the right leg and that as he grew older he was reasonably certain to have ulcers of the leg over the area of burn; and that he had suffered great pain and would continue to suffer pain in the future. The following language in the recent case of Squires v. City of Los Angeles, 100 Cal. App.2d 708, 713, 224 P.2d 774, 777, is quite applicable to the instant case: "The amount of money that will be adequate compensation for injuries and for incident pain and suffering rests largely within the sound discretion of the jury. Such discretion will not be interfered with by a reviewing court unless it clearly appears that the award is so grossly excessive as to shock the conscience and to compel the conclusion that the verdict was the result of passion and prejudice. [Citing cases.]"

[21] The court also said, 100 Cal. App. 2d at page 714, 224 P.2d at page 778: "There is nothing in the record to indicate that the damages awarded are excessive or that the verdict was a result of passion or prejudice on the part of the jury. Moreover, since the value of the dollar is measured by its purchasing power, in view of the current economic conditions and of the depreciated value of money the verdict cannot be criticized as being excessive."

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

109 Cal.App.2d 306

PEOPLE v. MEADE.

Cr. 4707.

District Court of Appeal, Second District, Division 1, California.

Feb. 18, 1952.

The defendant was convicted in the Superior Court of Los Angeles County, Edwin L. Jefferson, J., of pool selling and bookmaking, and from the verdict, sentence, judgment, and order denying motion for new trial, defendant appealed. The District Court of Appeal, Drapeau, J., held that evidence sustained conviction.

Appeals from verdict and sentence dismissed, and judgment and order affirmed.

1. Criminal Law ⇐1023(10)

An appeal does not lie from a verdict in a criminal case.

2. Criminal Law ⇐1023(10)

An appeal does not lie from a sentence in a criminal case.

3. Gaming ⇐98(3)

Evidence was sufficient to sustain conviction of pool selling and bookmaking. Pen.Code, § 337a, subd. 1.

4. Gaming ⇐103

Where defendant was charged in first count of information with pool selling and bookmaking and under second count with the making, offering, and accepting of bets on horse races, and prosecution relied on the same facts to convict under both counts, fact that defendant was acquitted of violating the second count did not prevent use of such facts to convict defendant under the first count. Pen.Code, § 337a, subds. 1, 6.

Joseph T. Forno, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. Fitzpatrick, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant was charged in two counts with violations of subdivisions 1 and 6 of section 337a of the Penal Code, to-wit: pool selling and bookmaking; and making, offering and accepting bets on horse races, respectively.

Upon arraignment defendant's motion to set aside the information under section 995 of the Penal Code was denied; he entered his plea of not guilty, waived a jury trial and the cause was submitted on the transcript taken at the preliminary hearing. The court found defendant not guilty on count II and guilty as to count I, and denied his motion for a new trial.

Thereafter judgment and sentence were pronounced. Execution of the sentence was suspended and defendant was granted probation for a term of two years on condition that he pay a fine of $200 and follow the directions of the probation department.

[1, 2] This appeal is taken from the judgment of conviction, the verdict, the sentence and the order denying defendant's motion for a new trial. Since there is no appeal from a verdict or a sentence, People v. D'Elia, 73 Cal.App.2d 764, 766, 167 P.2d 253; People v. Clark, 106 Cal.App.2d 271, 235 P.2d 56, those appeals must be dismissed.

Two points are made upon this appeal, to-wit:

1. The evidence is insufficient to justify the conviction;

2. Where the facts tended to show a violation of one subdivision of section 337a, and appellant was acquitted on that count, those same facts cannot be used as a basis of finding appellant guilty of violating another subdivision of the same section.

The only witness produced at the trial was Police Officer Paul C. Ward. It was stipulated that he was an expert in all phases of bookmaking as conducted in Los Angeles County. And, in answer to the question, "Officer, what books, papers and paraphernalia are commonly used by bookmakers in this county?" he testified, "Pencils and papers, scratch sheets, racing forms, daily newspapers, California Digests, telephones, sometimes adding machines, clocks."

Officer Ward further testified that he arrested appellant at 3:55 P.M. of February 27, 1951, at a cocktail lounge located in the city of Los Angeles; that he observed appellant for a few minutes before placing him under arrest. Witness was standing in the bar when appellant entered and went to the rear of the room where he appeared to be making change at the cash register; that holding in his hand "a small piece of paper that was a portion of a scratch sheet for that date", appellant had a conversation with a woman customer; that the officer heard the lady mention the name General K. After that there was some discussion about money. "I heard the defendant say, 'You owe me,' but I couldn't hear the rest of it. The defendant then came to the end of the bar where I was standing and called out, 'Does anyone else want to get in in the sixth?' He then turned to the telephone and dialed a number. He talked in the phone for a short while, facing the wall, then he turned his face slightly towards my direction and I overheard him say, 'Give me 544, one to win and one to place.' He also said, 'Give me 552, five to win.' He then turned his face back the other way and I couldn't hear any more of the conversation. Immediately after he hung up the telephone I placed him under arrest." The piece of scratch sheet found in appellant's possession was introduced in evidence. With respect to this exhibit, Officer Ward testified that the printed matter on the face thereof "represents the various horses running in the 5th, 6th, 7th and 8th races at Santa Anita on the day of the arrest. It also gives their post position with the handicap and jockeys. There are also two very small index numbers labeled beside the 6th, the beginning of the 6th and the 8th race on the sheet. * * * They are written in pencil. * * Index numbers are commonly used in a phone spot instead of the name of the horse for recording the bets that are called in. These numbers aren't always consistent but they are fairly so."

Interpreting the conversation which he overheard, it was his opinion that "the 554 would represent a horse and the one to win and one to place would be $1.00 to win and $1.00 to place on that horse. * * * 552 would be the name of a horse, and five to win would be the amount wagered on it." Also, that a bet called in for that day would be on a horse running on that date. That he checked the exhibit with the racing section of a daily newspaper for the date in question, from which he determined that "the number 554 would stand for the horse Pater in the 8th race on that day. * * * the 552 mentioned would, in my opinion, be the horse Yondetega, also running in the 8th race at Santa Anita" on the same date; he also ascertained that "General K was running in the 6th race at Santa Anita on * * * the 27th day of February", the day of the arrest.

In connection with his first point, appellant argues that there was no evidence that he was engaged in pool selling or bookmaking at the time of his arrest, or that he received a bet or purported bet on a horse race.

Bookmaking is defined in People v. Bradford, 95 Cal.App.2d 372, 378, 213 P.2d 37, 40, as "the making of a book of bets."

The testimony hereinabove narrated discloses that at the time of his arrest, appellant was in possession of betting paraphernalia, to-wit: a piece of scratch sheet, containing pencilled notations respecting various horses running in races at Santa Anita on the day in question. Moreover, his telephone conversations in the presence of the witness Ward were directly related to these notations.

[3] All of the evidence tended to connect appellant with the crime of which he was convicted and fully meets the evidentiary requirements for sustaining a conviction of violating section 337a of the Penal Code as was announced in People v. Newland, 15 Cal.2d 678, 104 P.2d 778. That rule was stated in People v. Bradford, supra, 95 Cal.App.2d 372, 380, 213 P.2d 41, as follows: "While an appellate tribunal is entitled to consider the evidence it can

not weigh it. The sole function of an appellate court is to determine whether on the face of the evidence it can be held that sufficient facts could have been found by the trier of facts to warrant an inference of guilt. Unless it clearly appears that upon no hypothesis whatever is there substantial evidence to support the conclusion reached in the court below, the verdict of a jury or the decision of the trial judge will not be set aside on the ground of insufficiency of the evidence to sustain it. If the circumstances reasonably support the verdict or decision rendered, the opinion of the appellate court that those circumstances might also reasonably be reconciled with the innocence of the accused, will not justify the latter court in interfering with the determination of the trial court. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778."

[4] It is also urged that since appellant was acquitted of a violation of subdivision 6 of section 337a, supra, that the facts relating to acts condemned by that subdivision cannot be used to convict appellant of a violation of subdivision 1.

There is no merit in this point. In People v. Ghio, 82 Cal.App. 28, 32, 255 P. 205, 206, this court in construing said section stated: "Section 337a of the Penal Code contains six subdivisions, and is so framed that one set or series of acts might constitute a violation of each or all of said subdivisions."

Also in 6 Cal.Jur.Ten Yr.Supp.(1950 Rev.) 213, sec. 8, it is said: "The statute was intended to prevent bookmaking, pool selling, and bets connected therewith in any way, and it is immaterial whether the race is actually run, or that the defendant acts gratuitously or without a financial interest in the bet or in but a single transaction."

The appeals from the verdict and sentence are dismissed. The judgment and the order denying motion for new trial are, and each of them is, affirmed.

WHITE, P. J., and DORAN, J., concur.

109 Cal.App.2d 359

NEWMAN v. NEWMAN.

Civ. 18697.

District Court of Appeal, Second District, Division 2, California.

Feb. 19, 1952.

Action for divorce and custody of minor children. The Superior Court of Los Angeles County, Julius V. Patrosso, J., entered interlocutory decree of divorce awarding custody of minor children to husband, and wife appealed. The District Court of Appeal, Fox, J., held that evidence established that welfare and best interests of children would be directly promoted by change of custody.

Order affirmed.

1. Divorce ⇐303(3), 312.6(6)

An application for modification of an award of custody of minor children is addressed to sound discretion of trial court, and its determination will not be disturbed on appeal except upon clear showing of abuse of that discretion.

2. Divorce ⇐303(2)

General rule is that to justify modification of order for custody of minor children there must have been change of circumstances after original decree was entered which renders it essential or expedient for welfare of child that there be change.

3. Divorce ⇐303(2)

On application for modification of award of custody of minor child, court is primarily concerned with welfare and best interests of child.

4. Parent and Child ⇐2(3.3)

Whether parent is proper person to have custody of minor child is controlled by determination of his or her fitness at time of hearing as it relates to welfare of child.

5. Divorce ⇐303(2, 3)

Where custody has been decreed to one parent, he or she may not be deprived of custody of child for alleged unfitness unless it be shown that such parent is so unfit as to endanger child's well-being or unless there is clear and convincing evidence that

child's welfare and best interests would be directly promoted by change.

6. Divorce ⇐303(3)

In proceeding on application for modification of interlocutory decree of divorce which awarded custody of minor children to husband, evidence established that welfare and best interests of children would be directly promoted by grant of custody to mother.

7. Divorce ⇐303(3)

Where husband had been awarded custody of minor children as incident to decree of divorce, and evidence established that at time of application by wife for modification of award, welfare and best interests of children would be directly promoted by change, and that children had not had proper care and supervision during period of husband's custody, it could not be said as matter of law that trial court had abused its discretion in modifying decree and awarding custody to wife.

Hobart & Hobart, Los Angeles, for appellant.

Hugh Culler, Los Angeles, for respondent.

FOX, Justice.

This appeal is from an order granting defendant's application for a modification of the interlocutory decree of divorce and awarding to her custody of the minor children of the parties.

As the sole ground for reversal plaintiff contends there is no evidence (1) of a change of circumstances to justify the modification of the interlocutory decree by which custody of the children was awarded to him or (2) that he is not a fit and proper person to have custody of the children.

[1] An application for modification of an award of custody of minor children is addressed to the sound discretion of the trial court and its determination will not be disturbed on appeal except upon a clear showing of abuse of that discretion. Robesky v. Robesky, 74 Cal.App.2d 523, 526, 168 P.2d 976; Cowen v. Cowen, 100 Cal. App.2d 366, 368, 223 P.2d 666; Horsley v. Horsley, 77 Cal.App.2d 442, 444, 175 P.2d 580.

[2–5] It is the general rule that to justify a modification of an order for custody of minor children there must be a change of circumstances after the original decree was entered which renders it essential or expedient for the welfare of the child that there be a change. It is, however, the welfare and best interests of the child with which the court is primarily concerned. Foster v. Foster, 8 Cal.2d 719, 728, 68 P.2d 719; Washburn v. Washburn, 49 Cal.App. 2d 581, 588, 122 P.2d 96; Johnson v. Johnson, 72 Cal.App.2d 721, 723, 165 P.2d 552. Whether a parent is a proper person to have the custody of a minor child is controlled by a determination of his or her fitness at the time of the hearing as it relates to the welfare of the child. Prouty v. Prouty, 16 Cal.2d 190, 194, 105 P.2d 295; Sorrels v. Sorrels, 105 Cal.App.2d 465, 469, 234 P.2d 103. Where custody has been decreed to one parent he or she may not be deprived of the custody for any alleged unfitness unless it be shown he is so unfit as to endanger the child's well-being or unless there is clear and convincing evidence that the child's welfare and best interests will be directly promoted by the change. Johnson v. Johnson, supra.

[6] A review of the record discloses evidence that both parents are devoted to the children and that the children have great affection for their mother and father. There is no question as to plaintiff's fitness from a moral standpoint but there is substantial evidence that the children have not had proper care and supervision during the five years they have been in his custody. The interlocutory decree was entered in July, 1945, and the hearing on the order to show cause re-modification of that decree was held in August, 1950. At that time plaintiff and the four children, three girls 13, 11 and 8 years of age, respectively, and a boy 10, slept in a combination living room and dining room between which there was no partition. The four bedrooms in the house were rented. The

single bath and kitchen were used jointly by all occupants of the house, which at times has been as many as sixteen. Plaintiff was employed and what supervision the children had in his absence was given by various women who rented rooms from him from time to time. At the time of the hearing they were being supervised by a Mrs. Dawson, who also had four small children of her own to care for, the eldest of whom was six years of age. Plaintiff's children were seen out at night alone as late as 10:00 or 11:00 o'clock and sometimes they could not be located. When plaintiff was at home he prepared the meals but for the most part during the week they were planned and prepared by the 13 year old girl, who also purchased the food.

Defendant testified she took the children to her home about once a week; that their clothes were not clean and their underclothing was soiled; they were always in need of a bath and their teeth had not been cleaned nor was their hair combed; she purchased tooth brushes for them to use at home and urged them to keep clean; when she took the children to her home she would have to bathe them before she could take them out.

The court investigator testified plaintiff's house was illy kept and very dirty; there was debris on the floor and the bedding was filthy; the school authorities reported to her that the children came to school without their breakfast and the money which their father had given them for their lunch was spent before lunchtime; they were suffering from malnutrition and needed dental care; they were not clean and were considered "problem children"; they had suggested to their father that he place them in a foster home, to which he would not consent.

It is clear from this evidence that the welfare and best interests of the children will be directly promoted by a change. According to the report of the court investigator, defendant's neighbors gave her a favorable reputation as to her conduct and habits since she has been living in the neighborhood. Her home, which has two bedrooms, is well furnished and immaculate. She is employed as a clerk and has been in the same position for over three years. She was highly recommended by her supervisor as to her attitude and dependability with respect to her work. Defendant is interested in the children's welfare. She testified as to the arrangements she proposed to make for their care and supervision during the time she is absent from home in her employment.

Plaintiff contends that the investigator's report cannot be considered since it is hearsay, citing Washburn v. Washburn, supra. The determination of the trial court in that case rested almost entirely upon inadmissible testimony and the report of the investigator which contained facts antecedent to the prior decree and did not set forth material facts subsequent thereto. Furthermore, the investigator was not available for cross-examination. In the instant case the report, which was admitted into evidence upon the stipulation of the parties, had reference solely to conditions subsequent to the original decree as they related to the question of the welfare and best interests of the children and the investigator was present and testified. The testimony of plaintiff's witnesses as to the care and attention which he has given the children, the relation of which occupies much of plaintiff's brief, merely creates a conflict in the evidence which the court has resolved against him.

[7] It cannot be said as a matter of law that there was any abuse of discretion on the part of the trial court in modifying the interlocutory decree and awarding the custody of the children to defendant.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concur.

109 Cal.App.2d 329

In re FOY'S ESTATE.

Civ. 18781.

District Court of Appeal, Second District, Division 2, California.

Feb. 18, 1952.

Proceeding in the matter of the estate of Robert William Foy. The Superior Court, Los Angeles County, Victor R. Hansen, J., entered an order and decree distributing the whole of the estate to Lauretta Beaty Foy, the putative wife of decedent, and the guardian of the estate of Robert F. Foy, a minor, appealed. The District Court of Appeal, Moore, C. J., held that trial court properly found that payment made pursuant to insurance plan of decedent's employer was paid as part consideration for decedent's services rendered on behalf of employer and that such payment was community property and distributable to putative wife of decedent.

Affirmed.

McComb, J., dissented in part.

1. Marriage ⇐54

The term "putative marriage" is applied to matrimonial union which has been solemnized in due form and good faith on part of one or both of the parties but which by reason of some legal infirmity is either void or voidable, and essential basis of such marriage is belief that it is valid.

See publication Words and Phrases, for other judicial constructions and definitions of "Putative Marriage".

2. Husband and Wife ⇐248

Where marriage was celebrated during period of time before interlocutory divorce decree obtained by one party had become final, and marriage was celebrated under circumstances which established it as a putative marriage, property thereafter accumulated by couple belonged to community estate and upon death of the husband, intestate, widow was entitled to take such estate. Probate Code, § 201.

3. Marriage ⇐50(5)

Evidence that decedent and respondent celebrated marriage ceremony in foreign country when interlocutory divorce decree granted to respondent had not yet become final, but that respondent and decedent cohabited as man and wife from date of futile rites until decedent's death, and that respondent believed in good faith that she was lawfully wedded wife of decedent, sustained finding that respondent was putative wife of decedent.

4. Husband and Wife ⇐264

Under evidence that employees of corporation who were authorized to fly in line of duty were included in insurance plan providing for benefit of $10,000 in case of accidental death as result of flight, which benefit was to be in addition to benefits of workmen's compensation insurance and in addition to benefits provided by corporation's group insurance plan, trial court properly found that payment made pursuant to plan to putative widow of test pilot who was killed in course of employment was paid as part consideration for services rendered on behalf of corporation and that such payment was community property and distributable to putative wife of decedent. Probate Code, § 201; Civ.Code § 164.

5. Husband and Wife ⇐248, 259, 272

Existence of marital relationship is indispensable to acquisition of community property and that which is earned by either spouse during coverture is a part of community estate, and that which is earned after dissolution of marriage belongs to spouse who earned it. Civ.Code, § 164.

6. Husband and Wife ⇐249

Fact as to whether property is community or separate property is to be determined by proof showing mode of acquisition.

7. Husband and Wife ⇐254

Proceeds of insurance policy on life of husband are community property to extent that premiums were paid with community funds.

George I. Devor, Los Angeles, atty. and guardian ad litem for appellant, Robert F. Foy.

John Bricker Myers, Los Angeles, for petitioner and respondent, Lauretta Beaty Foy.

MOORE, Presiding Justice.

This is an appeal by the guardian of the estate of Robert F. Foy, a minor, from the "Order and Decree of Settling of Account and of Final Distribution" distributing the whole of the estate of Robert William Foy, deceased, to Lauretta Beaty Foy, the putative wife of decedent.

As grounds for reversal appellant contends that (1) the evidence does not sustain the finding that Lauretta Beaty Foy was the putative wife of decedent and (2) the sum of $10,000 paid to the estate by North American Aviation, Inc., was a gratuity and should be distributed in accordance with the laws of succession relating to separate property.

Decedent was killed in the course of his employment as a test pilot with North American Aviation, Inc. He died intestate leaving four minor children, one of whom is Robert, child of his first marriage; two of whom are respondent's children by a prior marriage, and who had been adopted by decedent, and one of whom is the issue of decedent and respondent. The estate consists principally of insurance benefits in the amount of $10,000 paid by North American Aviation, Inc., his employer, and the sum of $347.27, accrued salary.

Respondent concedes that her marriage to decedent which took place in Tijuana, Mexico, on May 16, 1945, was void since at that time his marriage to his first wife, Vivienne, had not been finally dissolved. The record discloses that Vivienne was granted an interlocutory decree of divorce in New York on May 4, 1945, which was not entered until May 22, 1945, and did not become final until the expiration of three months thereafter. Rothstein v. Rothstein, 40 Misc. 101, 81 N.Y.S. 342. The trial court found that decedent and respondent played the stellar roles in a marriage ceremony after consultation with and upon the advice of an attorney at Tijuana; they cohabited as man and wife from the date of their futile rites until decedent's death; at the time of the hymeneal venture, Lauretta "believed in good faith that she was the lawfully wedded wife of decedent"; she had received no information as to the illegality of her wedding until the assertion in August, 1950, by objectors of their interest in the estate. From such findings the court concluded that respondent was the putative wife of decedent.

Respondent testified she first met decedent in 1943, at which time they were both in the Air Force. They subsequently met on divers dates until May, 1945, in San Francisco where, in the presence of witnesses, he told her he was divorced and they could be married as soon as he could arrange for a leave. They decided to go to Mexico for the marriage because decedent would be able to obtain a leave of absence for only a short time. He inquired at the Mexican Embassy in Los Angeles regarding marriage in Mexico. An appointment was made for them with an attorney in Tijuana. On May 16, 1945, accompanied by another couple on nuptials bent, they called at the office of the attorney who asked them questions and had them fill out forms; they were then introduced by the attorney to a magistrate who read a marriage ceremony to both couples, after which all parties signed the register. Respondent was told that it was a "proxy" marriage and that "you get married in another country that way, where you are not a resident and you have to have a proxy appointed who is a legal resident and that they serve as your proxy in carrying out the wedding arrangements"; that it would take about three days to register the marriage, after which time the certificate would be sent to them. Some days later they received the marriage certificate through the mail. Her testimony was that she and Robert William Foy lived together from the date of the ceremony at Tijuana until his decease.

[1–3] This testimony supports the finding that respondent was the putative wife of decedent. The term "putative marriage" is applied to a matrimonial union which has been solemnized in due form and good faith on the part of one or of both of the parties but which by reason of some legal infirmity is either void or voidable. The essential basis of such marriage is the belief that it is valid. Vallera v. Vallera, 21 Cal. 2d 681, 684, 134 P.2d 761; Estate of Krone, 83 Cal.App.2d 766, 768, 189 P.2d 741, McKay, Community Property, second edition,

page 92. Where a marriage is celebrated in the interlocutory period under circumstances which establish it as a putative marriage, the property thereafter accumulated by the couple belongs to the community estate and upon the death of the husband, intestate, his widow is entitled to take the entire estate. Estate of Krone, supra; Probate Code, § 201. Therefore the sum of $347.27, representing accrued earnings of decedent at the date of death, is distributable to respondent as the putative wife.

The $10,000.

The only evidence as to the nature of the insurance benefits paid to the estate by decedent's employer is the testimony of the witness Snyder of North American Aviation, Inc. It disclosed that all employees of the corporation duly authorized to fly in line of duty are included in an insurance plan for accidental death as the result of flights. The amount of benefits of such accidental death shall be $10,000. "Such benefits will be in addition to the benefits of Workmen's Compensation insurance, if any, and *if the employee is enrolled for the corporation's group insurance plan,* that shall likewise be in addition to the benefits provided by such group insurance, if any."

[4] Upon that evidence the court found that "the sum of $10,000 paid to the estate of decedent by North American Aviation, Inc. is a gratuity paid pursuant to the policy of said Corporation to pay such gratuity to the estate of employees killed during and in the course of their employment; that such gratuity was paid as a result of and during the performance of personal services by the decedent during his lifetime and while living with petitioner, Lauretta Beaty Foy, and was a part of the consideration for the services rendered by the decedent on the behalf of the corporation." From such findings the court concluded that the entire estate, including the $10,000 gratuity, is community property and as such distributable to respondent as the putative wife of decedent. Such conclusion is correct.

[5, 6] Existence of the marital relationship is indispensable to the acquisition of community property. That which is earned by either spouse during coverture is a part of the community estate. Civ.Code, § 164. If it is earned after dissolution of the marriage it belongs of course to him alone whose efforts produced it. Feig v. Bank of Italy, 218 Cal. 54, 56, 21 P.2d 421. The fact as to whether it is community or separate property is to be determined by the proof showing the mode of acquisition. Estate of Granniss, 142 Cal. 1, 4, 75 P. 324; Potter v. Smith, 48 Cal.App. 162, 168, 191 P. 1023.

[7] The proceeds of an insurance policy on the life of the husband are community property to the extent that the premiums were paid with community funds. Travelers Ins. Co. v. Fancher, 219 Cal. 351, 353, 26 P.2d 482; Dixon Lumber Co. v. Peacock, 217 Cal. 415, 418, 19 P.2d 233.

The $10,000 was not intended as a gift to Mr. Foy. The insurance on his life was paid for by his employer as a part of the compensation for his services. Its relation to decedent may be assimilated to the retirement fund accumulated for the benefit of an employee during his tenure. It was intended by both employer and decedent as a reward for services performed. Decedent's services paid the premiums. While there may have been no express agreement for such payment as a part of his wages it was forcefully implied by the hazardous nature of the services undertaken. While it is a gracious assumption that North American Aviation, Inc., out of the goodness of its heart had arranged for $10,000 gifts to those employees who might in line of duty fly over the "great divide," yet viewing the transaction in an impartial and realistic light it is manifest that there was no real donative intent present whatsoever.

The nearest approach to a precedent to be found is the Estate of Hansen, 91 Cal. App.2d 610, 613, 205 P.2d 686. Hansen was an army officer, a flyer in the South Pacific. Having failed to return from a dangerous mission, his name was carried on the records of the War Department as a missing person. More than two years elapsed before it was established that the soldier had gone to his death on the date

he was first listed as missing. The moneys intended as compensation for service and credited to the brave officer for the period after his death were in fact an actual gratuity given to his estate, paid under a mistake of fact or at least with full knowledge that Hansen might not return and that the funds would be delivered to his estate. This court (Division 3) pointed out that "the payments were not made as a bonus for services rendered prior to death." The facts there bear no resemblance to those at bar, except that both were flyers. The Government generously paid Hansen's estate for the years he was "missing" whereas in fact he was dead.

As Foy paid for insurance on his life by his services, the $10,000 was a community fund and properly inventoried as a community asset of his estate.

Affirmed.

FOX, J., concurs.

McCOMB, Justice (dissenting).

I dissent from the portion of the opinion holding the $10,000 community funds.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.



109 Cal.App.2d 268

MORIN et al. v. CITY COUNCIL OF CITY OF SAN JOSE et al.

Civ. 14732.

District Court of Appeal, First District, Division 2, California.

Feb. 15, 1952.

Proceeding by Chadwick M. Morin and others for writ of mandamus to compel the City Council of the City of San Jose, and others, to find valid certain protests against annexation of contiguous territory and to set aside any determination to the contrary. The Superior Court, Santa Clara County, Leonard R. Avilla, J., entered judgment granting a peremptory writ of mandate, and the City Council and others appealed. The District Court of Appeal, Patterson, J., pro tem., held that protests were sufficient to defeat the annexation.

Judgment affirmed.

1. Municipal Corporations ⇐29(2)

The measure of power to be exercised by city council in proceedings for annexation of contiguous territory is determined by the Annexation Act of 1913. Government Code, §§ 35100–35157.

2. Tenancy in Common ⇐39

A cotenant may protect the estate from injury or loss without calling to his aid the assistance of other cotenants.

3. Municipal Corporations ⇐33(9)

One cotenant but less than all cotenants is authorized to sign a protest in proceedings for annexation of contiguous property by the city where it would subject the property to the burden of municipal taxation. Government Code, §§ 35100–35157.

4. Municipal Corporations ⇐33(9)

One cotenant may sign the names of his other cotenants to protest in proceeding for annexation of property by the city. Government Code, §§ 35100 to 35157.

5. Municipal Corporations ⇐33(9)

Statute providing for hearing upon protest in proceedings for annexation of property by the city contemplates a fair and impartial hearing at which competent evidence may be presented. Government Code, § 35121.

6. Municipal Corporations ⇐33(9)

Where protests in annexation proceedings by city were filed by a majority of owners and were valid according to statutory measure, court was not required to remand matter to city council because council was without authority to do anything except to sustain the protests and terminate the proceedings. Government Code, §§ 35100–35157.

Robert E. Cassin, City Atty., Eugene L. Rendler, Asst. City Atty., San Jose, for appellants.

Charles H. McDonald, City Atty. of City of Sunnyvale, J. Rainey Hancock, City

Atty. of City of Los Gatos, Herman J. Mager, City Atty. of City of Mountain View, C. M. Ozias, City Atty. of City of Fresno, for amici curiæ in support of appellants.

Burnett & Burnett, San Jose, for respondents.

PATTERSON, Justice pro tem.

This is an appeal from the judgment granting a peremptory writ of mandate to compel the City Council of the City of San Jose to find valid certain protests against the annexation of contiguous territory and to set aside any determination to the contrary.

On December 5, 1949, the City Council by resolution commenced proceedings to annex territory designated as "Bradley Manor No. 3". The proceedings were initiated under the provisions of Annexation Act of 1913, Government Code, Sections 35100–35157. Pursuant to the statute January 23, 1950 at 8 p. m. was fixed as the time for hearing protests. On that date purported protests were filed on behalf of the owners of 386 of the 668 parcels in the territory to be annexed. In view of the large number of protests the council continued the hearing for one week to determine their sufficiency. On January 30th the following week the council recessed to meet as a committee of the whole in a closed meeting out of the presence of the protestants or their representatives and considered the merits of the protests. They then returned to the council room and declared the protests to be insufficient in that they were not signed by a majority of the owners in the area to be annexed. The attorney for the protestants asked wherein the protests were insufficient. The council declined to answer and suggested that he should see the city attorney the following day. A resolution finding the protests insufficient was then adopted.

The plaintiffs as landowners and taxpayers filed on their own behalf and as representatives of the other protestants a petition for a writ of mandate to sustain the protests. An alternative writ was issued directing the council to show cause on February 17, 1950, why a peremptory writ should not issue. An answer was filed and the matter was set for trial on March 22, 1950. In the meantime an election was held on February 23, 1950, with the result that 326 ballots were cast for annexation and 291 against.

It developed at the trial that the council after receiving the protests directed the city clerk to check their sufficiency. The clerk testified that she checked the names listed on the protests against the record holders of the legal title and reported insufficient those protests wherein any discrepancies occurred. Prior to the January 30th meeting she found 52 of the protests showed a variance and so informed the council at the closed meeting on that date. Upon the basis of this report the council without a hearing declared the protests invalid. After the meeting of January 30th she made a further examination of the entire petition and found 14 additional protests to be insufficient. This would leave 320 valid protests and the total required to defeat the annexation would be 335.

It appeared from the testimony of the clerk that she found 20 protests insufficient because made by less than all of the joint tenants, 18 protests insufficient because one joint tenant signed the names of all joint tenants, 23 insufficient because signed by persons other than the holders of record title and 5 insufficient because the protestants requested in writing that their names be struck from the petition. The trial court found all of the 386 protests to be valid and that the action of the council in refusing to grant a public hearing on the protests and in attempting to determine their sufficiency in secret session and out of the presence of the protestants, their counsel or the public was in violation of the protestants' rights and in excess of the jurisdiction of the council; that the decision of the council was contrary to fact and unsupported by the evidence. A judgment was entered granting a peremptory writ of mandate.

[1] The measure of power to be exercised by the council is determined by the Annexation Act of 1913. American Dis-

tilling Co. v. City Council, Sausalito, 34 Cal. 2d 660, 213 P.2d 704, 18 A.L.R.2d 1247. That act provides as follows: "At any time not later than the hour set for hearing objections to the elections, any owner of property within the territory may make a written protest against the election. The protest shall state in general terms the name of the owner of the property affected and the location and area of the property." and that, "At the time set for hearing protests the city legislative body shall hear and pass upon all protests so made. If it finds that protest is made by the owners of a majority of separate parcels of property within the territory, no further proceedings for the annexation of any of the territory shall be taken for one year after the finding."

[2, 3] The only issue before the trial court was whether the council exceeded its authority in finding the protests insufficient. If the protests were sufficient the council was without jurisdiction to do anything except terminate the proceedings. It is contended that the court's finding that the protests were sufficient is unsupported. The defendants contend that the council was justified in declaring insufficient those protests which were signed by one but less than all of the cotenants and that also those in which one cotenant signed the name of all cotenants. It is an established principle of law in this state that one cotenant may protect the estate from injury or loss without calling to his aid the assistance of the other cotenants. This rule was invoked in Los Angeles Lighting Co. v. Los Angeles, 106 Cal. 156, 39 P. 535, in which it was held that one cotenant could sign a valid protest against a proposed street improvement, the Court said: "One of the questions involved herein is the effect of the signature to the protest by one of the several cotenants of a lot of land fronting upon the proposed improvement, the appellant contending that such protest should be entirely disregarded, upon the ground that a cotenant has no implied authority to do any act affecting the interest of the other cotenants in the land. It is undoubtedly true that it is not within the power of a cotenant to create an incumbrance upon the entire estate, or to impose any burden upon the interests of his cotenants therein, nor can he by any act of his confer jurisdiction upon any other body or tribunal to impose such burden, as was held in Mulligan v. Smith, 59 Cal. 206. This rule of inability is, however, entirely inapplicable to the acts of the cotenant in a case like the present. One cotenant can at any time protect the entire estate from injury or loss without calling to his aid the assistance of the other cotenants, and his act will inure to their benefit. He can resist an intruder, or evict a trespasser, remove an incumbrance, or redeem from a burden, and, since his acts in this behalf are in the interest of and for the benefit of his cotenants, their authority therefor, if necessary, will be presumed. We hold, therefore, that a cotenant is authorized to sign a protest against the improvement of a street by the city council under the aforesaid act. Upon any other rule a cotenant of land might be powerless to prevent an unwarranted imposition of this burden upon the land, even though he held the major interest therein." We are of the opinion that the same reasoning is applicable in this case where the annexation would subject the property to the burden of municipal taxation. The defendants rely upon Directors of F. I. District v. Abila, 106 Cal. 355, 39 P. 794, decided by the same court a few days after it decided Los Angeles Lighting Co. v. Los Angeles, supra. In this later case the court held that one cotenant alone could not bind his cotenant in signing a petition for the organization of an irrigation district. This was an act, however, which would place a burden upon the property instead of protecting it from a burden. This is consistent with the language and the decision in Los Angeles Lighting Co. v. Los Angeles, supra.

[4] We think that the Los Angeles Lighting Co. v. Los Angeles case, supra, also disposes of the objection to the protests in which one cotenant signed the names of his cotenants. The court said: "The protests contemplated by this statute are not required to be executed with any particular formality. They do not create any burden

or obligation, and are not to be executed with the ceremonies required for a transfer of real estate, or for creating a charge thereon. It is sufficient if they indicate to the city council that the proposed improvement is objected to, and that this objection is made by the owners of a majority of the frontage upon the line of the work. The statute does not require that the authority to sign the protest, if signed by an agent, shall accompany the protest, nor was it necessary that the authority of Couget to Sarrail should be in writing. When the council came to consider the sufficiency of the protest they could then require the production of the authority, if it was challenged; but, if on its face a protest purports to have been signed on behalf of the owners of a majority of the frontage, a disregard of it by the council is at the risk of their future action in ordering the improvement, being without their jurisdiction." These 38 protests which the city council erroneously held to be insufficient added to the parcels which the clerk reported to the council as sufficient and which were not challenged would be more than one-half of the parcels. The council should have so found and in accordance with the statutory provision thereupon terminated the proceedings.

In view of our conclusions it is unnecessary to pass upon the remaining protests which the council held to be insufficient for other reasons.

[5] Plaintiffs complain that the protestants were not granted a hearing upon the protests as required by the statute. A closed hearing out of the presence of the protestants is not the kind of hearing contemplated by Government Code section 35121. Such a hearing contemplates a fair and impartial hearing at which competent evidence may be presented. Saks & Company v. City of Beverly Hills, 107 Cal.App. 2d 260, 237 P.2d 32; Carstens v. Pillsbury, 172 Cal. 572, 158 P. 218; 29 C.J., 285, 39 C.J.S., Hear, p. 875.

[6] Defendants urge that if the council incorrectly held these protests insufficient that the court should have remanded the matter to the council for a further hearing in accordance with the court's views. There would be no reason to remand it to the council for a further hearing. The trial court's finding of sufficiency required the conclusion that the city council had no discretion to do other than comply with the statute and terminate the proceedings. American Distilling Company v. City Council, Sausalito, supra.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.



108 Cal.App.2d 861

TERRY et al. v. CIVIL SERVICE COMMISSION et al.

Civ. 14795.

District Court of Appeal, First District, Division 1, California.

Jan. 29, 1952.

Proceeding in the matter of application of Juanita Banks Terry and others, petitioners, against the Civil Service Commission of the City and County of San Francisco, State of California, and others, to compel defendants to permit petitioners to take examination for positions of playground director. The Superior Court, City and County of San Francisco, William T. Sweigert, J., entered a judgment adverse to defendants, and they appealed. The District Court of Appeal, Peters, P. J., held that rule of commission requiring that applicants be graduates of colleges approved by certain associations in order to take the examination, was arbitrary, discriminatory, and void.

Judgment affirmed.

1. Municipal Corporations ⇐216(2)

Rule of Civil Service Commission of City and County of San Francisco that, in order to qualify for civil service examinations for playground directors, applicants must have graduated from university or college on accepted list of Associations of

American Universities or Northwest Association of Secondary and Higher Schools, or must have had two years of college education at one of such schools plus a year actual experience, or must have completed two year course in recreational leadership given by City College of San Francisco, was arbitrary and discriminatory and void, where evidence showed graduates from excluded colleges were as well qualified as those from included colleges.

2. Municipal Corporations ⇐217(3)

The establishment of educational requirements for certain positions, where reasonably justified, is well within power of the Civil Service Commission of City and County of San Francisco.

3. Municipal Corporations ⇐216(2)

Any rule adopted by Civil Service Commission of the City and County of San Francisco with respect to educational requirements for certain positions, must be reasonable and not operate to discriminate unreasonably between qualified applicants.

4. Mandamus ⇐75

Discretion of Civil Service Commission of City and County of San Francisco in reference to administration of Civil Service Act is a high discretion which will not be interfered with by courts unless clear abuse of discretion is shown, but courts should not hesitate to interfere where commission attempts to discriminate between qualified applicants for positions.

5. Constitutional Law ⇐238(1)
Municipal Corporations ⇐217(3)

Civil Service Commission of City and County of San Francisco has power to classify applicants for positions, but such classification must be reasonable, and, if unreasonable, applicants discriminated against have been denied equal protection guaranteed by state and federal constitutions.

6. Constitutional Law ⇐238(1)

The right to work is fundamental and enjoys the personal liberty guarantees of the Fourteenth Amendment to the Federal Constitution, and any unreasonable limitations that deprives qualified persons of equal opportunity to qualify for work is unconstitutional. U.S.C.A.Const.Amend. 14.

7. Constitutional Law ⇐238(1)

The right of citizens to work for the government is not absolute, but it should be safeguarded from legislative or quasi legislative action which discriminates against persons or classes of persons.

8. Appeal and Error ⇐781(4)

Fact that after applicants for positions for playground directors instituted mandamus proceedings to compel Civil Service Commission to permit them to take examination for such positions, they were allowed to take but failed to pass the examination, did not require dismissal of appeal, on ground that the proceedings were moot, since question involved was the legal right of applicants to take examination and not the right to pass it.

9. Mandamus ⇐16(1)

Generally, courts will not issue a writ of mandate to enforce an abstract right of no practical benefit to petitioner or where to issue the writ would be useless, unenforceable, or unavailing.

Dion R. Holm, City Atty., City and County of San Francisco, Norman Sanford Wolff, Deputy City Atty., San Francisco, for appellants.

Adams & Reynolds, John Adams, Jr. and R. J. Reynolds, all of San Francisco, for respondents.

PETERS, Presiding Justice.

Respondents, citizens of the United States and residents of San Francisco for over nine years, were denied the right to take a civil service examination for playground director solely because they were not graduates of one of the limited number of colleges accredited by the Civil Service Commission. The commission, by rule, has provided that only graduates of certain designated colleges can qualify to take the examination. The day before this particular examination was to be given the respondents applied to the trial court for an alternative writ of mandate. The writ

was issued and, at the same time, the trial court ordered the commission to permit the five respondents to take the examination, pending further orders of the court. Pursuant to this order the respondents were permitted to take the examination. Several months later the hearing on the writ was had, and, at its conclusion, the judge gave it as his opinion that the challenged rule was arbitrary, unreasonable and void, and ordered findings prepared accordingly. Before the findings were signed, the examination papers were graded and it was discovered that all five of the respondents had failed to make a passing grade. The commission thereupon moved to dismiss on the ground that the proceeding was moot. The motion was denied, and a judgment granting the peremptory writ was entered. The judgment declares that the rule in question is "arbitrary, unreasonable and discriminatory as between residents and citizens of San Francisco * * * with substantially equal educational qualifications" and that its adoption by the commission constituted an abuse of discretion. The commission appeals, contending that its accreditation rule, as a matter of law and fact, is fair and reasonable, and that the finding to the contrary is totally unsupported. The commission also contends, as it did before the trial court, that, since respondents failed in the examination, the entire proceeding is moot.

Facts:

The Civil Service Commission announced that on April 8, 1949, an examination would be given for the position of playground director. In its official scope circular the duties of that position were described as follows: "R56. Playground Director. Under general supervision: supervises play and recreation at a playground; organizes recreational activities including conducting clubs and groups in handicraft, dramatics, music, folk dancing, games and athletics, and other related activities; administers first aid in case of injury; prepares required reports on activities; and performs related duties as required."

The minimum requirements for this position were fixed by the commission and set forth in its circular as follows:

"*Minimum Requirements*: Either

"1. Graduation from a university* or college* which shall have included courses or extra-curricular work which indicates an interest or aptitude for recreation work. Applicants shall state on the application blank the nature of their university work which indicates such interest in recreation work; or

"2. Two years of college* education, and at least one year of first class paid experience within the last five years as a playground director or in related recreational work.

"3. Successful completion of the two-year college course in recreational leadership given by the City College of San Francisco.

> "*University or college education to be acceptable must be in universities or colleges on the accepted list of the Association of American Universities, or the Northwest Association of Secondary and Higher Schools."

It was stipulated that each of the respondents filed an application, in proper form, to take the examination in question; that with each application there was filed an official transcript of the applicant's record indicating that each applicant was a graduate of a university or college, and that each had taken such courses and had participated in extra-curricular work as to indicate "an interest or aptitude for recreation work" as set forth in the circular. It was further stipulated that the respondents' applications were denied and that such denial was based solely on the fact that the colleges and universities from which respondents graduated were not on the list accredited by the Association of American Universities or the Northwest Association of Secondary and Higher Schools.

It should be here pointed out that the list of accredited colleges published by the Association of American Universities is a "dead" list for the reason that that as-

sociation ceased to publish such a list in 1948.

The examination announcement was released by the commission in February of 1949. The parties stipulated that at that time there were five regional associations that accredited colleges and universities within their respective areas, and that such associations were:

The North Central Association of Colleges and Secondary Schools;

The Middle States Association of Colleges and Secondary Schools;

The New England Association of Colleges and Secondary Schools;

The Southern Association of Colleges and Secondary Schools;

The Northwest Association of Secondary and Higher Schools.

It was further stipulated that each of respondents is a citizen and resident of San Francisco, and is a graduate of a college or university that is an accredited member of the Southern Association of Colleges and Secondary Schools.

The stipulation then sets forth a table showing the number of colleges and universities accredited by the regional associations, and the number in each region accredited up to 1948 by the Association of American Universities. The substance of this table is that, in all but the New England association, there are substantially more schools accredited by the regional associations than were formerly accredited by the national one. The northwest association is limited to colleges in California, Idaho, Montana, Nevada, Oregon, Utah, Washington and Alaska.

It was stipulated that 336 persons applied to take the examination here involved, that 208 qualified and that 188, exclusive of the five respondents, actually took the examination.

The evidence establishes, without contradiction, that there is little or no difference in the standards used by the five regional associations to accredit colleges and that, in educational circles, the accreditations are inter-changeable. Herman A. Spindt, Director of Admissions of the University of California at Berkeley, so testified. He further testified that the University of California accepts the judgment of any of these regional associations in admitting students. P. F. Valentine, Dean of Instruction of San Francisco State College, and chairman of a committee that determines the admission policies of that school, agreed with Spindt, and further testified that his school accepts students from other accredited schools on an equal basis. It was his opinion that there was no reason to discriminate between the accredited schools of the various associations. He stated that he was familiar with the accreditation standards of the southern association and of the northwest association and that there was no substantial difference between the standards adopted by each. There was other evidence that other groups accept the regional associations' recommendations inter-changeably.

William L. Henderson, Personnel Director and Executive Secretary of the Civil Service Commission, testified that the duties of playground director as set forth in the scope circular have been the same for the past twenty years, but that the "Minimum Requirements" have been changed. Up until 1947 the requirement was "graduation from a recognized university or college with major work in recreation, physical education, sociology or child psychology." Henderson testified further that the requirement that the applicant must be a graduate of a college accredited by either the national association or the northwest association was added after the 1947 examination for this position, and was added at his suggestion. He attempted to justify the limitation to colleges accredited by these two associations on the ground that the commission, in the past, had occasionally run into difficulty in determining what was a "recognized university or college" within the meaning of the old rule. He felt that a fixed standard was needed so that the nature of the educational requirement would be clearly indicated. He also felt that a sufficient number of San Francisco citizens could qualify under the new rule so as to assure suffi-

cient applicants for the available jobs. Thus, he gave two reasons for the new rule. Expressed in his own language these two reasons were: "One, we wanted to establish a definite fixed standard which everyone would understand and we could administer and, secondly, we wanted to assure adequate competition by qualified persons." He finally explained: "Now, we had to draw the line somewhere and we drew it at that point."

Henderson stated that graduates in the northwest area included the bulk of all applicants, but he admitted that he had made no population or other studies in reference to the problem. Prior to the war, according to Henderson, eighty per cent of the persons in the municipal service, who had to be college graduates, came from the five colleges located around San Francisco Bay. Henderson had no idea how many citizens of San Francisco were graduates of colleges outside the northwest area. He was of the opinion that about half the colleges of the United States would be included in the accreditation lists of the northwest regional and the national associations.

On this evidence the trial court found that the southern regional association has accrediting standards substantially equal to those of the northwest regional association; that colleges generally accept the graduates of any accredited college without discrimination; that the graduates from excluded colleges are as well qualified as those from the included colleges; that the inclusion of graduates of all of the colleges accredited by all of the five regional associations would impose no hardship or inconvenience on the commission; that the change from "a recognized university or college" to the new rule was made merely to avoid "indefiniteness as to what constituted a recognized college," and because the commission "desired to draw a line somewhere," and because the commission felt that a majority of qualified graduates would be included in the rule as restricted; that no sound reason can be given for limiting recognition to but one of the five regional accrediting associations; "that the restrictive provision hereinbefore referred to is not practical in character or related to matters fairly to test the relative capacities of applicants, specifically these Petitioners, for the position to be filled, and is not an appropriate test to establish the merit and fitness of applicants, specifically Petitioners, and that any finding to the contrary by the Civil Service Commission is arbitrary, unreasonable and not founded on any fact or reasonable theory."

Based on these findings judgment granting the peremptory writ of mandate was entered.

The Finding that the Challenged Rule is Arbitrary and Discriminatory is Amply Supported by the Evidence.

[1] This is the main question involved. The answer is clear—the commission had no legal power to limit public employment to the graduates of the colleges accredited by either of the two associations, and the rule so providing is arbitrary and discriminatory, and is void.

Section 7 of the San Francisco charter provides that employees of the city must be citizens and, with certain exceptions not here involved, must be residents of the city for at least one year before their appointment. Admittedly, all of the respondents possess these needed qualifications.

There are three other sections of the charter that should be mentioned, sections 140, 144 and 145. So far as pertinent here, these sections provide:

§ 140: "* * * All appointments in the public service shall be made for the good of the public service and solely upon merit and fitness, as established by appropriate tests, without regard to partisan, political, social or other considerations. * * *"

§ 144: "Any citizen having the qualifications prescribed by section 7 of this charter may submit himself for any examination under conditions established by the civil service commission. * * *"

§ 145: "All applicants for places in the classified service shall submit to tests which shall be competitive, * * * Such tests

shall be without charge to the applicants. * * * The tests may be written, oral, mechanical or physical, or any combination of them, practical in character and related to matters fairly to test the relative capacity of the applicants for the positions to be filled. The commission shall be the sole judge of the adequacy of the tests to rate the capacity of the applicants to perform service for the city and county. * * * No question submitted to applicants shall refer to political or religious opinions or fraternal affiliations. * * *"

[2–5] The commission correctly argues that under section 144 it has the right to adopt rules and regulations fixing the conditions under which applicants may take civil service examinations. Undoubtedly the establishment of educational requirements for certain positions, where reasonably justified, is well within the power of the commission. It is conceded that the requirement of a college education for applicants to take the examination for playground director is a reasonable exercise of this power. But any rule adopted by the commission must be reasonable and not operate to discriminate unreasonably between qualified applicants. While it is no doubt the law that the discretion of the commission in reference to administration of the civil service act is a "high discretion" which will not be interfered with unless a clear abuse of discretion is shown, Nelson v. Dean, 27 Cal.2d 873, 881, 168 P.2d 16, 168 A.L.R. 467; Almassy v. Los Angeles County Civil Service Comm., 34 Cal.2d 387, 396, 210 P.2d 503, the courts will not and should not hesitate to interfere where the commission attempts to discriminate between qualified applicants. The commission has the power to classify, but such classification must be reasonable. If unreasonable, those discriminated against have been denied the equal protection guaranteed by the state and federal Constitutions.

The proper restrictions on the power of a board or commission, or even the Legislature, were illustrated in the recent case of Accounting Corp. v. State Board of Accountancy, 34 Cal.2d 186, 208 P.2d 984. In that case, a provision of the Business and Professions Code provided that no person would be permitted to practice public accounting unless he had been issued a permit. It was further provided that nothing in the chapter should prevent any corporation which had been legally organized and had engaged in practice in California for three years prior to the date of the statute from continuing such practice under its corporate form. Plaintiff was a corporation. It had not been engaged in the practice of accounting for a period of three years. The Board of Accountancy threatened to prohibit plaintiff corporation from practicing public accountancy. The Supreme Court held that the provision excluding plaintiff was arbitrary, stating, 34 Cal.2d at page 191, 208 P.2d at page 987: "The evil of the proviso to section 5062 is that it confers a privilege to remain in business upon a class of corporations arbitrarily selected from among those engaged in public accounting at the time the new accounting chapter became effective." And again, 34 Cal.2d at page 190, 208 P.2d at page 986: "But where a statute discriminates against individuals or corporations solely because they are new to the field and such discrimination does not appear to have any relation to the public interest, the legislation disregards constitutional protections against arbitrary classification. [Citing cases.]"

Of course, it is not and cannot be contended reasonably that the exclusion of graduates from colleges accredited by the other four regional associations in any way is in the public interest.

Under section 145 of the charter the civil service tests are to be competitive, practical in character and related to matters so as to test fairly the relative capacities of the applicants. A distinction between graduates of schools accredited by any one of the five regional associations is arbitrary. The evidence shows, without contradiction, that such a distinction is not based on any material differences in standards between schools in the various regions. It is not even suggested that the experience of the commission with graduates of the excluded schools indicated unequal qualifications. The evidence shows

that the commission adopted this rule without investigation or knowledge of how, and to what extent, it would affect the citizens of San Francisco. It had no knowledge of population trends or of the number of new residents in this area in the past ten years. The commission adopted the rule without considering the standards of accreditation used by the various regional associations, and with full knowledge that it would deprive an appreciable number of San Franciscans of the opportunity to work for the city.

The commission seeks to justify its limited rule on the grounds that such rule made it easier for the commission to administer examinations, and that under the limited rule a sufficient number of applicants would be secured to fill all vacant positions. Such arguments indicate a lack of appreciation of the duties and responsibilities of the commission towards the residents of the city. The commission was not created for the benefit of the commissioners or its secretary, but to serve all of the people of the city. It is not only the duty of the commission to secure qualified persons for public employment, but also its duty to administer the act impartially and without discrimination to the end that those qualified may have the opportunity to compete for public employment. The privilege of working for the government, local, state and federal, is an important one. It should not be arbitrarily granted to some and denied to others equally qualified.

[6, 7] It hardly needs citation of authority to establish the principle that the right to work is fundamental and enjoys the personal liberty guarantees of the Fourteenth Amendment. Any unreasonable limitation that deprives qualified persons of the equal opportunity to qualify for work is unconstitutional. See Bautista v. Jones, 25 Cal.2d 746, 749, 155 P.2d 343. The right to work for the government is, of course, not absolute, but it should be safeguarded from legislative or *quasi* legislative action which discriminates against persons or classes of persons. Abe v. Fish & Game Commission, 9 Cal.App.2d 300, 49 P.2d 608.

None of the cases cited by appellants suggests, far less compels, a contrary conclusion. Thomas v. Kern, 280 N.Y. 236, 20 N.E.2d 738, 129 A.L.R. 347, involved a rule of the Civil Service Commission by which, on an examination for policemen, credit was given for college training of a particular type if such training were received at any institution accredited by New York State University. The rule was upheld. It will be noted that this case involves credits on an examination, and not qualifications to take an examination. Moreover, it does not appear from the opinion what the accreditation policy of the New York State University was. For all that appears, it may be as broad as that of the University of California or the San Francisco State College, and other colleges generally. Those two named institutions, and many others, accredit all colleges accredited by any of the five regional associations. The case is of no help here.

Another case relied upon by appellants is also a New York case—Price v. Morton, 189 Misc. 983, 72 N.Y.S.2d 868. There the petitioner was excluded from taking an examination for health officer because he had only served a six-months' internship and the requirement was one year's internship. The petitioner had what he considered a reasonable substitute for one year's internship—many years of medical practice, study and public service. The court upheld the one-year requirement as being reasonable. The opinion carefully points out that the requirement was the result of the deliberations and recommendations of a group of well-qualified physicians and was in accord with the requirements of several other jurisdictions. The court stated, 72 N.Y.S.2d at page 869: "While it is not unlikely that individuals will from time to time appear who though they cannot meet the qualifications can nevertheless perform the duties, the fact that such exceptional persons might be excluded does not make the regulation which debars them arbitrary."

In that case the requirement was the result of careful study and the weighing of relevant factors, and was reasonably re-

lated to the requirements of the position in question. In our case the requirement was not based on study or knowledge of the facts, and has no reasonable relation to the requirements of the position. Moreover, the one-year internship requirement would adversely affect only a few exceptional individuals. The requirement in our case obviously excludes a substantial number of otherwise qualified persons. The New York requirement is similar to the requirement of a college education. Although a few self-educated persons might have the equivalent of a college education, the power of the commission cannot be doubted to impose the requirement of a college education and thus exclude a few self-educated persons. The case is not in point on the issue before this court.

Under the circumstances disclosed by this record the finding that the questioned rule is arbitrary and discriminatory is amply supported by the evidence—in fact, the evidence would support no other conclusion.

The Proceeding is not Moot.

It will be remembered that, pursuant to court order, the respondents were permitted to take the examination, and before judgment was entered the papers were marked and it was discovered that all respondents had failed to make a passing grade. Appellants claim that this renders the entire proceeding moot, and that for this reason the appeal should be dismissed.

[8, 9] The point is without merit. The question here involved is the legal right of respondents to take the examination, not the right to pass it. The rule here involved applies not only to this examination but to many other positions, and to future examinations. The matter involved is of great public interest and affects many citizens of San Francisco. Of course, as a general proposition courts will not issue a writ of mandate to enforce an abstract right of no practical benefit to petitioner. Clementine v. Board of Civil Service Comm'rs, 47 Cal.App.2d 112, 114, 117 P.2d 369, or where to issue the writ would be "useless, unenforceable, or unavailing." Roscoe v. Goodale, 105 Cal.App.2d 271, 273, 232 P.2d 879, 881. None of these cases involved matters of public concern almost sure to arise again.

The present case falls within the rule announced in such cases as Rattray v. Scudder, 67 Cal.App.2d 123, 153 P.2d 433. There, petitioner's license had been revoked for one year, and he sought, by mandate, to review the order of revocation. Pending appeal, the one-year period expired, and the respondent moved to dismiss the appeal on the ground that the issue was moot. The court stated, 67 Cal. App.2d at page 127, 153 P.2d at page 435: "Apparently, this is a case where the appeal should not be dismissed if that action can be avoided. In any event, it should not be dismissed as moot, which is the ground most strongly urged. * * * As a practical matter this judgment, if allowed to stand, will have a direct bearing and real effect upon any renewal of the respondent's license, * * *. Moreover, important public questions are involved both directly, with respect to this judgment, and indirectly, through the effect on future appeals in such cases which could not be determined before the license in question had expired." See, also, Johnstone v. Richardson, 103 Cal.App.2d 41, 48, 229 P.2d 9; Southern Pac. Terminal Co. v. Interstate Commerce Comm., 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310.

The judgment appealed from is affirmed.

BRAY and Fred B. WOOD, JJ., concur.

BLUMENTHAL v. LIEBMAN et al.

No. 14808.

District Court of Appeal, First District, Division 1, California.

Feb. 20, 1952.

Rehearing Denied March 21, 1952.

Hearing Denied April 17, 1952.

Harry Blumenthal sued Jeanette Liebman, individually and as administratrix of the estate of Ben Liebman, deceased, for the rents, issues and profits of certain real property. From a judgment of the Superior Court, City and County of San Francisco, Samuel F. Finley, J., for defendants, plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that a prior judgment, ordering the court clerk to deliver to plaintiff decedent's and defendant's deed, conveying the property to plaintiff's predecessors in interest, on plaintiff's payment to defendant of a specified sum, was a final determination that plaintiff did not own the property until payment of such sum, so that he was not entitled to the rents, issues and profits previously received by defendant.

Judgment affirmed.

1. Judgment ⇐564(1)

A judgment ordering court clerk to deliver deed, deposited with him by escrow holder thereof under court order, to grantees' successor in interest on his payment of specified sum to grantor, individually and as administratrix of deceased co-grantor's estate, was final determination that such successor did not then own property conveyed and did not become owner thereof until delivery of deed on payment of such sum, so that he was not entitled to rents, issues and profits received by administratrix before such delivery

2. Judgment ⇐948(1)

In action for rents, issues and profits of realty, conveyed by defendant and her husband, since deceased, by deed, placed in escrow, to persons to whose rights and duties plaintiff succeeded, defendant, joining issue respecting right to such rents, etc., properly invoked, in proof of their right thereto, estoppel of plaintiff by prior judgment to claim ownership of land conveyed, without pleading such judgment. Code Civ.Proc. § 1962, subd. 6.

3. Judgment ⇐948(1)

A judgment, relied on in subsequent action merely as conclusive evidence of fact constituting matter of defense or element of cause of action, not as complete bar to action, need not be pleaded. Code Civ.Proc. § 1962, subd. 6.

4. Pleading ⇐428(7)

A party failing to object when roll of prior judgment is offered in evidence by opposite party waives any objection predicated on failure to plead such judgment. Code Civ.Proc. § 1962, subd. 6.

5. Pleading ⇐409(4)

A plaintiff, introducing in evidence entire file of previous action, including complaint and answer, fact findings, judgment, and modification of findings and judgment, waived right to object to defendant's invocation of such judgment as final determination that plaintiff did not own certain land in proof of defendant's right to rents, issues and profits thereof without pleading judgment. Code Civ. Proc. § 1962, subd. 6.

6. Judgment ⇐670, 715(2)

In action against widow, individually and as administratrix of her deceased husband's estate, for rents, issues and profits of realty conveyed by spouses' deed, placed in escrow, to parties to whose rights and duties plaintiff succeeded, defendant, in her individual capacity, was entitled to invoke plaintiff's estoppel by judgment in his prior action against escrow holder and widow, as administratrix only, for delivery of deed, to claim ownership of realty and right to rents, issues and profits thereof, as against contention that parties and issues in two actions were not identical.

7. Judgment ⇐958(1)

A judgment for defendants in action for rents, issues and profits of realty will not be reversed on ground that trial judge was apparently of opinion that he was powerless to determine, in face of prior judgment in plaintiff's previous action for delivery to him of deed to realty, what matters were before court and actually adjudicated therein, where trial court and

District Court of Appeal made such use of pleadings and other documents in judgment roll and file of former action as seemed indicated for understanding of provisions of prior judgment.

8. Escrows ⇐12

Generally, a deed placed in escrow takes effect as conveyance on performance of prescribed conditions and delivery of deed to grantee by depositary. Civ.Code, § 1057.

9. Escrows ⇐9

Where all conditions of escrow, in which deed was placed, have been performed, and grantee is entitled to possession of deed, title to realty conveyed may be deemed to have passed.

10. Escrows ⇐13

The rule that title to realty, conveyed by deed placed in escrow, may be deemed to have passed when all conditions of escrow have been performed and grantee is entitled to possession of deed, does not sanction relation back to earlier date, such as that of execution of deed or commencement of escrow; doctrine of relation back being recognized as exception to general rule and only when circumstances are appropriate to its application.

11. Escrows ⇐13

Passing of title to realty, conveyed by deed placed in escrow, did not relate back to date of execution of deed, so as to entitle successor to grantees' rights and duties to recover rents, issues and profits of realty from date of his performance of escrow conditions, in view of judgment finally determining, in his action for delivery of deed, that he did not own realty until delivery of deed on his payment of specified sum.

12. Judgment ⇐564(1)

The fact that first paragraph of trial court's fact findings in action for delivery of deed to plaintiff adopted as true allegations of certain paragraphs of complaint that defendant did not own and was not entitled to possession of deed, which was consistent with specific facts declared in second paragraph of findings until amended to find that plaintiff was owner of and entitled to possession of deed on his payment to defendant of specified sum, did not affect finality of determination by judgment, as modified accordingly, that plaintiff did not become owner of property until delivery of deed to him on his payment of such sum.

13. Escrows ⇐8(1)

Neither party to escrow, in which deed was placed, could successfully assert right to immediate physical possession of deed so long as escrow remained open.

14. Escrows ⇐8(1)

In action for delivery to plaintiff of deed deposited with court clerk by defendant escrow holder, for whom administratrix of deceased grantor's estate was substituted as defendant, plaintiff could have prevailed only on strength of his own right, not weakness of defendant's right, to deed.

Morris Oppenheim, San Francisco, for appellant.

Lloyd J. Cosgrove and Cosgrove, Molinari & Tinney, all of San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiff appeals from the judgment rendered against him in an action to recover from Jeanette Liebman, individually, and as administratrix of the estate of Ben Liebman, deceased, the rents, issues and profits of certain real property, which she had received during the period commencing October 18, 1945, and ending April 1, 1948.

The "entire case," as stated by appellant in his opening brief, "turns upon the construction of the judgment" in a former action, a judgment which had become final and was deemed by the trial judge determinative of the issues in this action.

In 1943 Ben Liebman and Jeanette Liebman, his wife, executed a deed, dated December 21, 1943, conveying this real property to Frank and Edna Rusalem, and placed the deed in escrow for delivery to the Rusalems upon the performance of certain conditions. Appellant succeeded to the rights and duties of the Rusalems.

Ben Liebman died and Jeanette was appointed administratrix of his estate. December 10, 1945, appellant commenced an action (the "former action" mentioned herein) against the escrow holder, for delivery of that deed. Upon motion of the escrow holder, the deed was deposited with the clerk of the court, and Jeanette Liebman, as administratrix of the estate of Ben Liebman, was substituted for the escrow holder as defendant. By an amended and supplemental complaint, the plaintiff alleged he was "the owner and entitled to the possession" of the deed; that, without any right whatsoever, defendant claimed some right or interest in or to the deed; and prayed for judgment ordering delivery of the deed to him, and for general relief. Defendant joined issue and alleged that she was owner and entitled to possession of the deed, and prayed judgment for its possession and for general relief.

The court, by its findings of fact, declared plaintiff the owner and entitled to the immediate possession of the deed, and, by its judgment ordered the clerk to deliver it to him forthwith. Defendant moved for a new trial. Upon the hearing of that motion, the court changed the provisions of paragraph II of the findings of fact, and modified the judgment in accordance with those changes. Paragraph II, as thus changed, reads as follows: "That plaintiff is *upon payment by plaintiff to defendant of the sum of Thirty-One Thousand ($31,000.00) Dollars,* the owner and is entitled to the immediate possession of a certain deed executed *by Ben Liebman and Jeanette Liebman, his wife,* on or about the 21st day of December, 1943, ~~by Ben Liebman and Jeanette Liebman, his wife, wherein and whereby the~~ *under which deed* said Ben Liebman and ~~the said~~ Jeanette Liebman, *his wife,* granted and conveyed unto Frank Ruselam, and Edna Ruselam, his wife, *that* certain real property situate, lying and being in the City and County of San Francisco, State of California, and bounded and ~~particularly~~ described as follows, *to wit*: * * *." (Additions and deletions in effecting the changes are indicated by italics and strike-out type, respectively.)

It is clear that by this finding, as thus changed, the court found that plaintiff in the former action was not then the owner of the deed but would become the owner, and entitled to its possession, upon payment of the $31,000. The intent to so find is accentuated by changes which the trial judge made in the typewritten draft of the amendment to Paragraph II. That draft commenced with the words: "That plaintiff is the owner and upon payment by plaintiff to defendant of the sum of Thirty-One Thousand ($31,000.00) Dollars, is entitled to the immediate possession * *." The judge, by pen, struck out the words "the owner and," and inserted them between "Dollars," and "is entitled," to read as first herein quoted.

In accordance with that concept, the judgment was modified to direct the clerk to deliver the deed upon payment of the $31,000. The pertinent portion of the judgment as thus modified, reads as follows: "It is hereby ordered, adjudged and decreed that the Clerk of this Court, forthwith and without delay, *upon the payment by plaintiff to defendant of the sum of Thirty-One Thousand ($31,000.00) Dollars,* deliver to Harry Blumenthal, Plaintiff herein, a certain deed hereinafter described, *which deed was* heretofore, pursuant to an order of Court made herein, ~~delivered and~~ deposited with *the* ~~said~~ Clerk *of this Court* by California Pacific Title Insurance Company." (Additions and deletions in effecting the modification are indicated by italics and strike-out type, respectively.)

That judgment, modified October 8, 1947, became final. Neither party appealed.

By a writing dated March 29, 1948 (filed April 1, 1948, with the clerk and placed in the records and files of that action), the plaintiff acknowledged "receipt of deed pursuant to the judgment rendered and entered herein." Appellant, in his opening brief herein, states that defendant in the former action "received the entire sum of $31,000 and the clerk thereupon delivered the deed to the property to the appellant" herein.

[1] The conclusion is inescapable that the judgment in the former action was a

final determination that the plaintiff therein did not then own the property which the deed upon delivery would convey, and that delivery would not become due until payment of the $31,000; that delivery became due and was effected March 29, 1948; and that the plaintiff became the owner of the property on March 29, 1948, not at any time before.

The questions remain whether or not that determination was material to issues in the present action; whom, if any one, it binds in the present action; and who, if any one, may invoke it in the present action.

Appellant herein (plaintiff in the former action) commenced the present action April 1, 1948. In his complaint herein he alleges that ever since October 18, 1945, he has been "the owner and entitled to all of the rents, issues and profits of certain real property" described in the complaint (the very property described in the deed of December 21, 1943, and in the judgment in the former action); that ever since October 18, 1945, respondents, without right and without appellant's consent, have been collecting the rents, issues and profits of that property, and hold the moneys so collected "as constructive or involuntary trustees for the use and benefit of" appellant; that, though requested, respondents have failed to deliver those moneys to appellant or to render him an accounting thereof; and prays for judgment requiring respondents to deliver the moneys and to render appellant an accounting of all moneys collected. Respondents joined issue, denying all of the material allegations of the complaint.

Upon the trial, appellant sought to prove that on October 18, 1945, he fully performed all of the conditions of the escrow and thereupon became entitled to immediate delivery of the deed; that the delayed delivery was the fault of respondents, not his fault; hence, that he became the owner of the property on October 18, 1945, and entitled to all of the rents, issues and profits thereafter accruing. Respondents invoked the former judgment as determinative of the issue of ownership and the right to the rents, issues and profits. The court deemed the judgment determinative, found appellant neither the owner nor entitled to any of the rents, issues or profits described (prior to March 29, 1948), and rendered judgment for respondents. We have found no reason for disturbing that judgment.

[2–5] Appellant claims the former judgment is not available to respondents because not pleaded in the present action. But the statute says a judgment must be pleaded "if there be an opportunity to do so" and "if there be no such opportunity, the judgment * * * may be used as evidence". Code of Civ.Proc. sec. 1962, subd. 6. Here, appellant's complaint tendered the question of the right to the rents, issues and profits, not specifically the ownership of the land upon which that right depended. Respondents joined issue in respect to that right and, in proof of it, at the trial invoked against appellant the estoppel of the former judgment as to ownership of the land. We do not see that they needed to have pleaded the judgment. It is not unlike Higuera v. Corea, 168 Cal. 788, at page 789, 145 P. 529, in which the Supreme Court approved similar use of a judgment "as proof of the right of the defendant to the easement alleged in his answer." "When a prior adjudication is relied upon merely as conclusive evidence as to some fact constituting either matter of defense or an element of a cause of action and is not a complete bar to the action, the former judgment need not be pleaded. [Citations.]" Gough v. Gough, 101 Cal. App.2d 262, at page 269, 225 P.2d 668, at page 672. Moreover, if the opposite party fails to object when a judgment roll is offered in evidence, he thereby waives any objection he may have, predicated upon a failure to plead the judgment. See Flandreau v. Downey, 23 Cal. 354, 358; one of a number of early decisions cited by the Code Commissioners under subd. 6 of section 1962, in II Code of Civil Proc.Annot., 1874, pp. 432–433. The principle of waiver applies with special emphasis in the present action. Appellant himself introduced in evidence the entire file of the former action, including the complaint and answer, the findings of fact, the judgment, and the modification of the findings and the judg-

ment. It hardly becomes him to object to respondents' use of his own evidence.

[6] Appellant further contends that estoppel by judgment is not available to respondents for lack of identity of parties and of issues in the two actions. Ownership of the real property is, as we have seen, an issue common to each. Appellant and the respondent administratrix were parties to the former action, in an adversary position, on that issue. Respondent Jeanette Liebman, in her individual capacity, was not a party to the former action. May she in her individual capacity invoke the bar of the judgment? The answer is "yes," furnished by Bernhard v. Bank of America Nat. Trust & Savings Ass'n, 19 Cal.2d 807, at pages 811–813, paragraphs [4] and [5], 122 P.2d 892.

[7] Appellant says that the "trial judge was apparently of the opinion that he was powerless to determine, in the face of the former judgment in the previous action, what matters were before the court and actually adjudicated therein. It is well settled in this state, that extrinsic evidence is admissible to prove the issues involved by the prior judgment if they do not appear on its face." The answer is that the trial court and this court have made such use of the pleadings and other documents in the judgment roll and in the file of the former action as seemed indicated for an understanding and interpretation of the provisions of the judgment rendered in that action.

[8–11] Appellant represents also that his rights "are the same as though the deed had been delivered to him on the date of its execution." The general rule is that when a deed is placed in escrow, it takes effect as a conveyance upon performance of the prescribed conditions and delivery by the depositary. Civ.Code, sec. 1057. Where "all of the conditions of the escrow have been performed and the grantee is entitled to possession of the deed, it may be deemed that the title has passed." Hagge v. Drew, 27 Cal.2d 368, 375, 165 P.2d 461, 465. That does not sanction relation back to an earlier date, such as the date of execution of the deed or of commencement of the escrow. See Holman v. Toten, 54 Cal.App.2d 309, 313, 128 P.2d 808. The doctrine of relation back is recognized as an exception to the general rule, and only when the circumstances are appropriate to its application. In Miller & Lux, Inc., v. Sparkman, 128 Cal.App. 449, 17 P.2d 772, 774, the "agreement entered into between the parties" showed it was their intention that the buyer, as a part of the purchase price, pay all taxes accruing after the date of execution of the instrument. Accordingly, said the court, "to effect the intention and to do equity the passing of title under the deed will be held to relate back and to take effect as and of the date of the constructive or conditional delivery", the date the deed was placed in escrow. 128 Cal.App. at page 454, 17 P.2d at page 774; see also, discussion of other types of circumstances in which the doctrine applies, 128 Cal.App. at pages 454–457, 17 P.2d 772. We have found in the instant case no basis for applying the doctrine of relation back, in the face of the judgment rendered in the former action.

[12–14] Appellant directs attention to the fact that paragraph I of the findings of fact in the former action adopted as true the allegations of certain paragraphs of the complaint and thereby found that the defendant in that action did not own the deed and was not entitled to its possession. That was quite consistent with the specific facts declared in paragraph II of the findings until amended. After that amendment, any inconsistent provisions of paragraph I would necessarily yield. Besides, the defendant could lack a right to immediate possession of the deed quite consistently with a similar absence of right on the part of the plaintiff therein. So long as the escrow remained open, neither party could successfully assert a right to immediate physical possession of the deed. Also, the plaintiff could have prevailed only upon the strength of his own right, not upon the weakness, if any, of the defendant's right.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

109 Cal.App.2d 334

PEOPLE v. STEWART.

Cr. 4695.

District Court of Appeal, Second District, Division 2, California.

Feb. 18, 1952.

Hearing Denied March 13, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Charles W. Fricke, J., of assault with intent to commit rape, assault by means of force likely to produce great bodily injury, and attempt to commit sexual perversion, and he appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained conviction for assault with intent to rape and attempt to commit sexual perversion.

Judgment affirmed.

1. Witnesses ⇐389

In prosecution for assault with intent to commit rape, assault by means of force likely to produce great bodily injury, and attempt to commit sexual perversion, court did not err in refusing to permit defendant to pursue impeachment of prosecutrix with respect to position of his knees at time of alleged offenses, by attempt to show alleged contradiction between prosecutrix's testimony at trial and her testimony at preliminary examination, where prosecutrix admitted that what she had testified to at preliminary examination was true, since defendant achieved his purpose. Code Civ.Proc. § 2052.

2. Criminal Law ⇐1035(3)

If defendant was of opinion that trial judge exceeded bounds of propriety in discussing testimony of prosecuting witness, it was incumbent on defendant to assign remarks of trial judge as misconduct and request instruction that jury should disregard such remarks, and defendant was not privileged to sit silent and then rely on such remarks for a reversal on appeal.

3. Assault and Battery ⇐96(1)

In prosecution for assault with intent to commit rape, assault by means of force likely to produce great bodily injury, and attempt to commit sexual perversion, court did not err in refusing to instruct with respect to simple assault, where under testimony of prosecutrix, defendant was guilty as charged, and where under testimony of defendant, he was not guilty of any crime.

4. Criminal Law ⇐829(1)

Where subject of instruction requested by defendant was fairly and generously covered by other instructions which were given, refusal of requested instruction was correct.

5. Criminal Law ⇐834(2)

An accused is not entitled, as a matter of right, to prescribe the form of an instruction.

6. Rape ⇐59(13)

In prosecution for assault with intent to commit rape, court properly refused to give requested instruction of defendant that jury must find beyond a reasonable doubt that defendant's acts indicated clearly a felonious intent to ravish prosecutrix, notwithstanding her most violent resistance, since a woman in the clutches of a rapist is not required to resist with violence.

7. Rape ⇐14

The extent to which a woman must resist advances of an attempted rapist is for the woman only to determine, and she is required to go no further than is necessary to make manifest her unwillingness to yield to the attack.

8. Rape ⇐15

The crime of attempted rape is accomplished if at any moment during struggle between accused and woman, accused intends to use such force as may be necessary to gratify his lustful concupiscence against the will of the woman.

9. Rape ⇐14

The importance of the resistance of a woman to an attempted rapist inheres in his intent to use force and her nonconsent, but the offense does not hinge on the woman's utmost exertion.

10. Rape ⇐53(2)

Evidence sustained conviction for assault with intent to rape.

11. Sodomy ⇐6

Evidence sustained conviction for attempted sex perversion. Pen.Code, § 288a.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

Gladys Towles Root, Los Angeles, for appellant.

MOORE, Presiding Justice.

Appellant was convicted of three felonies, namely, assault with intent to commit rape; assault by means of force likely to produce great bodily injury; attempt to violate section 288a of the Penal Code. He demands a reversal of the judgment on three grounds, to wit: (1) denying appellant complete impeachment of the complaining witness; (2) refusing to give certain requested instructions; (3) insufficiency of the evidence to support the judgment.

The prosecutrix, a young woman 26 years of age, had lived in Los Angeles for some five months, having emigrated from Quebec. She had engaged to work as a nurse's aid at a hospital. She made the acquaintance of appellant through a friend about two weeks prior to the episode involved. At the first meeting she promised to accompany him on an outing on the evening of March 9.

On the latter date, at his suggestion, they visited a cocktail bar where each had a drink of liquor. In order to obtain eatables they visited another cocktail bar where they drank again without eating. She expressed a desire to go home. He agreed to comply with her wishes but stated that he would like to visit the "Country Club." Notwithstanding her opposition he was persistent and promised not to be too long. At the club they drank again without eating. She then repeated her wish to terminate their festivities to which he orally assented. It was two o'clock in the morning. As they drove along she suddenly realized that they were traveling in a strange vicinity. He told her it was all right as he proceeded up Laurel Canyon to the Hollywood Hills. He stopped his car where there was no building in close proximity. She argued that she did not wish to delay there and begged him to return her to her apartment. He promised to do so but immediately began kissing her. After having engaged in osculations and while holding her, he insisted upon an act of sexual intercourse. She resisted his advances, but despite all her efforts he extended his hand under her dress and up to her waist. When she prevented his removing her panties, he hit her in the face, became violent and told her to lie down. When she refused, he choked her. As he pushed her down on the seat, he exposed his private parts. He repeatedly told her to submit or he would kill her. In the struggle against her resistance he succeeded in getting one of his knees between hers and tried to spread her legs while she unsuccessfully attempted to open the door. With his genitals still exposed he demanded that she do the act of fellatio. When she refused he hit her in the ribs and pushed her head down to his reproductive organs. She tried again to escape from the car but he closed the door and again choked her. He pushed her body down flat on the seat and her leg up to it. At that time her right tibia was broken. When she sat up again he hit her in the nose with his shoe. When she recovered from the fainting that ensued she tried to escape but when she put her foot on the ground she could bear no weight upon it. As he put her back into the car she begged him to take her home. On the way he stopped at a drive-in to get her coffee. While he was out of the automobile she managed to reach the kitchen and there asked a man to call the police. When the officers arrived, appellant had departed.

The officers discovered bruises on her nose, on the side of her face and on her arms. She had suffered multiple contusions about the body, the head and the extremities, and black and blue marks were over her hands. The left side of her chest, her legs and ankles were contused and a swelling was found near the right knee. X-rays showed a fracture of the tibia and her tenth rib. Such injuries necessitated her hospitalization.

The officers discovered appellant at his residence about 7:15 a. m. In reply to their inquiries he said nothing out of the usual had happened; that it was a regu-

lar evening. He admitted he had slapped the prosecutrix several times but denied that he had done any damage by hitting her. When they told him of her statements that he had tried to make her submit to carnal intercourse, his reply was that he had just gone out with her and had taken her up to the hills; that he had tried "to lay her" but had failed; that he had a little bit of trouble but did not think it was too much. When asked if he treated all his girl friends that way, he replied that he did not; that ordinarily he was quite a lover and that he really didn't have too much difficulty. He explained that he left her at the drive-in; that he saw her stagger into the kitchen and ask someone to call the police. He denied that he had put his hands under her dress; said that when she fell out of the car he picked her up and put her on the seat and she began talking in a foreign language and hit him on the chest; he then shook her and hit her twice; when she quieted down he started to take her home, but did not hit her with his fist or in her ribs or on the nose; denied ever having been on top of her or having his knees across her legs or one knee between her legs. He denied having choked her although he admitted that when they started on the outing she did not have any bruises or injuries about her face. Later he did see a bruise on her cheek at the drive-in. Also, he knew that when driving up Laurel Canyon he was going away from the direction of her home.

No Error in Ruling

[1] Appellant contends that he was prejudiced by the court's ruling in refusing to permit him to pursue the impeachment of the prosecutrix with respect to the position of his knees. In order that the situation may be clearly understood we present on the margin that portion of the transcript which includes the questions and the rulings of the court.[1]

1. "Q. But what I am trying to find out, at the time, after the defendant had choked you and you again sat in an upright position in the seat, you say the defendant had his knees over you at that time? A. Yes.

"Q. Now, how were the defendant's knees over you at that time? A. He had them on each side of myself.

"Q. On each side of you? A. Yes.

"Q. Therefore his knees were on the seat on each side of you, is that correct? A. Yes."

"Q. Were those questions asked of you and were those answers given by you at the preliminary hearing? A. That's the best I consider. I was too frightened to remember all of the things, the positions.

"Q. You mean by that that at the preliminary hearing you were frightened and the answers you gave there were not correct?

"Mr. Carr: Wait a minute, that isn't her testimony.

"The Court: That isn't what she said.

"Mr. Haley: That's what I understood her to say.

"The Court: She said she was frightened. Let's take it this way: Miss Fortier, first you remember when you had that other hearing, did you say that, what has just been read? A. Yes.

"The Court: Now, you mentioned something about being frightened: you mean you were frightened at the time of the hearing, or at the time it happened? A. I was frightened at the time, everything happening.

"Mr. Haley: All right.

"Q. Now then, will you tell us now whether or not the testimony you gave at the preliminary hearing was correct, or whether the testimony you gave here Friday was correct?

"The Court: I will sustain an objection to that. That's assuming that one of them is incorrect.

"Mr. Haley: All right.

"The Court: I will ask the witness a question for the purpose of the record:

"What you said down in the court there, this part just read, is that the way it was, as best you can remember it now?

"The Witness: Yes, your Honor.

"Mr. Carr: That wasn't a Court, your Honor, that was over at the Queen of the Angels Hospital, they had a bedside hearing.

"The Court: It was still a court.

"Mr. Haley: I take it the testimony I just read to you is the correct testimony, is that correct?

"The Court: The witness answered—unless you doubt the Court's question.

"Mr. Haley: No, if your Honor pleases, I don't. I don't believe the young lady

No error is found in the court's ruling. If appellant's attempt was to show a contradiction between the prosecutrix' testimony at the trial and her testimony at the preliminary examination, his purpose was achieved when she admitted that what she said at the preliminary was true. Further inquiry into the same subject could have served no purpose. Code Civil Proc., sec. 2052; People v. Kennedy, 21 Cal.App.2d 185, 199, 69 P.2d 224; People v. Agullana, 4 Cal.App.2d 34, 37, 40 P.2d 848. In telling counsel that the witness had answered the question, the court acted as required by section 1044 of the Penal Code. Whereas section 2052 of the Code of Civil Procedure permits a witness to rehabilitate himself by his explanations the impeaching party has not the same privilege to pursue the matter after having received a definite and final answer to his impeaching question. People v. Ah Wing, 35 Cal.App. 218, 221, 169 P. 402.

As a matter of fact, the prosecutrix was not impeached by her testimony at the preliminary trial. While she had there testified that his knees straddled her body, her direct testimony at the trial indicates that appellant was in several positions during the course of the struggle and that he did have his knees astride her or on each side of her and that he subsequently moved to her left side and had his knees on the seat. It appears at another place that at one time he placed one of his knees between her legs in order to push one leg off the seat. Clearly there was no substantial inconsistency between the statements of the prosecutrix at the main trial and at the preliminary.

Appellant further assigns the conduct of the judge as prejudicial, asserting that his Honor's remarks carried the impression to the jury that there was no conflict and that if there was it came about only by reason of the inability of the witness properly to express herself in clear English. The court advised counsel that the witness had admitted the correctness of the prior statement and by reason thereof the matter remained as one for argument to the jury as to whether there was any inconsistency in the witness' testimony at the trial and at the preliminary. Thereafter the court instructed the jury fully upon the subject of impeachment. Even if the trial judge had been commenting on the evidence and the credibility of the prosecutrix his behavior was squarely in accordance with Article VI, section 19 of the Constitution, and sections 1093(6) and 1127 of the Penal Code which specifically permit such comment by the trial judge as he may deem "necessary for the proper determination of the case".

[2] And if the judge had exceeded the bounds of propriety in discussing the testimony of the witness, it was incumbent upon appellant to assign such remarks as misconduct and to request an instruction to disregard the offensive words. A party is not privileged to sit silent in the presence of statements deemed detrimental to his interest and rely for salvation upon an appeal. It is his duty to give the trial judge the opportunity to correct any error that he might have made in the course of a trial. Having failed to do so, his demands for reversal by reason of such error will avail nothing. Ward v. De Martini, 108

completely understands the Court's question, or at least she doesn't completely give an answer. All I am asking now—

"The Court: If there is any conflict there you can argue it to the jury. She has admitted making the statement.

"Mr. Haley: Yes.

"The Court: Now, it is only when a witness denies a statement we go into the question of explanations. If the witness desires to make an explanation she would say; at the present time the witness hasn't indicated any desire to make a statement. She said it is the way it happened.

"Mr. Haley: Yes.

"The Court: I think we have to take into consideration the manner of expression, Mr. Haley. That's the basis of the Court's ruling. People don't always express themselves perfectly—in fact, the most difficult thing in the world is to express the idea in the English language with absolute accuracy.

"Mr. Haley: Very well."

Cal.App 745, 751, 292 P. 192. Moreover, the error will not give ground for reversal unless the record discloses that it resulted in a miscarriage of justice. Const., Art. VI, sec. 4½.

No Error in Refusing Instructions

[3] Appellant's contention is that the court prejudiced him by its refusal to instruct the jury that the crime of assault with intent to commit rape necessarily includes the crime of simple assault and that the crime of assault by means of force likely to produce great bodily injury necessarily includes the crime of simple assault.[2] There was no justification for such instruction. Where the evidence is such as to make it clear that if the accused is guilty at all, he is guilty of the higher offense of which he is charged, a court may properly refuse to instruct on simple assault. People v. McCoy, 25 Cal.2d 177, 187, 153 P.2d 315. In his brief appellant says "he admitted slapping the complaining witness for the purpose of bringing her out of her hysteria. He denied hitting her with his fist and he denied hitting her with his shoe." As to the events which occurred prior to the time prosecutrix left the car there was a direct conflict. Appellant had emphatically denied that any of the events related by the prosecutrix had taken place and therefore as to his conduct he was either guilty as charged or he was not guilty of any crime. Therefore, the refusal of the instruction on simple assault was proper. People v. Thomas, 100 Cal.App. 82, 84, 279 P. 826. A refusal to give the instruction was in fact favorable to appellant for the reason that if the jury had chosen to disbelieve the stories of prosecutrix they would necessarily have found appellant not guilty of any crime. People v. Lopez, 135 Cal. 23, 25, 66 P. 965.

People v. Burns, 88 Cal.App.2d 867, 200 P.2d 134, does not avail appellant. The instruction was appropriate there. Two separate assaults occurred.[3] The wife testified that the more serious blow was struck by her husband in the evening. In the morning he hit her with his slipper. Husband admitted spanking his wife mildly with his slipper but denied having assaulted his wife in the evening. It was properly held error to refuse an instruction on simple assault. As to the morning episode, the jury could have found from the testimony of both parties that husband was guilty of only a simple assault. From all the evidence, it could have been found that no assault took place in the evening. Therefore the situation was not one where the defendant was either guilty of a felony or not guilty at all; hence the instruction should have been given as requested by Burns. In the case at bar appellant contradicted the prosecutrix. If the testimony of the girl was true, appellant was guilty as charged. Nothing she said would have warranted the finding of a simple assault. Had the jury adopted appellant's testimony he would have been acquitted outright. The battery he admitted was not mentioned by prosecutrix and it occurred after the assaults and struggles she had described. There was, therefore, no simple assault involved in the incidents narrated by prosecutrix. It would have been error for the court to give the instruction requested, since there was no simple assault upon the young woman, but only a felonious attack, a beating of her body for the purpose of accomplishing rape.

2. "Defendant's Requested Jury Instruction No. 1.

"You are instructed that you may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, if in your judgment the evidence supports such a verdict under my instructions.

"To enable you to apply the foregoing instruction, if your findings of fact requires you to do so, I instruct you that the offense of assault with intent to commit rape of which defendant is charged in Count 1 of the information, necessarily includes the crime of simple assault, and the offense of assault by means of force likely to produce great bodily injury of which the defendant is charged in Count 2 of the information, necessarily includes the crime of simple assault.

"Refused".

3. The husband was accused under section 273d of the Penal Code.

No Error in Refusing Appellant's Instruction No. 2

[4–9] Appellant also requested the court to read the instruction [4] set out on the margin below. The refusal was proper. The entire subject was fairly and generously covered by other instructions. By reason thereof the refusal was on that ground alone correct. The accused is not entitled, as a matter of right, to prescribe the form of an instruction. People v. McKenna, 11 Cal. 2d 327, 337, 79 P.2d 1065; People v. Walker, 99 Cal.App.2d 238, 244, 221 P.2d 287; People v. Syed Shah, 91 Cal.App.2d 722, 725, 205 P.2d 1077. Moreover, the instruction is erroneous in its inaccurate statement of the law. It would have had the court direct the jury that they must find beyond a reasonable doubt that the defendant's acts indicated clearly a felonious intent to ravish his victim, "notwithstanding her most violent resistance." Such an instruction is a bold argument, embodying familiar legal principles and certain established facts but beginning and ending with a rank sophistry. A woman is not required when in the clutches of a rapist to resist with violence. The extent to which she must resist his advances is for the victim only to determine. She is required to go no further than is necessary to make manifest her unwillingness to yield to the attack. People v. Tollack, 105 Cal. App.2d 169, 233 P.2d 121; People v. Blankenship, 103 Cal.App.2d 60, 67, 228 P.2d 835. The crime is accomplished if at any moment during the struggle the accused intends to use such force as may be necessary to gratify his lustful concupiscence against the will of his victim. People v. Meichtry, 37 Cal.2d 385, 231 P.2d 847. The importance of the woman's resistance to the rapist inheres in (1) his intent to use force and (2) her nonconsent; but the crime does not hinge upon the woman's "utmost exertion." People v. Norrington, 55 Cal.App. 103, 110, 202 P. 932. At any rate, the jury is entitled to determine the ultimate facts of the fiend's intent and the extent of the victim's resistance without a misdirection by the court. The instruction was properly rejected for the further reason that it implies that the only acts of which appellant was guilty were caresses, embraces and persuasion or lewdness, indecency and lasciviousness. The vices named came into the orbit of appellant's conduct incidentally. If he kissed or embraced her, as he contends, and innocently laid his hand upon her knees, it was only as part of his initiatory undertaking. But as she unfolded the story he exercised force immediately upon her refusal to yield. His lewd and lascivious acts as she reported them were evidence of his intent to rape and could not reasonably have been disassociated from his employment of force to achieve his desires. In view of the two divergent narratives given in testimony, to read the proposed instruction would have been gross error. Appellant's reference to People v. Mullen, 45 Cal.App.2d 297, 114 P.2d 11 is of no avail. That decision has been too often distinguished to require extended comment. Suffice it to say, the court there correctly determined that the facts involved did not constitute an assault with intent to rape. The acts of Mullen were as a zephyr contrasted with the violent storm of Stewart.

4. "The specific intent in the charge of assault with intent to commit rape, must be such that the assault must have been made with intent to commit rape, notwithstanding all possible resistance that could be made.

"The mere fact that a person is garbed in the vestments of the male and uses persuasion, caresses and embraces, is not evidence of a felonious intent. The man may generously employ all those arts hoping to persuade and yet finally abandon the attempt.

"There may be in this case evidence that the defendant may have been guilty of *ludeness*, indecency and even lasciviousness, such evidence would not be sufficient to warrant the finding that he was guilty of an assault with intent to commit rape. Before such a finding can be justified, it must appear beyond a reasonable doubt that the acts of the defendant were such as to indicate clearly a felonious intent to ravish the woman, notwithstanding her most violent resistance."

Evidence Sufficient as to Count I

[10] That the established facts prove the crime charged in the first count is patent to a casual observer. After giving her liquor and transporting her to a dark place in Laurel Canyon, he stopped his conveyance at a distance from human habitation. His first proposal was that she engage with him in the sexual act. His ensuing conduct has been described above. It culminated with his slapping, hitting and choking her and his threats to kill her. He hit her face with his shoe, fractured her rib, and broke her tibia at the knee. That she resisted to an ultimate success is no credit to appellant. When a man in a dark isolated place demands sex of a woman and chokes and beats her for resisting his demands and abandons his efforts only after disabling her, little argument is required to convince a disinterested person of his criminal aims. At least the finding of a jury and the trial judge is the final answer. People v. Meichtry, 37 Cal.2d 385, 231 P.2d 847; People v. Lutes, 79 Cal.App. 2d 233, 236, 179 P.2d 815; People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. The authorities cited by appellant for the purpose of proving that the evidence is insufficient as a matter of law to establish an assault with intent to commit rape, People v. Mullen, supra; People v. Manchego, 80 Cal. 306, 22 P. 223; People v. Brown, 47 Cal. 447, are readily distinguishable.

Evidence Sufficient as to Count III

[11] Finally, it is contended that the proof failed to establish the crime of violating section 288a of the Penal Code for the reason that appellant could have effectuated his purpose "with little difficulty" at a time when the girl was disabled. His guilt is none the less because he was not inhibited by an "extraneous circumstance." He certainly had the intent and made an attempt to consummate his purpose. It would be puerile to hold that by exposing himself and pressing prosecutrix' head toward his pelvic area he was merely making preparations. Having declared his desire but little movement on his part was required to constitute his conduct an attempt. His design being manifest, his acts in furtherance thereof completed the crime. He twice commanded her to engage in the act of perversion and attempted to enforce his order by physical force. Merely because he failed to gain compliance and desisted only because of the woman's illness or resistance, it is not thereby established that he voluntarily abandoned his criminal aim. His offense was then already complete. People v. Gibson, 94 Cal.App.2d 468, 470, 210 P.2d 747; People v. Fiegelman, 33 Cal.App.2d 100, 105, 91 P.2d 156. Under the evidence it would have been a valid finding if the jury had determined that appellant desisted by reason of the girl's violent resistance or of appellant's fear that his blows had fatally injured her. People v. Lutes, 79 Cal.App.2d 233, 237, 179 P.2d 815.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

Hearing denied; CARTER, J., dissenting.



109 Cal.App.2d 316

KING v. GEROLD et al.

Civ. 18687.

District Court of Appeal, Second District, Division 2, California.

Feb. 18, 1952.

Rehearing Denied March 4, 1952.

Hearing Denied April 17, 1952.

Action by Walter R. King against Phil Gerold, doing business as the Gerold Manufacturing Company for breach of licensing agreement for production of certain design house trailers. The Superior Court, Los Angeles County, Otto J. Emme, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Moore, P. J., held that license agreement which merely barred licensee from manufacturing and selling particular design and style house trailer after expiration of license term was not void as being in restraint of trade, since it did not prohibit licensee from thereafter carrying on his lawful business of manufacturing trailers.

Judgment affirmed.

1. Patents ⇐209(1)

Where intent of parties was to replace original licensing agreement for production of house trailers by licensing agreement subsequently executed, surrender of rights under original licensing agreement was sufficient consideration to support subsequent agreement.

2. Monopolies ⇐14

License agreement for production of house trailers which barred licensee from manufacturing and selling trailers of particular design and style after expiration of six months term was not contract in restraint of trade and therefore void, since prohibition did not extend to carrying on by licensee of his lawful business as trailer manufacturer, but only to particular design created by licensor. Business and Professions Code, § 16600.

3. Patents ⇐212(1)

Where complaint set forth licensing agreement by which licensee was barred from manufacturing and selling house trailers of particular design and style after expiration of agreement, and alleged that licensee had continued such practice and was thereby accumulating profits from manufacture and sale, and that licensor had been injured and sustained damages to extent of $30,000, and answer denied damages to licensor in any amount or at all, licensee was given adequate notice of licensor's theory of damages and was not deprived of his opportunity to demand jury trial.

4. Patents ⇐212(1)

Where licensee breached provision of licensing agreement prohibiting him from producing certain design house trailer after expiration of term, admeasurement of damages to licensor by royalties he would have had received agreement was still in effect was improper, since licensor had no contractual right to royalties after termination of contract, and basis did not reflect actual damages as result of breach and competitive acts by licensee.

5. Patents ⇐212(1)

Where licensee breached provision of licensing agreement prohibiting him from producing certain design house trailer after expiration of license term, and there was testimony concerning loss of profits to licensor as result of wrongful competition by licensee, licensee could not complain of award of damages consonant with such testimony, since licensee had, by his wilful breach of contract, given rise to difficulty of proving exact amount of loss of profits.

6. Damages ⇐6

Where promisor by his wilful breach of contract has given rise to difficulty of proving amount of loss of profits, promisee is required to show amount of damages only with reasonable certainty, and such uncertainties as exist will be resolved against promisor.

Macbeth & Ford, Los Angeles, and Robert W. Omer, Burbank, for appellant.

Robert B. Hughes and Youngdahl & Glick, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

Respondent is the inventor and designer of a house trailer known as the "Sport King." On September 27, 1946, by a writing he licensed appellant to manufacture and sell such trailer for a period of six months—expiring March 16, 1947. It was agreed that (1) respondent should receive a royalty of $50 for each trailer sold at wholesale and $100 for each sold at retail; (2) if the license be not renewed after the initial six-months' period appellant "shall cease to produce said trailer for any purpose whatsoever." The contract was drawn by appellant's attorney. It was their mutual intention by the writing of September 27 to replace the less formal but substantially similar contract executed by the parties approximately a week previously. It is a fact not without value that the earlier document contained no express requirement for appellant to cease production after six months in the event the parties should fail to effect a new agreement.

During the term of the contract respondent worked for appellant and supervised construction of the trailers. After the ex-

piration of the contract he left appellant's employ and commenced operations alone, building trailers in which he incorporated certain minor changes which he had previously suggested to appellant. Notwithstanding that the licensing agreement was not renewed appellant continued to manufacture and sell a trailer substantially similar to that designed by respondent. As a result of the competition so created, respondent was forced to make numerous reductions in his selling price. The rivalry had not long continued before respondent instituted the instant action seeking damages for breach of contract, an accounting for unpaid royalties and an injunction to restrain appellant's continued manufacture of such trailers. Damages were awarded respondent but an injunction was denied for the reason that it was determined that appellant at the time of trial had discontinued manufacturing the trailers.

[1] Numerous points are asserted as grounds for reversal of the judgment. The first contention is that the agreement of September 27 is void for lack of consideration and as being in restraint of trade. From the record however, it is apparent that the last mentioned contract was intended to replace the earlier document which was rescinded by mutual agreement. This is evident from the testimony of respondent that the former contract was intended to be operative only until a formal, more complete licensing agreement could be drawn under the guidance of appellant's attorney. Accordingly, a sufficient consideration is to be found in the surrender of the former rights existing under the original agreement. Gardner v. Shreve, 89 Cal.App.2d 804, 808, 202 P.2d 322. In any event, assuming the earlier agreement to be still in force, appellant is, by its terms, impliedly barred from producing the trailer after the six months since the license was limited to the duration of that term.

[2] The argument that appellant's agreement to cease manufacturing the trailer at the expiration of six months makes the contract one in restraint of trade and therefore void under the provisions of section 16600, Business & Professions Code, fails to consider the terms of the writing. Appellant is not thereby prohibited from carrying on his lawful business of manufacturing trailers but is barred merely from manufacturing and selling trailers of the particular design and style invented by respondent who in the first instance licensed appellant to use such design for a limited time only. The situation is factually distinct from that in Summerhays v. Scheu, 10 Cal.App.2d 574, 52 P.2d 512, 513, where the defendant vendor of a patent agreed "never again enter into the orchard heater business at any place".

[3] Appellant's contention that the court erred in awarding damages pursuant to respondent's second cause of action is without merit. This count after setting forth the contract of September 27 alleges that defendant is continuing to manufacture and sell trailers of plaintiff's design after the expiration of such agreement; that defendant is thereby accumulating profits from such manufacture and sale; that "by reason of the premises, plaintiff has been injured and sustained damages to the extent of $30,000." Damages in this amount were demanded in the prayer.

It is thus clear that appellant's assertion that he has not been given notice of any theory of damages and consequently has been deprived of an opportunity to demand a jury trial is wholly unjustified. Such conclusion is further supported by the fact that appellant's answer specifically denied that respondent had sustained any damages "to the extent of Thirty Thousand * * * Dollars, or in any other amount or at all."

[4–6] The only remaining question requiring consideration is the measure of damages to be awarded respondent. The court apparently made its award based upon the royalties respondent would have received from appellant's sales if the licensing agreement were still in effect. Since respondent had no contractual right to such royalties after the termination of the contract, and inasmuch as this basis does not necessarily reflect the actual damage and loss to respondent from defendant's breach and unfair competitive acts such a measure would be improper. However, respondent

did testify that as a result of appellant's infringing activities, respondent was compelled repeatedly to reduce his price to a point where profits for his own sales were some $26,000 below the sum he could have earned producing and selling trailers free from appellant's wrongful competition. Under such circumstances and upon the record appellant as a naked wrongdoer is in no position to complain of the award. Where the promisor by his wilful breach of contract has given rise to the difficulty of proving the amount of loss of profits, it is proper to require of the promisee only that he show the amount of damages with reasonable certainty and to resolve uncertainties against the promisor. Steelduct Co. v. Henger-Seltzer Co., 26 Cal.2d 634, 651, 160 P.2d 804.

Judgment affirmed.

McCOMB and FOX, JJ., concur.



109 Cal.App.2d 320

COX et al. v. HOLLYWOOD FILM ENTERPRISES, Inc.

Civ. 18766.

District Court of Appeal, Second District, Division 2, California.

Feb. 18, 1952.

Hearing Denied April 17, 1952.

Action by Paul Cox and others, co-partners, doing business under firm name and style of Coast Visual Education Company against Hollywood Film Enterprises, Inc., for amount allegedly due upon vacation of premises leased by plaintiffs from defendant. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., entered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that terms of lease disclosed that lessees were not authorized to terminate lease or to cease paying rent during term thereof in absence of lessor's desire to occupy leased space and notice to lessees in writing of such desire.

Judgment affirmed.

1. Landlord and Tenant ⇐80(3), 195(1)

Sublease of premises which gave sublessor option, upon service on sublessees of notice in writing to terminate sublease in event sublessor deemed space necessary for its own business, to terminate lease, and which gave sublessees privilege of occupancy for 30 months after receipt of notice and right to bonus of $5,000 if premises were vacated within 30 months from date of sublease, did not give sublessees right to terminate lease or cease paying rent during term of lease, but in absence of notice of sublessor's desire to occupy leased premises, sublessees were liable for rent during period premises remained unoccupied after voluntary vacation by sublessees.

2. Contracts ⇐154

Where a covenant is susceptible of two or more constructions, one of which would make contract unfair and another which would make instrument fair and just, latter should be adopted.

3. Landlord and Tenant ⇐80(3)

Sublease authorizing sublessor, by service of notice in writing, to terminate sublease in event sublessor deemed space necessary for its own business, and which gave sublessees privilege of continuing their occupancy for 30 months after receipt of notice, and right to $5,000 bonus if sublessees should vacate and surrender premises within 30 months from date of sublease, gave rise to right to $5,000 bonus only if notice be served prior to expiration of 30 months from date of lease and premises were surrendered before expiration of such 30 months from date of lease.

4. Landlord and Tenant ⇐24(1),

While parties are free to contract for lease on such terms as they desire, contract of lease which permits one party to withdraw at his pleasure is void for lack of mutuality.

Wayne Veatch, Henry R. Thomas and Henry F. Walker all of Los Angeles, for appellants.

Raymond Wallenstein, Los Angeles, for respondent.

MOORE, Presiding Justice.

On February 20, 1948, respondent by a writing subleased to appellants certain space in its Hollywood studios on Sunset Boulevard for a six-year term. For twenty-six months appellants occupied and paid rent as sublessees. April 14, 1950, they notified respondent of their intention to vacate the premises, demanded $5,000 from respondent and seventeen days thereafter removed their fixtures and equipment. They made no payment of rentals after such notice but instituted this action to recover $5,000 from respondent and contended that they were not obliged to pay the $200 monthly rent as provided by the sublease. Approximately one year thereafter, a controversy having arisen, the parties submitted the matter upon an agreed statement of facts and issues as follows:

"Agreed Facts

"1. Plaintiffs are co-partners, doing business under the firm name and style of Coast Visual Education Company, in the County of Los Angeles, State of California.

"2. Defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the County of Los Angeles.

"3. On or about February 20, 1948, plaintiffs, defendant and others entered into a certain "Agreement for Sale of Corporate Stock, etc.", a photostatic copy of which is hereto attached and made a part hereof as Exhibit 'A'.

"4. Thereafter on the same day, to wit, February 20, 1948, plaintiffs and defendant entered into a written agreement entitled 'Sublease', a true and correct copy of which is hereto attached and made a part of this stipulation as Exhibit 'B'.

"5. No considerations passed or were paid to either plaintiffs or defendant other than as expressed in said agreement for sale of corporate stock and sublease attached hereto as Exhibits 'A' and 'B', nor did defendant receive a deposit, security or bonus for executing said sublease.

"6. Said Exhibits 'A' and 'B' were drawn by an attorney selected jointly by plaintiffs and defendant.

"7. Pursuant to the terms of said sublease, plaintiffs did occupy the certain premises described in said sublease in the building located at 6058–6060 Sunset Boulevard, Hollywood, California, from said date of February 20, 1948 until on or about May 6, 1950.

"8. Defendant did not at any time advise plaintiffs that it desired said premises, nor did it request plaintiffs to vacate said premises or to surrender or terminate said sublease.

"9. On or about April 14, 1950, plaintiffs notified defendant in writing that they intended to vacate said premises on May 5, 1950 and demanded the sum of $5,000.00 from defendant.

"10. On or about April 19, 1950, defendant notified plaintiffs that it rejected said demand for $5,000.00 and denied any indebtedness in any sum whatsoever to plaintiffs, and demanded the continued payment of the rent due under the terms of said sublease.

"11. Plaintiffs vacated said premises on or about May 6, 1950 without the request or consent of the defendant, nor did defendant at any time subsequent to said date of May 6, 1950 consent to or acquiesce in plaintiffs' act in vacating said premises.

"12. Said premises were vacant from said date of May 6, 1950 up to and including October 20, 1950. Plaintiffs did not pay to defendant rental payments of $200.00 a month due on the 20th day of the respective months of April to September of 1950, inclusive, as provided in said sublease.

"13. Plaintiffs have demanded said sum of $5,000.00 from defendant and defendant has refused to pay same.

"14. Defendant has demanded said sum of $1200.00 in rent from plaintiffs, and plaintiffs have refused to pay same.

"Issues

"The points in controversy, and upon which the decision of this court is requested, are as follows:

"1. Did the plaintiffs have the right to terminate said sublease and vacate said premises without the request of defendant

or without first securing the consent of defendant?

"2. Is defendant obligated to pay to plaintiffs the sum of $5,000.00 under the provisions of said sublease and the foregoing facts as herein recited?

"3. Are the plaintiffs obligated to pay to defendant the sum of $1200.00, being the rental for the six months during which time said premises were vacant, and in addition thereto reasonable attorney's fees as provided under the provisions of said sublease and the foregoing facts as herein recited?"

The court duly filed its conclusions that "defendant is not obligated to pay plaintiffs $5,000 under the provisions of the sublease"; that "plaintiffs are obligated to pay to defendant the sum of $1,200" as rentals for the six months the premises were vacant and also "reasonable attorneys fees as provided under the provisions of said sublease." The ensuing judgment directs recovery by respondent of $1200 with interest and $350 attorney's fees. This appeal followed.

Rentals Due for Period of Vacancy

Appellants' obligation to pay rent for the period the leased quarters were unoccupied is fixed by the sublease. By paragraph 2 of that instrument the lessee agrees to pay in advance "the monthly rental of $200" for each calendar month. By paragraph 15 it is provided that should lessee "default in the payment of any of the rent * * * at the time and in the manner herein specified * * * it shall be lawful for the Lessor to enter * * * remove all persons therefrom * * * and again to possess its estate * * * either with or without terminating this sublease." The only other provisions of the sublease relating to a termination of the tenancy are those of paragraphs 9 and 11. The 9th makes an end of the lease if the premises are wholly destroyed by fire or an act of God. Paragraph 11 authorizes lessor to occupy the premises and put an end to lessee's right of possession in the event of the latter's bankruptcy or other insolvency proceeding. Neither of those two paragraphs was by any covenant or event rendered inoperative prior to appellants' abandonment.

The only other language having to do with the closing of the relation of landlord and tenant is found in paragraph 14, as follows:

[1] "In further consideration for the making of this sublease, Lessee agrees in the event Lessor deem it necessary to have and occupy for its own purposes and business the premises and space leased and demised to Lessee herein, Notice in writing to that effect including notice to vacate and demand for possession will be given to Lessee hereunder and Lessee shall have thirty (30) months from and after the receipt of said notice to vacate and surrender up the premises demised hereunder."

[2] "In the event Lessee vacate and surrender to Lessor the herein demised premises within 30 months from the date of this agreement (February 20, 1948), whether the Notice provided for in the preceding paragraph be given or not, Lessee herein is to receive from Lessor $5000.00 in cash as a bonus and consideration therefor upon surrender of said premises to Lessor."

[1] Sentence [1] one authorizes lessor at its option to terminate the sublease "in the event lessor deem it necessary" to occupy the space for its own business. But such authority may be exercised only upon the happening of two events, namely, (1) the giving by lessor of written notice to lessee of its desire for possession to be used by lessor in its business; (2) service of a notice upon lessee to vacate. The only privilege accorded lessees by sentence [1] one is to continue their occupancy for 30 months after receipt of the notice to vacate. But in addition to such privilege, it is provided in sentence [2] two that if lessees vacate and surrender the demised premises within the 30 months from the date of the sublease they shall be paid $5000 by lessor. Therefore, it is clear that under no circumstances are lessees authorized to terminate the lease or to cease paying rent during the six-year term in the absence of lessor's desire to occupy the space.

Appellants contend that the first words of sentence [2] two of paragraph 14 mean "in any event, if lessee vacate." Such in-

terpretation is authorized by no known rules of construction. The phrase "in the event" has an established connotation. It is ubiquitously considered more polite than "if" and is by legalistic writers frequently used in lieu of the more popular word. If the phrase be transformed into that suggested by appellants, it would require lessor to pay lessees $5,000 in the event the building should burn down, or lessees be adjudicated bankrupts, or if they should cease to pay rent. The second [2] sentence is perfectly clear if we strike out the phrase "whether the Notice provided for in the preceding paragraph [1] be given or not." It performs no office and serves only to becloud the context. With that phrase stricken the sentence could mean only: upon receipt of the notice mentioned in sentence [1] one, lessee might continue to occupy the premises for 30 months more and if the notice be served prior to the expiration of 30 months from date of the lease, lessee might surrender the premises and take the bonus of $5,000 for the waiver of the right of occupancy for a further 30 months after receipt of the notice.

[2] The evident purpose of the *whether* clause was to provide for a contingency which might occur during the first 30 months of the lease-term, upon the happening of which lessor might desire the premises for some purpose other than for use of its film laboratory. Should such a contingency occur, lessor could not give the notice required by sentence one for that notice must announce that the premises are required for lessor's business. By no stretch of the imagination can any language in paragraph 14 be so construed as releasing appellants from the payment of rent during the six-year term. Respondent never notified appellants that it desired the space for its own business. Since such demand by lessor coupled with notice to terminate the tenancy was the only demand or notice mentioned in the sublease and since that right was not asserted, appellants' tenancy and obligation to pay rent continued. Therefore, having without right abandoned the demised premises during their lease term, they owe rent for the six months during which the space was vacant. Where a covenant is susceptible of two or more constructions, one of which would make the contract unfair and another would make the instrument fair and just, the latter should be adopted. (6 Cal.Jur. 271, § 169.)

The $5,000 Bonus Not Due Appellants.

[3, 4] The construction urged by appellants of paragraph 14 is no less than absurd. If they were correct, lessees would on the first day of their term have had the right to vacate and surrender the demised premises and collect a bonus of $5,000. If they were correct, there would never have been a contract by reason of the lack of mutuality. Fabbro v. Dardi & Co., 93 Cal.App.2d 247, 251, 209 P.2d 91; Alameda County v. Ross, 32 Cal.App.2d 135, 145, 89 P.2d 460; Shortell v. Evans-Ferguson Corp., 98 Cal.App. 650, 660, 277 P. 519. While parties are free to contract for a lease on such terms as they please, their efforts are futile if they choose such phraseology as permits one party to withdraw at his pleasure. Such a contract is void. Naify v. Pacific Indemnity Co., 11 Cal.2d 5, 11, 76 P.2d 663, 115 A.L.R. 476.

In the view of the sublease most generous to appellants, no consideration for the $5,000 bonus is to be found. They seek to strengthen their argument by invoking the terms of Exhibit A which was executed on the same day by five parties including appellants and respondent. Such efforts are unavailing. The sublease is a complete writing in itself and requires no illumination by any other document. Exhibit A [1]

1. Exhibit A was executed by five parties, to wit: Film Enterprises, Inc., first party; Carmel Productions, Inc., second party; William Horsley, third party; Cox, Thomas and Utz doing business as Coast Visual Education Company, fourth party; Thomas H. Emmett, fifth party. Respondent was indebted to appellants in the sum of $15,000 and to Horseley in a sum exceeding $34,000. The debt due Horsley was secured by a pledge on all the issued shares of respondent (1123), one half of which was owned by appellants, the other half by Emmett. Title of the stock was held by appellants and Emmett in equal shares. Carmel Production, Inc. sought to acquire from appellants the shares owned by them.

was composed primarily for the sale of securities. The implication that the $5,000 bonus was for a consideration passing to respondent pursuant to the terms of Exhibit A is wholly unwarranted. The argument that as of the date of the writings it was "most difficult to procure suitable rental places for conducting business" does not shed any such light upon the sublease as to render its own language unintelligible or to give it a meaning different from that which appears under the ordinary rules of construction. The contention that respondent requested appellants to surrender the premises at the time of executing, and by the terms of the sublease, is merely an assertion—as absurd as it is gratuitous. The agreement made by Exhibit A was complete for its purpose, but it is unthinkable that by any of its terms respondent agreed to pay appellants $5,000 if they would leave the premises within 30 months after date of the writing as a consideration for a transfer of the corporate stock of respondent. The second paragraph of Exhibit A is respondent's agreement to pay appellants $15,000 "in full payment." By the fifth paragraph it agrees to make a sublease of space in its premises to appellants for six years commencing February 20, 1948. There is not a suggestion that respondent asked for an immediate restoration of the space leased. On the contrary, the stipulation of facts contains the covenant: "Defendant did not at any time advise plaintiffs that it desired said premises, nor did it request plaintiffs to vacate said premises or to surrender or terminate said sublease." All the terms of Exhibit A have been wholly executed.

The only light emanating from Exhibit A is that appellants owed respondent in some amount. This indebtedness was assumed by Carmel Productions under its arrangement with appellants. Respondent's debt to appellants was paid in full at the time. Not a word is found there or in any other passage of the Exhibit to indicate a plan or desire on respondent's part to make a gift of $5,000 to appellants or to release them from the obligation to pay the fixed rent. Moreover, paragraph 5 of the stipulation declares: "No considerations passed or were paid to either plaintiffs or defendant other than as expressed in said agreement for sale of corporate stock and sublease attached hereto as Exhibits 'A' and 'B' nor did defendant receive a deposit, security or bonus for executing said sublease." Since respondent received nothing from appellants as a consideration for the sublease other than the mutual promises expressed within it how can it be said that appellants can now demand $5,000 for their willfully and unceremoniously scorning a solemn obligation?

The second sentence of the fifth paragraph of Exhibit A as originally typed read as follows: "In the event First or Second Party shall deem it necessary to occupy the premises so to be leased to Fourth Party hereunder, notice in writing to that effect shall be given and Fourth Party shall be

Thereupon the parties executed Exhibit A whereby appellants sold to Carmel 561½ shares for $30,000, payable in installments; respondent to pay its indebtedness of $15,000; Carmel Productions to assume debt of appellants owing to respondent and to procure for appellants a release from their liability to Horsley on a promissory note. In the Fifth paragraph it was declared as follows: "First Party hereby agrees to make and deliver to Fourth Party herein, a sub-lease, upon certain space in the premises now leased by First Party from William Horsley, Third Party herein, which said lease is to be in form customarily employed and shall provide: Said lease is to be for a period of six years duration, commencing February 20th, 1948 (unless sooner determined as hereinafter provided) at the monthly rental of $200.00; Fourth Party is to have the space now occupied by it in said premises aforesaid except that that portion of the building now occupied by Fourth Party as a shop is to be relinquished by March 20th, 1948 or before and in lieu thereof Fourth Party is to be permitted to occupy a space directly in the rear of its store now known as Mrs. Merollo's room. In the event First or Second Party shall deem it necessary to occupy the premises so to be leased to Fourth Party hereunder, notice in writing to that effect shall be given and Fourth Party shall be given 30 months to vacate. Fourth Party should it vacate and surrender premises within 30 months from the date of this agreement from Febr. 20th 1948. shall receive $5,000 as Bonus and Consideration therefor".

given 30 months to vacate, and in this event Fourth Party is to receive $5,000.00 as consideration for their vacating said premises prior to the expiration of said 30 months." From that language it appears to have been intended that if respondent should deem it necessary to occupy the space leased to appellants, the latter must be so notified, and at the same time they were to have an additional 30 months occupancy and to receive $5,000 as consideration for vacating prior to the expiration of the extra 30 months. By this original draft appellants were privileged to remain 30 months after notice that respondent required the space for its own use coupled with a demand to vacate, without regard to the date of such demand. Also, they were to receive the $5,000. The parties determined that such was not exactly their intention. To make use of the draft, they interlined it so as to limit appellants' right to collect the bonus only in the event of their surrender of the space during the first 30 months of the lease. The interlineation apparently prepared with extra care provides: "Fourth party, should it vacate and surrender premises within 30 months from the date of this agreement from Febr. 20th, 1948 shall receive $5,000 as a bonus in consideration therefor." Since the interlineation supplants the passage deleted, ("and in this event Fourth Party is to receive $5,000.00 as consideration for their vacating said premises prior to the expiration of said 30 months"), it must be interpreted in the light of undeleted typewritten words which the stricken portion modified in the original draft. Turning to the part that was left undisturbed just preceding the deletion, it is seen that the parties contemplated that respondent might "deem it *necessary to occupy the premises,*" whereupon "notice in writing to that effect shall be given and fourth party shall be given 30 months to vacate." Since the necessity of respondent's need and desire for appellants to vacate was a fundamental condition for the latter to restore possession, their contention must fall in view of the fact that no notice was ever served by respondent that it desired the space and no demand was ever made for a restoration. Inasmuch as they agree that no demand for possession was ever made, no construction of the sublease is reasonable other than that the parties had in mind and planned for respondent's possible, future desire for the subleased space. In no part of the contract is there to be found in words or by implication that appellants would be privileged to cancel the lease on their own motion.

The judgment is affirmed with directions to the trial court to entertain respondent's motion for additional fees, provided application therefor be filed within 30 days after the filing of the remittitur. Oakland California Towel Co. v. Roland, 93 Cal.App.2d 713, 718, 209 P.2d 854.

McCOMB and FOX, JJ., concur.



109 Cal.App.2d 310

CONSOLIDATED PHOTOGRAPHIC INDUSTRIES, Inc. et al. v. MARKS et al.

GRIFFITH et al. v. MARKS et al.

Civ. 18550, 18551.

District Court of Appeal, Second District, Division 2, California.

Feb. 18, 1952.

Hearing Denied April 17, 1952.

Consolidated Photographic Industries, Inc., and others and Winston E. Griffith and John W. Hooper, copartners, doing business under the fictitious name and style of Griffith Photo Service, brought action against Robert Marks, the Atlas Photographic Industries, Inc., and others to enforce covenants by Robert Marks in contract for sale of photo-finishing concern that he would not engage in the photo-finishing business in the county for five years. The Superior Court of Los Angeles County, William R. McKay, J., entered judgments adverse to the named defendants, and they appealed. The District Court of Appeal, Moore, P. J., held that plaintiffs were entitled to enforce the covenant as to Robert Marks.

Judgments modified and, as modified, affirmed.

1. Corporations ⇐617(2)

Where individual, who owned photo-finishing concern, entered into written agreement with corporation for sale of business to corporation, and individual covenanted not to engage in photo-finishing business in county for five years, and two partnerships owned stock of corporation, and subsequently corporation discontinued operations of its own and sold all of its assets to partnerships, partnerships could enforce covenant against individual. Business and Professions Code, §§ 14100, 16600, 16601.

2. Contracts ⇐117(2)

An agreement by seller of business to refrain from carrying on a similar business within a limited area is valid and enforceable as an exception to general policy that all contracts whereby one is restrained from engaging in a lawful trade or business are void. Business and Professions Code, §§ 16600, 16601.

3. Contracts ⇐322(3)

In actions against individual and corporation to enforce covenant by individual, made in connection with sale by individual of photo-finishing concern, that he would not engage in the photo-finishing business in the county for five years, evidence was insufficient to establish that individual solicited customers of plaintiffs for corporation. Business and Professions Code, §§ 16600, 16601.

4. Corporations ⇐1

In actions against individual and corporation to enforce covenant by individual, made in connection with sale by individual of photo-finishing concern, that he would not engage in the photo-finishing business in the county for five years, evidence was insufficient to establish that individual and corporation were effectually the same. Business and Professions Code, §§ 16600, 16601.

Kenneth N. Chantry, Beverly Hills, for appellant Atlas Photographic Industries.

Gerson Marks, Beverly Hills, for appellant Robert Marks.

Warner, Peracca & Cowan, Los Angeles, for respondents Winston E. Griffith and John W. Hooper.

Keatinge, Arnold & Zack, Los Angeles, for respondents Consolidated Photographic Industries, Inc., Monarch Photo Co., Inc., and Kug-Art Photo Service, Inc.

MOORE, Presiding Justice.

By the judgment herein Robert Marks was "enjoined and restrained until November 1, 1952, from engaging in the photo finishing business in the County of Los Angeles." Atlas Photographic Industries, Inc. was enjoined from employing Marks "as an officer, agent or otherwise" and from servicing specified photographic accounts in Los Angeles county. Both have appealed on the grounds that Mr. Marks' covenant not to compete with his vendee is void, and that section 16601 of the Business and Professions Code does not protect respondents' prior business from competition by Marks or his codefendants.

On October 27, 1947, appellant Marks as the sole owner of a photo-finishing concern operating under the fictitious name of Twentieth Century Photo Laboratories entered into a written agreement for the sale of such business including its tangible assets and good will to Twentieth Century Photo Laboratories, Inc., a corporation, hereafter referred to as Twentieth Inc. In that agreement Marks also covenanted not to engage in the photo-finishing business in Los Angeles county for a period of five years.

Twentieth Inc. was formed for the specific purpose of acquiring Marks' business including his goodwill. Its outstanding stock is held in equal shares by respondents Griffith Photo Service and Monarch Photo Service. Both Griffith and Monarch at that time were copartnerships. Each group had been separately engaged in the photo-finishing business in Los Angeles county for many years.

Shortly after the sale was completed it was determined that Twentieth's facilities were inadequate for the proper operation of its business and thereafter all processing of Twentieth's accounts was done at the

plants of Griffith and Monarch. About March 1, 1948, Twentieth discontinued entirely operations under its own name and sold all its assets to Griffith and Monarch. Such assets including photo-finishing accounts were divided equally between the two shareholders.

Until August, 1950, Marks engaged in related business enterprises outside Los Angeles county. For a portion of this period he was in Monarch's employ servicing out-of-town accounts. On the last mentioned date, however, Marks caused defendant Atlas to be organized, and at the time of suit was an officer. Also, he was owner of 50 per cent of its outstanding stock. Atlas immediately commenced operation of a photo-finishing business in Los Angeles county in direct competition with Monarch and Griffith.

[1] Thereafter these actions were instituted to restrain the operations of Marks and his corporations. They were tried together and separate judgments were entered in favor of both plaintiffs. In demanding a reversal, Marks and Atlas contend that neither Monarch nor Griffith has "title to the goodwill" of the original Marks' business transferred to Twentieth. This contention rests upon the hypothesis that good will cannot exist detached from an active business; that the good will involved herein was destroyed when Twentieth Inc. ceased its operations; that in any event such good will was never transferred to respondents because the going business was not transferred to them. Despite appellants' clever analysis of the intangible element of good will and their fervent argument in support thereof they have not changed the judgment of this court. The decrees here on review are well fortified by the agreed statement, by the statutes and by the intendments arising from the facts and the conclusions. Contrary to the argument advanced respondents are entitled to the benefit of Marks' covenant with Twentieth Inc. to refrain from engaging in a competing photo business.

[2] By statute, Business and Professions Code, sec. 16601, it is provided that one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a limited area and that such covenant is effective "so long as the buyer, or any person deriving title to the good will * * * from him, carries on a like business therein." Such agreements are valid and enforceable as exceptions to the general policy that all contracts whereby one is restrained from engaging in a lawful trade or business are void. B. & P. Code, sec. 16600.

Appellants' contention that the good will of the original firm has been destroyed and that therefore Marks is free to disregard his solemn contractual promise to Twentieth Inc. is without support in reason or authority. The good will of a business is defined as the "expectation of continued public patronage." B. & P. Code, sec. 14100. This asset was taken over by Twentieth Inc. upon its purchase from Marks. Since it was thereafter properly assigned and conveyed by means of successive valid transfers Graca v. Rodrigues, 33 Cal.App. 296, 298, 165 P. 1012, there is no question but that respondents as assignees from Twentieth Inc. should be able to enforce Marks' negative covenant.

Section 16601 does not require the buyer or his successor to maintain operation of the same identical business sold by the covenanting party. There is no requirement therein that it be conducted under the same name as previously utilized or that the same type of business organization be employed, since the last cited section requires only that a "like business" be carried on.

Respondents took over the photo-finishing accounts held by Marks. For a time they were serviced nominally by Twentieth Inc. though the actual processing from the inception has been done in the Griffith and Monarch laboratories. Presumably these accounts are still being handled by respondents. In short, respondents took over the Marks business in its entirety—its physical assets and its "expectation of continued public patronage." There has been virtually no change in the conduct of Twentieth's operations from the time of the original sale. As a matter of fact, members of the Griffith and Monarch copartnerships and

their successor corporations are the real parties in interest. Also they are essentially the beneficiaries of Marks' agreement. Surely this was known to and in the contemplation of Marks at the time he executed the agreement of sale. He is therefore in no position now to complain of the enforcement of his own covenant. Respondents thus come within the letter and spirit of section 16601 and are entitled to equitable relief to compel performance of appellant's promise.

Appellant Atlas Photographic Industries has also filed its own brief wherein it attacks three findings as being wholly unsupported by the evidence. The findings in question are that (1) appellant Marks "organized or caused to be organized" the Atlas concern, and (2) Marks solicited certain named Griffith and Monarch customers for Atlas. On the basis of such findings Atlas was enjoined from employing Marks and from continuing the servicing of the designated accounts. The attack on the first finding is wholly unjustified in view of appellants' admission in their answers that Marks caused Atlas' organization.

[3, 4] However, the criticism of the other finding made in both actions is well taken. The record does not reveal evidence to support the determination that Marks solicited the specified customers (with the exception of Ramona Pharmacy) on behalf of Atlas or that others under his direction and control did so. Respondents have not pointed to any direct evidence in support of such finding but rather argue that Marks as vice president, director and holder of one half of Atlas' outstanding stock had complete control of the corporation and that therefore Atlas was a mere instrumentality of Marks. However, such factors do not of themselves support a finding that Atlas was the alter ego of Marks or that the corporation was only an instrumentality by which he sought to evade his agreement. There is neither affirmative proof nor direct inference from competent evidence to show such unity of interest and ownership as would indicate that the Atlas corporation and Marks are effectually the same. In the absence of such proof the corporation will be regarded as a separate entity. Judelson v. American Metal Bearing Co., 89 Cal.App.2d 256, 263, 200 P.2d 836. Since the record discloses neither pleading nor proof that Atlas was a mere instrumentality of Marks or that he owned all the capital stock of the corporation, it must be dealt with as a distinct entity. Ibid. The existence of a corporation separate from its stockholders or officers cannot be destroyed upon mere suspicion or surmise. In the absence of actual evidence as to Marks' control and dominion over Atlas' activities and in view of the fact that others have supplied as much capital as did he and that others apparently were also active in its operations, it would be gross error to conclude that Atlas and Marks are in such unity as to justify an injunction against Atlas' servicing respondents' former accounts. Therefore, without altering the judgments insofar as they affect the other defendants, they are now to be amended with respect to appellant Atlas.

It is therefore ordered that the judgment in action 18550 insofar as it affects appellant Atlas be modified by striking therefrom paragraph 3; that paragraph 3 of the judgment in action 18551 insofar as it affects appellant Atlas be stricken and that in lieu thereof the following be substituted: "3. It is further ordered, adjudged and decreed that defendant Atlas Photographic Industries Inc. be and it is hereby enjoined from further servicing or accepting the patronage of Ramona Pharmacy of Monterey Park, California."

As thus modified the judgments are affirmed.

McCOMB, J., concurs.

109 Cal.App.2d 346

GANANN v. GANANN.

Civ. 18374, 18465.

District Court of Appeal, Second District, Division 3, California.

Feb. 18, 1952.

Rehearing Denied March 11, 1952.

Hearing Denied April 17, 1952.

Suit for divorce wherein the defendant wife filed a cross-complaint. The Superior Court of Los Angeles County, Kurtz Kaufman, J., entered a judgment awarding the husband a divorce and an order denying the wife's application for attorney's fees and costs on appeal, and the wife appealed. The District Court of Appeal, Vickers, J. pro tem., held that evidence supported the judgment and denial of allowance for attorney's fees and costs on appeal was not abuse of discretion.

Judgment and order affirmed.

1. Appeal and Error ⇐1010(1)

District Court of Appeals cannot substitute its judgment for trial court's judgment which is supported by findings which are based on substantial evidence.

2. Divorce ⇐130

In husband's suit for divorce, evidence supported finding that wife had treated husband with extreme cruelty and had wrongfully inflicted upon him grievous mental suffering during marriage.

3. Divorce ⇐184(7)

In husband's divorce suit, credibility of his testimony was for trier of fact.

4. Divorce ⇐249(4)

Where husband at time of marriage on January 16, 1949, had substantial equities in residence, furniture and automobile, and during marriage husband had salary of $400 a month and wife had salary of $230 per month, and payments made by husband on residence property, furniture and automobile were from his separate property, and salaries of husband and wife were used for payment of living expenses of themselves and wife's mother and two children by previous marriage who lived with the parties, without any record being kept of amounts so spent, and husband was granted divorce in March 1950, trial court was justified in awarding to husband whatever community interest in the residence property, furniture and automobile existed.

5. Divorce ⇐252

Husband who was granted divorce, being the nonoffending party, was entitled to something in excess of one-half of whatever community interest existed in residence property, furniture and automobile, and whether any of such property should be awarded to wife, the offending party, rested in sound discretion of court. Civ. Code, § 146, subd. 1.

6. Appeal and Error ⇐500(1)

To predicate error on undue restriction of cross-examination, record must show what material facts, if any, would have been developed if counsel had been permitted greater latitude on cross-examination.

7. Divorce ⇐182, 194

Trial court, in determining whether wife should be allowed attorney's fees and costs on her appeal, must consider needs of wife, ability to pay of husband, and good faith of wife, and can consider not only evidence produced at hearing in order to show cause, including affidavit, but also history of entire litigation, and circumstances that brought unfavorable results to wife, including evidence introduced at trial.

8. Divorce ⇐182, 194

In determining whether attorney's fees and costs should be allowed wife on her appeal in divorce action, in view of absence of any expression by her, court was justified in concluding that existence of her good faith depended to great extent upon whether there was reasonable basis for assertion by her counsel that he would be successful in securing reversal, and was entitled to consider that each finding and each portion of judgment to be attacked by appeal was supported by substantial evidence and that there were no questions of law involved upon which wife could have reasonable hope of prevailing.

9. Divorce ⇐182, 194

Granting of attorney's fees and costs on appeal in divorce action rests in sound discretion of trial court and will not be dis-

turbed by reviewing court unless abuse of discretion is shown.

10. Divorce ⇐182, 194

Where wife against whom judgment in divorce action had been entered sought allowance for attorney's fees and costs on her appeal, but she neither testified nor filed any affidavit in regard to good faith of appeal, and affidavits as to needs of wife and ability to pay of husband were conflicting, denial of allowance was not abuse of discretion.

Monta W. Shirley, Los Angeles, for appellant.

Shatford & Shatford, Temple City, for respondent.

VICKERS, Justice pro tem.

Appeals by defendant and cross-complainant from a judgment of divorce and from an order denying her application for attorney's fees and costs on appeal.

The parties involved in this divorce case carried on a meretricious relationship for 10 months in 1948 while the respondent was awaiting a final decree of divorce from his first wife. That decree having been entered they were married on January 16, 1949. Marital strife quickly developed and they separated on April 25, 1949. Respondent filed suit for annulment or divorce on May 23, 1949. Thereafter appellant filed an answer and cross-complaint. The cause was on trial for three days in March, 1950, following which the court awarded a divorce and the property involved to respondent. It gave no relief to appellant except that it directed respondent to pay to appellant and her attorney $50 court costs and $300 attorney's fees. Following the entry of judgment the appellant sought an order compelling respondent to pay her attorney's fees and costs on appeal. After a hearing on the order to show cause the trial court denied her any relief.

[1] Appellant attacks the judgment on the ground that the findings and judgment are not supported by the evidence. Each of the findings is supported by substantial evidence. The judgment is supported by the findings. Under the long established rules of law we cannot substitute our judgment for that of the trial court. Appellant also urges that the court made erroneous rulings in the sustaining of respondent's objections to some of appellant's questions. We find no merit in any of appellant's contentions.

[2, 3] The record contains ample evidence to support the court's finding that during the marriage the appellant had treated respondent with extreme cruelty and had wrongfully inflicted upon him grievous mental suffering. Such evidence consisted in part of respondent's testimony, which was sufficiently corroborated, that commencing a few weeks after the marriage appellant on several occasions insisted that he transfer his separate property to her name and threatened to leave him at once unless he did so; that she was frequently mentally disturbed; that she accused him of having lost his manhood and of being impotent; that she repeated such accusations to members of his family; that shortly before the separation she said: "Let us get rid of this farce of a marriage and get a divorce"; and that respondent suffered greatly by reason thereof. The court was fully justified in drawing the inference that if the appellant loved the respondent at the time of the marriage she lost that love shortly afterwards and that that fact became evident to respondent. In her briefs the appellant insisted that the court should not have believed the respondent. However that was within the sole discretion of the trial court. We can not say from the record that the court was not justified in believing the respondent's testimony to be true.

Appellant also contends that the court should have awarded her at least some of the property involved and that the failure of the court to do so was so unfair and unjust as to result in a miscarriage of justice. At the time of the marriage the appellant had no property assets, except a small amount of furniture, while the respondent had substantial equities in the

residence in which the parties thereafter lived and in the furniture with which it was equipped and in an automobile. The respondent was required to make substantial monthly payments to protect these equities. During the marriage the respondent received approximately $400 per month and the appellant received approximately $230 per month as their respective salaries from separate employments. During the marriage the respondent received $2,500 in cash from a property settlement theretofore made with his former wife and borrowed approximately $450 on his life insurance policy. During the same period of time he made various payments upon the residence property, the furniture and on his automobile. The court found that all of such payments, made prior to May 1, 1950, were made out of his separate property. It also found "It is true that there is no other community interest other than the $2,496.54 spent by plaintiff on his separate property." It also found as a conclusion of law "That any and all community interests, if any, by reason of payments on obligations on plaintiff's separate property made after marriage is awarded to plaintiff." The apparent uncertainty of the court in regard to the existence of community property, appears to have been due to the following evidence: That the appellant's mother and her two children by her previous marriage lived with the parties; that the salaries of the parties were used for the payment of the living expenses of the entire family, without any record being kept of the amounts so spent; that according to an itemized statement of account the respondent spent approximately $2,300 more than he received from his earnings from the date of marriage to the time of trial.

[4, 5] Under the facts presented we cannot say that the court was not justified in awarding to the respondent whatever community interest in the property in question existed. The respondent, being the non-offending party, was entitled to something in excess of one-half of such community interest, see Civ.Code, sec. 146, subsec. One; Harrold v. Harrold, 100 Cal. App.2d 601, 608, 224 P.2d 66, and what, if any such property was to be awarded to the appellant, the offending party, rested in the sound discretion of the court. In support of her contention that a portion of the property should have been awarded to her the appellant urges that the evidence establishes that prior to the marriage the respondent promised to convey title in the residence property to the parties as joint tenants. However, there was a direct conflict in the evidence on this subject and again the court chose to believe the respondent rather that the appellant. There is therefore no merit to this contention.

[6] We have examined the portions of the reporter's transcript cited by the appellant in support of her contention that the court erred in certain rulings upon the admissibility of evidence. Appellant's principle complaint in this regard is that the court unduly restricted the cross-examination of the respondent. From our examination of the portions cited, as well as other portions of the reporter's transcript, it does not appear that the court was unduly restrictive of counsel for the appellant while cross-examining or that it was more liberal with counsel for the respondent in that regard. Furthermore, there is no showing in the record as to what, if any, material facts would have been developed on behalf of appellant if her counsel had been permitted greater latitude on cross-examination.

From the matters presented in the briefs and from the record as examined by us we cannot say that the manner in which the trial was conducted was unfair or unjust to the appellant or that a miscarriage of justice resulted therefrom.

[7] In arriving at its decision denying attorney's fees and costs on appeal, it was necessary for the trial court to consider the needs of the wife, the ability to pay of the husband and the good faith of the wife. It was proper for the court to take into account not only the evidence produced at the hearing on the order to show cause, including the affidavits, but also

the history of the entire litigation, and the circumstances that brought the unfavorable result to the wife, including the evidence introduced at the trial. See Wittman v. Superior Court, 19 Cal.App.2d 734, 736, 66 P.2d 180. The appellant sought an order for $1,500 attorney's fees and $800 costs. The affidavits of the parties do not appear in the clerk's transcript. They were specified in appellant's notice to the clerk of the trial court for inclusion in the clerk's transcript and are before us by virtue of an order augmenting the record on appeal. According to her supporting affidavit the appellant's monthly income was $230 and her monthly expenses $231. By her testimony she declared that these expenses included the support of herself, her two children and her mother, as well as the food supplied her brother. She also testified she was living with her brother rent free. In her affidavit she also set forth the value of her husband's separate property as $26,000. According to respondent's affidavit the value of his interest in his separate property was only $7,000 or $8,000 and consisted solely of equities. This was supported by uncontradicted evidence received during the trial. His affidavit further set forth his monthly income as approximately $385 and his monthly expenses as "$393 plus payments due on taxes, fire insurance and Department of Internal Revenue." He itemized $203 of his expenses as payments required to be made on his separate property. At the time of the purchase of the residence property, just prior to the marriage, the appellant paid $8,000 in cash thereon and agreed to pay an additional $12,000. How much had been paid thereafter on account of the principal of this debt was not disclosed. There was no testimony as to what sum or sums would be realized upon a sale of his separate real or personal property. The court was entitled to assume that he was required to pay the monthly installments or suffer the penalty of the loss of the property. It is therefore clear that the trial court had a difficult problem in weighing the needs of the wife against the ability of the husband to pay all or a substantial portion of the $2,300 demanded.

[8] In determining the question of appellant's good faith in seeking the allowances in question and in prosecuting the appeal the court had nothing of an evidentiary nature to consider except the record. The appellant was not questioned on this subject nor did she refer to it in her affidavit. Her counsel neither testified nor filed any affidavit in regard thereto. During the course of his argument he did assert, in strong terms, that he would be successful in securing a reversal of the judgment. In view of the absence of any expression by her the court was justified in concluding that the existence of appellant's good faith depended to a great extent upon whether there was a reasonable basis for this assertion by counsel. Apparently the court did not think so. "Where the trial court is satisfied, from the record before it, that the proposed appeal is not undertaken in good faith, or with reasonable belief that it has merit [citing a case], the application should be denied." Stewart v. Stewart, 156 Cal. 651, 656, 105 P. 955, 957. The court was also entitled to consider that each finding and each portion of the judgment to be attacked by the appeal was supported by substantial evidence and that there were no questions of law involved upon which the appellant could have a reasonable hope of prevailing.

[9] It is a firmly settled principle of law that the granting of attorney's fees and costs on appeal rests in the sound discretion of the trial court and will not be disturbed by the reviewing court unless abuse of that discretion is shown, see Kellett v. Kellett, 2 Cal.2d 45, 48, 39 P.2d 203. In reaffirming this principle the Supreme Court, in Weil v. Weil, 37 Cal. 2d 770, 236 P.2d 159, 170, said: "In rare instances, however, an order denying fees will be reversed where it is shown that the appeal presents 'debatable questions which were not without substantial merit or controversy.' Norris v. Norris, 50 Cal. App.2d 726, 735, 123 P.2d 847, 852. * *" It will appear from what we have said that this is not such a case. In both the Weil and Norris cases the ability of husband to pay was an accepted fact.

[10] In view of all the facts and circumstances before the trial court we cannot say that the trial court abused its discretion in denying to appellant the allowance of attorney's fees and costs.

The judgment and order are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



109 Cal.App.2d 299

GOLDENBERG v. MERRITT.

Civ. 18592.

District Court of Appeal, Second District, Division 1, California.

Feb. 18, 1952.

Action by Roy J. Goldenberg against Sulett C. Merritt for purchase price of merchandise purchased by defendant. Defendant filed a counterclaim. The Superior Court of Los Angeles County, James H. Pope, J., entered judgment for plaintiff and from an order granting a new trial to extent of taking testimony of one witness only, defendant appealed. The District Court of Appeal, Doran, J., held that the granting of the order was not an abuse of discretion, and that court had authority to grant such an order.

Order affirmed.

New Trial ⟸9

Order granting a new trial to extent of taking testimony of one witness only in order to rectify trial court's previous error in permitting plaintiff to make use of testimony taken at a previous trial without requiring a showing that the witness was unavailable was not an abuse of discretion and court had authority to grant such an order. Code Civ.Proc. § 662.

Derthick & Cusack and Wm. J. Cusack, Los Angeles, for appellant.

Desser, Rau, Christensen & Hoffman and Wm. Christensen, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from an order granting appellant a new trial to the extent that the order limits the new trial to the taking of the testimony of one witness only.

It appears that the respondent brought suit against appellant for the sum of $2,187, the purchase price of merchandise purchased by appellant. Appellant admitted the purchase but denied any indebtedness, alleging a counterclaim of $8,986.98 based upon an oral contract that if appellant would assist respondent in obtaining employment as auctioneer to sell certain estate property, respondent would pay appellant one-third of the compensation received in selling such property. Respondent secured the employment and earned a fee of $26,960.96. This was a second trial of the action, a new trial having been granted after a previous judgment for respondent.

During the course of the second trial, respondent, over appellant's objection that no proper foundation had been laid, read into evidence the testimony of one Eddie Allen given upon the occasion of the first trial. Judgment was thereafter entered in respondent's favor and a motion for a new trial made by appellant on the ground that the trial court erred in permitting respondent to read into evidence such prior testimony of Eddie Allen.

On February 15, 1951 the trial court made the following order: "Motion of defendant for a new trial having been heretofore submitted on January 11, 1951, the court grants the motion only as to the retaking of the testimony of Eddie Allen."

Thereafter and on August 14, 1951, the trial court made the following order *nunc pro tunc*:

"It having come to the attention of the court that the record of the order made by this court upon a motion for a new trial in the above entitled case does not fully set forth the order. It is hereby ordered

that the same be corrected to read as the same was given, to wit:

"Motion of the moving party having been heard, submitted and considered, it is ordered that the findings and judgment be set aside and the cause reopened for the purpose of taking the testimony of Eddie Allen."

On this appeal the appellant presents but one point: "The court may not limit the proceedings on a new trial to the testimony of one witness and such a limitation in the instant case amounted to an abuse of discretion". In this connection appellant calls attention to the fact that the record shows a direct conflict regarding the alleged oral contract; that therefore "the testimony of Eddie Allen, presumably a disinterested witness, would appear to have considerable weight in determining this important issue".

Section 662 of the Code of Civil Procedure, in reference to new trials, reads as follows: "In ruling on such motion, in a cause tried without a jury, the court may, on such terms as may be just, change or add to the findings, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may vacate and set aside the findings and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before findings had been filed or judgment rendered".

The respondent's position, as set forth in the brief, is that "The order made by the trial court on February 5, 1951, shows that it was the purpose and intent of the trial court to reopen the case for the purpose of receiving additional evidence and is proper under Section 662, Code of Civil Procedure". It is further argued that "The trial court had jurisdiction to make the order made on August 14, 1951, nunc pro tunc as of February 5, 1951, to show the true intent of its order theretofore made". It is also urged that in effect the trial court did not grant a new trial, but made the nunc pro tunc order reopening the case "in lieu of granting a new trial", as provided in Section 662, and that such order is not appealable.

The appellant's contention that the order hereinbefore set forth was unauthorized and amounted to an abuse of discretion, cannot be sustained. The intent and purpose of the order of February 5, 1951, as clarified by the nunc pro tunc order, is plain; namely, to rectify the trial court's previous error in permitting respondent to make use of testimony taken at a previous trial without requiring a showing that the witness, Eddie Allen, was unavailable. This, as respondent points out, "if the very purpose of Section 662, Code of Civil Procedure".

Roraback v. Roraback, 38 Cal.App.2d 592, 594, 596, 101 P.2d 772, 773, involved a somewhat similar order in which a new trial was "granted to the following extent only, to-wit: the findings of fact herein are hereby vacated and set aside, * * * and the case is reopened for the taking of further testimony by both sides." The reviewing court held that when such order is construed as a whole, "it comes clearly within the provisions of the last clause of section 662 * * *"; that the true meaning of an order "is not an isolated phrase appearing therein, but its effect when considered as a whole." The true purpose of the order was not to grant a new trial but to reopen the case.

The Roraback case just cited, further states: "The section in question, it is true, presents an innovation in court procedure, yet its purposes are so well recognized that it has been held the provisions of the section are to be liberally construed to achieve the purposes it was designated to accomplish." Such a liberal interpretation in the instant case, renders the meaning abundantly clear. Neither a want of authority to make the order, nor an abuse of the trial court's discretion, has been shown.

Giving appellant the benefit of the doubt in reference to the appealable nature of the order made, in view of the fact that

such order was entered pursuant to the provisions of the code section relating to new trial, but not deciding that question, the order made, as explained by the later nunc pro tunc order, must be sustained.

The order appealed from is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



109 Cal.App.2d 296

PEOPLE v. WHITE.

Cr. 842.

District Court of Appeal, Fourth District, California.

Feb. 15, 1952.

Appeal from a judgment of the Superior Court, Tulare County, Glenn L. Moran, J., sentencing one pleading guilty of driving an automobile after suspension of his driver's license to 90 days imprisonment in the Industrial Work Camp, and an order of such court denying appellant's application for probation. The District Court of Appeal, Griffin, J., held that the judgment was not invalid as imposing the penalty of imprisonment for non-payment of a civil debt because the license was suspended as the result of appellant's failure to deposit cash security after an automobile accident in which he was involved.

Appeal from order denying probation dismissed, and judgment affirmed.

1. Constitutional Law ⇐83(3)

A judgment sentencing defendant to imprisonment in road camp on his plea of guilty of driving automobile after suspension of his driver's license was not invalid as imposing penalty of imprisonment for nonpayment of civil debt because license was suspended as result of defendant's failure to deposit cash security after automobile accident wherein he was involved. Vehicle Code, §§ 332, 410 et seq., 420; Const. art. 1, § 15.

2. Criminal Law ⇐1147

Where probation officer made lengthy report, showing that one pleading guilty of driving automobile after suspension of his driver's license admitted being arrested for misdemeanors on at least twelve occasions, denial of his application for probation was not such an abuse of superior court's discretion as to warrant interference by appellate court, though report showed no felony convictions of defendant or flagrant or habitual violations of license suspension by him, in absence of record showing that trial judge did not consider such matters. Vehicle Code, § 332.

3. Criminal Law ⇐1023(10)

An attempted appeal from superior court's order denying probation of one pleading guilty of offense must be dismissed.

John R. Locke, Jr., J. M. Lopes, Visalia, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was charged with, and entered a plea of guilty to, violating section 332 of the Vehicle Code in that he drove an automobile upon a public highway during a time when his privilege to do so was suspended by the Department of Motor Vehicles.

The recommendation of the probation officer was that probation be denied and that defendant be fined $300 or serve 90 days in jail. The judge denied his application for probation and sentenced him to 90 days in the Industrial Road Camp. Notice of appeal was filed on August 2, 1951.

On this appeal defendant endeavors to present two contentions: (1) that it appears from the probation officer's report that defendant was in an automobile accident in 1950; that he carried no liability or property damage insurance and was required under secs. 410 et seq. of the Vehicle Code, Financial Responsibility Law, to deposit security in the amount of $470 be-

cause of this accident; that he did not do so; that as a result of this fact his license to operate a motor vehicle was suspended or that it was surrendered to the department in January, 1951; and that accordingly, the imprisonment of defendant for driving an automobile while his license was suspended for the grounds stated, was in violation of Article I, sec. 15 of the Constitution of California, in that it constituted imprisonment for nonpayment of a civil debt; (2) that the court abused its discretion in not granting probation under the circumstances related in the report of the probation officer.

[1] As to the first proposition, counsel for defendant cites no cases in support of his argument. In many respects the constitutionality and validity of section 420 and other kindred sections of the Vehicle Code have been upheld in Escobedo v. State of California, 35 Cal.2d 870, 222 P.2d 1. The authorities there cited help to fortify the defense of the attack here made. It was there held that the State, in the exercise of its police power, could constitutionally have required a deposit of security by owners of all vehicles as a condition to licensing them. The defendant's imprisonment here was not for debt nor for his failure to deposit security following the accident which caused him to be imprisoned, but rather, it was for his affirmative act in driving his automobile at a time when he was forbidden to do so. The situation is analogous to those cases in which persons, in order to carry on certain businesses and professions, have been required to pay license taxes, and have failed to do so. When such persons have been convicted of carrying on such businesses and professions without having paid the license tax, the courts have upheld the legality of imprisonment therefor against the contention that it would be unlawful imprisonment for debt. In re Johnson, 47 Cal.App. 465, 467, 190 P. 852; In re Nowak, 184 Cal. 701, 708, 195 P. 402; In re Diehl, 8 Cal.App. 51, 55, 96 P. 98.

The penalty here imposed was a punishment exacted as a means of deterring the defendant and others from the commission of such delinquencies in the future, and was not an imprisonment for debt.

[2] As to the second contention, defendant admits that the granting or denial of probation is a matter of discretion with the trial court in the light of all the circumstances of the case, but argues that there was such an abuse of discretion in the instant case as would warrant interference by this court on appeal. He cites People v. Keylon, 122 Cal.App. 408, 10 P.2d 86, and argues that since the probation officer's report shows no *felony* convictions of defendant, and that he had not been driving "as a flagrant and habitual violator of his license suspension", the policy of the law would have been better served by granting probation and requiring defendant as a condition thereof to post the required security; that these matters, as well as others, were not fully set forth in the report, and accordingly, the court did not have the opportunity of considering all of the factors involved.

The probation officer made a lengthy report on the subject matter. There is nothing in the record which indicates that the trial judge did not take into consideration the matters referred to by defendant. In addition to other facts obtained by investigation, it showed that defendant admitted being arrested for *misdemeanors* on at least 12 different occasions. No abuse of discretion appears in the court's action denying probation. People v. Payne, 106 Cal. App. 609, 289 P. 909; People v. Russell, 156 Cal. 450 457, 105 P. 416; People v. Hopper, 20 Cal.App.2d 108, 113, 66 P.2d 459; People v. Wooley, 15 Cal.App.2d 669, 675, 59 P.2d 1065.

[3] The attempted appeal from the order denying probation is dismissed. People v. Brooks, 140 Cal.App. 480, 35 P.2d 583.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

LEVENE v. LEVENE.

Civ. 14803.

District Court of Appeal, First District, Division 2, California.

Feb. 8, 1952.

Rehearing Denied March 8, 1952.

Hearing Denied April 3, 1952.

Proceeding to collect on divorce judgment requiring payment of support money for children. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., issued an order that execution issue covering the installments accruing during five year period preceding the order and denying execution covering installments falling due more than five years prior to the motion, and from portion of order denying execution, the plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that the denial was not an abuse of discretion.

Orders affirmed.

1. Execution ⇐73

Under statute relating to issuance of execution more than five years after entry of judgment, judgment debtor does not have burden of showing that if execution had been sought prior to application for execution it would have been effective. Code Civ.Proc. §§ 681, 685.

2. Divorce ⇐311

On divorced wife's application for an order that execution issue covering child support installments under divorce decree, financial ability of husband to pay installments accruing prior to the five year period preceding the application, was not a matter which could be put in issue, where such installments were no longer due because of the limit of the statute relating to issuance of execution more than five years after entry of judgment. Code Civ.Proc. §§ 681, 685.

3. Execution ⇐73

Under statute relating to issuance of execution more than five years after entry of judgment, trial court, in its discretion, must determine whether judgment creditor has exercised due diligence to discover leviable property of the debtor. Code Civ.Proc. §§ 681, 685.

4. Appeal and Error ⇐983(3)

The trial court's exercise of discretion under statute relating to issuance of execution more than five years after entry of judgment will not be disturbed upon appeal unless it clearly appears that the trial court has abused its discretion. Code Civ.Proc. §§ 681, 685.

5. Divorce ⇐311

Trial court's order issuing execution covering child support installments under 1932 divorce decree accruing during five years preceding date of motion in 1949 and denying execution covering installments falling due more than five years prior to the motion was not an abuse of court's discretion, where wife had not attempted prior to 1949 to collect the unpaid installments or to discover property subject to execution. Code Civ.Proc. §§ 681, 685.

Abraham Setzer, San Francisco, for appellant.

Esmond Schapiro, San Francisco, for respondent.

NOURSE, Presiding Justice.

Appellant and respondent were divorced in March, 1932. Appellant was awarded custody of their two minor children for whose support respondent was ordered to pay $50 a month. Both parties have since remarried and have continuously resided in San Francisco. During the first five years following the judgment respondent made no payments and, concededly, was unable to do so. In 1939 respondent opened a jewelry business in San Francisco in which he prospered and from the proceeds of which he and his second wife acquired considerable property, both real and personal, and maintained at least two bank accounts. Until December, 1949, appellant did nothing to collect on the judgment or to discover property subject to execution except to consult several friends of hers who were lawyers. She took no court action. As a result of the proceedings initiated in 1949 appellant had an order that execution issue covering the instalments accruing during the five year period pre-

ceding the order and denied as to the prior instalments. Respondent complied with this order paying appellant the full sum awarded with interest and costs.

The appeal is taken from the portion of the order denying execution covering instalments falling due more than five years prior to the motion.

[1, 2] The first ground stated is that section 685, Code of Civil Procedure is precise in its terms. The second point is: "The rationale decidendi of the decisions of our appellate courts permitting a creditor to enforce a judgment after the elapse of five years from the entry thereof is that the creditor must show that he did previously comply with section 681 C.C.P., within the time therein limited, or, that he show the futility of the issuance of execution during said period." The third point is that in considering such an application after the five year period the court should do equity. The fourth point is a criticism of Maguire v. Corbett, 101 Cal.App.2d 314, 225 P.2d 606, as being out of line with Butcher v. Brouwer, 21 Cal.2d 354, 132 P.2d 205. The fifth point is that since it would have been an idle act to have sought execution during the five year period such act was not required. The sixth point is but an extended comment on some of respondent's evidence which indicated his willingness to pay some part of the judgment in recent years if he had been requested to do so. The relevancy of this discussion is not apparent. The seventh point is that respondent failed to show that if execution had been sought prior to this application it would have been effective. Such burden does not rest on the judgment debtor. Beccuti v. Colombo Baking Co., 21 Cal.2d 360, 363, 132 P.2d 207. The foregoing, as well as the four "points" next listed are not arguments on the merits of the case and require no comment. The last point is that respondent made no showing that he is not now financially able to pay all sums accruing under the judgment. This was a matter that was not, and could not have been, put in issue. Respondent's case rested on the theory that the remaining instalments were no longer due because of the limit of the statute. If a defendant resists on the ground that the plaintiff does not hold a legally enforceable obligation his ability to pay is beside the issues.

[3–5] The case for respondent is controlled by Butcher v. Brouwer, 21 Cal.2d 354, 132 P.2d 205; Di Corpo v. Di Corpo, 33 Cal.2d 195, 200 P.2d 529; Lohman v. Lohman, 29 Cal.2d 144, 173 P.2d 657; Read v. Read, 91 Cal.App.2d 357, 205 P.2d 44; Maguire v. Corbett, 101 Cal.App.2d 314, 225 P.2d 606, and many other cases holding that the failure of the judgment creditor to exercise diligence to discover leviable property of the debtor is sufficient to defeat his motion for a writ of execution and that whether such diligence has been exercised is a question resting with the trial court. And when the trial court has exercised its discretion the reviewing court may not disturb the judgment except upon a showing of a clear and positive abuse of such discretion. No abuse of that discretion has been disclosed here.

An appeal was also taken from an order purporting to dissolve a preliminary injunction but it is not pressed, and furthermore it is wholly without merit.

Orders affirmed.

GOODELL, J., and JONES, J. pro tem., concur.

109 Cal.App.2d 274

KRUG v. MEEHAN.

Civ. 18248.

District Court of Appeal, Second District, Division 3, California.

Feb. 15, 1952.

Milton A. Krug, as Special Administrator of the Estate of James Cleary, deceased, sued Rose A. Meehan to set aside conveyances of realty to her and plaintiff's intestate as joint tenants. From a judgment of the Superior Court of Los Angeles County, Arnold Praeger, J., dismissing the suit, plaintiff appealed. The District Court of Appeal, Vallée, J., held that plaintiff's second amended complaint was sufficient to state a cause of action as alleging the ultimate fact that the conveyances were procured by defendant's undue influence over intestate and facts showing a relation of trust and confidence between him and defendant.

Judgment reversed with directions.

See also, Cal.App., 239 P.2d 46.

1. Pleading ⇐8(16)

A mere averment that instrument, such as deed, was procured by undue influence, is statement of conclusion of law.

2. Pleading ⇐35

An averment of conclusion of law is ordinarily deemed surplusage and will be disregarded in considering sufficiency of pleading.

3. Pleading ⇐8(1)

A complaint must allege ultimate facts, not evidentiary facts or conclusions of law.

4. Pleading ⇐8(16), 11

The rule requiring allegations of facts, where undue influence is issue, does not require allegation of evidentiary facts, but only that ultimate facts be pleaded, and does not exclude conclusions of fact, but only conclusions of law.

5. Pleading ⇐193(1)

Where substantial facts constituting cause of action are averred in complaint or inferable by reasonable intendment from matters pleaded therein, complaint is not demurrable for insufficiency, though allegations of such facts are intermingled with conclusions of law.

6. Deeds ⇐72(1)

The ultimate test of existence of undue influence, invalidating conveyances in joint tenancy, is that conveyances were not natural result of uncontrolled will of one of grantees, but represented in fact the will of other grantee. Civ.Code, § 1575.

7. Deeds ⇐188

In suit to set aside conveyances of lands to defendant and plaintiff's intestate as joint tenants, plaintiff's second amended complaint was sufficient to state cause of action as alleging, without resort to conclusions of law, ultimate fact that conveyances were procured by defendant's undue influence over intestate and facts showing that relation of trust and confidence existed between intestate and defendant. Civ. Code, § 1575.

8. Gifts ⇐47(3)

Where confidential relation exists between parties and party in whom confidence is reposed actively participates in transaction whereby he obtains gift from or advantage over other party, presumption of undue influence arises, and party gaining gift or advantage has burden of rebutting such presumption and showing fairness and good faith. Civ.Code, § 1575.

9. Deeds ⇐188

In suit to set aside conveyances of land to plaintiff's intestate and defendant as joint tenants on ground of defendant's undue influence over intestate, plaintiff's second amended complaint was not insufficient because of failure to allege that intestate was of weak mind, as weakness of mind of person imposed on is not necessary element of undue influence in case arising from breach of confidential relationship. Civ.Code, § 1575.

Gilford & Mendelson and Roy M. Good, all of Los Angeles, for appellant.

Arthur G. Baker, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of dismissal in a suit to set aside conveyances of realty. Defendant's demurrer to the

second amended complaint was sustained with leave to amend. Plaintiff declined to amend within the time allowed, hence the judgment.

The second amended complaint alleges:

1. Plaintiff is special administrator of the estate of James Cleary who died November 15, 1948, at the age of 78, leaving as his only heirs a son and a daughter.

2. March 11, 1948, Cleary purchased Parcel 1, and April 20, 1948, purchased Parcel 2; both parcels are in Los Angeles county. Title to both parcels was taken in the names of Cleary and defendant as joint tenants. All of the money used to purchase both parcels belonged to Cleary.

3. At the time of the purchases, and for many years prior thereto, Cleary and defendant, although not married, lived and resided together, and maintained the relation of husband and wife. At the time of the purchases Cleary reposed great confidence and trust in defendant, and in her judgment and advice.

4. During said period, and particularly at the time of the purchases, Cleary consulted with defendant relative to his business affairs and followed her advice and instructions in managing them; defendant controlled and influenced the mind and actions of Cleary to the extent that he did whatever she suggested or instructed him to do. Defendant succeeded in substituting her will for the will of Cleary; and by taking advantage of the trust and confidence he reposed in her, succeeded in obtaining her name along with his as grantees in joint tenancy of the properties.

5. The purchases were made and defendant was named as a joint tenant in the deeds as a direct result of the undue influence exerted as alleged; Cleary at the time of the purchases was acting under and subject to the undue influence of defendant.

6. Defendant sought out and located the properties prior to their purchase and advised, encouraged, and persuaded Cleary to purchase them. Defendant established escrows in connection with the purchases, accompanied Cleary to the place where the escrows were established, handled and took an active part in the preparation, and arranged the details of the signing by Cleary and the preparation of escrow instructions providing for the acquisition of title in her name with that of Cleary as joint tenants. Defendant concealed the fact of such purchases from the children of Cleary, and instructed Cleary to likewise conceal such fact from them.

7. By reason of the relation between Cleary and defendant and by taking advantage of the trust and confidence reposed in her by Cleary, and by the exercise of undue influence over Cleary by defendant as alleged, she acquired over his mind an influence whereby his free will was overborne and her own substituted for it, and thus she was enabled to, and did, procure Cleary to make the purchases and to name herself as a joint tenant in the deeds.

8. Defendant claims to be the surviving joint tenant and the sole owner of the properties.

Plaintiff asserts the complaint states facts sufficient to constitute a cause of action. Defendant says it does not. We have concluded it does. We have had occasion recently to state the rules governing the construction of a complaint on a general demurrer thereto, and they need not be repeated. Toney v. Security First Nat. Bank, 108 Cal.App.2d 161, 238 P.2d 645.

[1–5] Undue influence consists: "1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; 2. In taking an unfair advantage of another's weakness of mind; or, 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress." Civ. Code, § 1575. We are concerned with the first class only as there is no allegation that Cleary was weak of mind. Defendant argues that the pleading does not allege any facts but only conclusions of the pleader. Of course a mere averment that an instrument was procured by undue influence is a statement of a conclusion of law. Estate of Stoddart, 174 Cal. 606, 610, 163 P. 1010. An averment of a conclusion of

law is ordinarily deemed to be surplusage and will be disregarded in considering the sufficiency of a pleading. Ohm v. City and County of San Francisco, 92 Cal. 437, 449–450, 28 P. 580; Callahan v. Broderick, 124 Cal. 80, 82–83, 56 P. 782. The complaint must allege ultimate facts, not evidentiary facts or conclusions of law. The line of demarcation between a conclusion of fact and a conclusion of law is not easy to draw in all cases. The allegation of an ultimate fact usually, if not always, involves one or more conclusions. The rule which requires allegations of facts where undue influence is the issue does not require the allegation of evidentiary facts but only that ultimate facts be pleaded; it does not exclude conclusions of fact but only conclusions of law. Estate of Bixler, 194 Cal. 585, 589–590, 229 P. 704; Lewis v. Beeks, 88 Cal.App.2d 511, 521, 199 P.2d 413; Green v. Darling, 73 Cal.App. 700, 703, 239 P. 70; Lester v. Beer, 74 Cal.App. 2d Supp. 984, 989, 168 P.2d 998. If substantial facts which constitute a cause of action are averred in the complaint or can be inferred by reasonable intendment from the matters which are pleaded, although the allegations of these facts are intermingled with conclusions of law, the complaint is not subject to demurrer for insufficiency.

[6] The pleading alleges in effect that the conveyances in joint tenancy were not the natural result of the uncontrolled will of Cleary but represent in fact that of defendant. This, it was said in Estate of Stoddart, 174 Cal. 606, 611, 163 P. 1010, and Estate of Bixler, 194 Cal. 585, 590, 229 P. 704, is the ultimate test of the existence of undue influence.

In Murphy v. Crowley, 140 Cal. 141, 73 P. 820, an action to cancel a deed on the ground of undue influence, it was alleged that the title to the property in question was taken in the name of the defendant Margaret Crowley "at her instance and at her dictation, the said Daniel being compelled thereto, and overpowered by the dominant will and aggressive energy of the said defendant, Margaret E. Crowley", and that from the date of their marriage down to his death the defendant, Margaret, "exercised a controlling influence over the mind and actions of the said Daniel, managed exclusively his property, and he was under her complete subjection and domination," which allegations were held sufficient. In Stohr v. Stohr, 148 Cal. 180, 82 P. 777, also an action to cancel a deed on the ground of undue influence, the allegations were that the defendant lived with the grantor and was her confidential business agent and had an intimate and confidential association and relation with her and had her trust and confidence and was able to and did exercise great influence and control over her will; that at the time of signing the deed the defendant, with intent to take an unfair advantage of the weakness of mind of the said grantor and gain possession of her property, induced and persuaded her to make and acknowledge the deed, and those allegations were held sufficient. In Yordi v. Yordi, 6 Cal.App. 20, 31, 91 P. 348, 353, involving a similar cause of action, the allegations held sufficient were as follows: "[T]hat said Yordi, 'for the purpose of causing her (plaintiff) to convey to him (her husband) the said lot of land, without consideration, intimidated plaintiff, and exerted upon her the predominating influence which he then had over her by reason of his position as her husband, and used the complete confidence which she then and at all times, until his death, reposed in him, and thereby did then and there cause her, against her will and contrary to her wishes, to make, acknowledge, execute, and deliver to him a deed of conveyance of said lot of land, without consideration'; that 'plaintiff made * * * and delivered the said deed to said Fred Yordi solely by reason of his said acts and conduct, and not freely or voluntarily'; that 'said deed was prepared by a scrivener selected by said Fred Yordi,' and under his 'personal direction'; that the property was of the value of $4000; that plaintiff received 'no pecuniary advantage in return for said deed, and said Yordi suffered no pecuniary damage therefor,' and that 'plaintiff had no independent advice in said transaction.'" The allegations of the second amended complaint in the present case also bear a strik-

ing similarity to those held sufficient to state a cause of action in Estate of Bixler, 194 Cal. 585, 229 P. 704, and Estate of Olson, 19 Cal.App. 379, 126 P. 171.

[7, 8] We are of the opinion that the allegations of the second amended complaint do, without resort to the conclusions of law, allege the ultimate fact that the conveyances were procured by the undue influence of defendant. Where a confidential relation exists between the parties, and the one in whom confidence is reposed actively participates in a transaction whereby he obtains a gift from, or advantage over, the other, a presumption of undue influence arises and casts on the party who has gained the gift or advantage the burden of rebutting it and showing fairness and good faith. Fish v. Security-First Nat. Bank, 31 Cal.2d 378, 384, 189 P.2d 10. The facts alleged are sufficient to show that a relation of trust and confidence existed between Cleary and defendant. Gatje v. Armstrong, 145 Cal. 370, 371–373, 78 P. 872; Piper v. Somerville, 128 Cal.App. 667, 17 P.2d 1027. It is averred that defendant actively participated in securing the conveyances whereby, without consideration, she received a joint tenancy interest in the properties.

[9] Defendant argues that the complaint is insufficient because there is no allegation that Cleary was of weak mind. Weakness of mind of the person imposed upon is not a necessary element of undue influence in a case which arises out of a breach of a confidential relationship. Buchmayer v. Buchmayer, 68 Cal.App.2d 462, 467, 157 P.2d 9.

We have examined the special demurrer and find that the grounds stated are not well taken.

The judgment is reversed with directions to overrule the demurrer to the second amended complaint and permit defendant to answer.

SHINN, P. J., and WOOD, J., concur.

38 Cal.2d 407

YOUNGSTOWN STEEL PRODUCTS CO. OF CALIFORNIA v. CITY OF LOS ANGELES et al.

L. A. 21494.

Supreme Court of California, in Bank.

Feb. 19, 1952.

Action by the Youngstown Steel Products Company of California against the City of Los Angeles and the Department of Water and Power to compel the raising of certain power lines and to obtain a declaration of the rights of the parties under an instrument. The Superior Court, Los Angeles County, Daniel N. Stevens, Judge pro tem., entered judgment for defendants, and the plaintiff appealed. The Supreme Court, Gibson, C. J., held that the judgment would be modified by striking therefrom certain words not appearing in grant of right of way to erect and maintain poles and wires.

Judgment modified and affirmed.

Prior opinion 229 P.2d 814.

1. Electricity ⇐9(1)

Where wires were installed under a grant authorizing the city to erect and maintain poles with all necessary wires and fixtures thereon, and to have access to the right of way for purpose of repairs, and there was no evidence of any actionable interference with plaintiff's use of the underlying property or of any conduct openly hostile to its title prior to the time the dispute arose, the city did not obtain a prescriptive right to maintain its lines at the level at which they were erected.

2. Easements ⇐48(1)

If the location of a right of way is not defined by a grant, a reasonably convenient and suitable way is presumed to be intended, and the right cannot be exercised over the whole of the land.

3. Easements ⇐48(5)

Where right of way has been used at a particular location with the acquiescence of the servient owner, the parties have, in effect, placed their own practical construction upon the grant, and the easement will be regarded as fixed at that place.

4. Easements ⇐47

Once the location of an easement has been finally established, whether by express terms of the grant or by use and acquiescence, it cannot be substantially changed without the consent of both parties.

5. Easements ⇐48(6)

The grantor has no right either to hinder the grantee in his use of a right of way or to compel him to accept another location, even though a new location may be just as convenient.

6. Electricity ⇐9(3)

Where grant authorized city to maintain power lines over land, the phrase "for aerial only", which appeared in the margin of the instrument, meant that the city had no right to install underground conduits or to erect poles or other fixtures on the plaintiff's land, and did not show an intention to create a right of way which could not become fixed by use but could be changed at any time to accommodate reasonable requirements of owner of underlying land.

7. Electricity ⇐9(3)

Where the city had erected power lines under grant authorizing the city to have the right of way across plaintiff's land with the right to erect and maintain poles with all necessary wires and to have access to said right of way for purposes of repair, and the transmission lines had been maintained for a period of 17 years at a height of 51½ feet without objection, the city acquired an easement to maintain its power lines at the height of 51½ feet by reason of the grant and acquiescence, and plaintiff must bear expense of raising the wires to height of over 61 feet.

8. Electricity ⇐9(3)

Where the city agreed with plaintiff for raising height of power lines and nothing in agreement changed any of terms of grant which authorized the city to maintain and erect wires above the plaintiff's land and to have access to right of way for purpose of repairs, the city had a right to maintain the power lines at the higher level and the rights of the plaintiff were the same as they were when the wires were at the old level.

9. Electricity ⇐9(1)

A grant which expressly gave city a right of access to make repairs and to clear away foliage was not inconsistent with grant of an aerial right of way.

10. Electricity ⇐9(1)

Where grant to city authorized right of access to make repairs and to clear away foliage, and to erect and maintain power lines, but made no reference to "other appurtenances" and record did not show what devices or fixtures were intended to be covered by such words, judgment declaring that city was entitled to install and maintain wires and "other appurtenances" for transmission of electrical energy was modified by the striking of the words "other appurtenances."

Chandler, Wright, Tyler & Ward and Oliver S. Northcote, all of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Gilmore Tillman, Chief Asst. City Atty., and Alfred H. Driscoll, Deputy City Atty., all of Los Angeles, for respondents.

O'Melveny & Myers and Louis W. Myers, all of Los Angeles, amici curiæ on behalf of respondents.

GIBSON, Chief Justice.

This action was brought to compel the defendants to raise certain power lines and to obtain a declaration of the rights of the parties under an instrument granting to the city the right to maintain the wires above plaintiff's land. The grant gives the city a right of way across the land "with the right to erect and maintain poles with all necessary wires and fixtures thereon, and to keep same free from foliage * * * [and to] have access to said right of way * * * for purposes of repairs * * *." The instrument is printed save for the phrase "for aerial only," which appears in handwriting near one margin. The grant does not specify the location of the wires or the height at which they should be carried. The lines were installed at a height of 51½ feet above the ground and were supported by poles erected on adjoining property. From the time the easement was granted until the present dispute arose, a period of 17 years, the transmission lines were maintained at that level without objection.

Plaintiff's property has been used at all times here involved as a storage yard for pipe, and cranes were employed to move the pipe about the premises and to load and unload trucks and cars. In 1946, in order to store pipe at a greater elevation than before, plaintiff acquired a new type of crane which could reach to a height of 61 feet above the ground. While being used on parts of the land below the power lines, the crane came into contact with the wires, and an electrical current was discharged into it. This action was filed on June 10, 1947, following a refusal by the city to raise its lines unless plaintiff would pay the cost.

After the action was filed and prior to the trial, the crane struck the wires a second time, and the parties then agreed that defendants should immediately raise the power lines and that the allocation of costs incurred in moving them should be made by the court. Pursuant to the agreement the city raised the power lines to an altitude sufficient to obviate any interference with plaintiff's operations.

The trial court found and concluded that the exercise by defendants of their rights under the grant for a period of 17 years, with the acquiescence of the servient owners, gave defendants a fixed and definite right to maintain wires at a height of 51½ feet. The court also concluded that defendants acquired a prescriptive right to keep the lines at that level.

Defendants were awarded the sum of $988.78, the amount expended by them in raising the wires. The judgment declares that defendants are entitled to install wires "and other appurtenances" for the transmission of electrical energy supported by poles on each side of the property but they may not install underground conduits or poles or other fixtures on the surface of plaintiff's land; that defendants are entitled to maintain the wires at the level at which they now exist, which is a height in excess of 61 feet above the ground at their lowest point; that plaintiff is not entitled to require a change in the present location

or height of the wires without defendants' consent; and that defendants are entitled to have access to the property for the purpose of clearing away foliage and making repairs.

[1] It is clear that the court erred in concluding that the city had acquired a prescriptive right to maintain its wires at a height of 51½ feet. The wires were installed under the grant, and there is no evidence of an actionable interference with plaintiff's use of the underlying property or of any conduct openly hostile to its title prior to the time the dispute arose in 1946. The city did not, therefore, obtain a right to maintain its lines at that level by prescription. See Pabst v. Finmand, 190 Cal. 124, 128, 211 P. 11; Wheatley v. San Pedro, L. A. & S. L. R. R. Co., 169 Cal. 505, 515, 147 P. 135; Faulkner v. Rondoni, 104 Cal. 140, 146, 37 P. 883. We are of the view, however, that the court properly required plaintiff to reimburse defendants for the amount expended by them in raising the wires, and, except as hereinafter noted, correctly declared the rights of the parties.

[2–5] It is well settled that if the location of a right of way is not defined by the grant, a reasonably convenient and suitable way is presumed to be intended, and the right cannot be exercised over the whole of the land. See 3 Tiffany, Real Property [1939] p. 328; Winslow v. City of Vallejo, 148 Cal. 723, 726, 84 P. 191, 5 L.R.A.,N.S., 851. Where the right of way has been used at a particular location with the acquiescence of the servient owner, the parties have, in effect, placed their own practical construction upon the grant, and the easement will be regarded as fixed at that place. See Winslow v. City of Vallejo, supra, 148 Cal. 723, 726–727, 84 P. 191; Vestal v. Young, 147 Cal. 715, 717, 82 P. 381; Hannah v. Pogue, 23 Cal. 2d 849, 854, 147 P.2d 572; 3 Tiffany, Real Property [1939] pp. 321, 330–331; 2 Thompson on Real Property [Perm.Ed.] pp. 162–163, 164–167. Once the location of an easement has been finally established, whether by express terms of the grant or by use and acquiescence, it cannot be substantially changed without the consent of both parties. Winslow v. City of Vallejo, supra, 148 Cal. 723, 726–727, 84 P. 191; see Hannah v. Pogue, 23 Cal.2d 849, 854, 147 P.2d 572; cf. Ward v. City of Monrovia, 16 Cal.2d 815, 821, 108 P.2d 425. And the grantor has no right either to hinder the grantee in his use of the way or to compel him to accept another location, even though a new location may be just as convenient. See 17 Am.Jur. p. 989; Allen v. San Jose Land & Water Co., 92 Cal. 138, 140–141, 28 P. 215, 15 L.R.A. 93; cf. Hannah v. Pogue, 23 Cal.2d 849, 855, 147 P.2d 572.

[6, 7] Plaintiff argues that the phrase "for aerial only" restricts the grant in such a manner that the foregoing rules should not be applied in the present case. It contends that by use of the phrase the parties showed an intention to create a right of way which could not become fixed by use but could be changed at any time to accommodate the reasonable requirements of the owner of the underlying land. The parties, of course, could have made such an agreement, but it is clear that they did not do so here. We agree with the trial court that the words "for aerial only" do not have the effect claimed by plaintiff, but mean instead that defendants shall have no right to install underground conduits or to erect poles or other fixtures on plaintiff's land. The general rules relating to fixing the location of easements are applicable, and the city acquired a right to maintain its power lines at a height of 51½ feet by reason of the grant and the acquiescence in the exercise of the right of way at that level for 17 years. Accordingly, plaintiff must bear the expense of raising the wires.

[8] The portion of the judgment which declares that the defendants have a right to maintain the power lines at their present level, a height in excess of 61 feet, is entirely proper, since the parties have relocated the right of way at the new level by agreement. Nothing in the agreement changed any of the terms of the grant, and the rights of the dominant owner are the same as they were at the old location. See Wallace Ranch Water Co. v. Foothill Ditch Co., 5 Cal.2d 103, 116, 53 P.2d

929; Vargas v. Maderos, 191 Cal. 1, 3, 214 P. 849.

[9, 10] By the terms of the grant the city was expressly given a right of access to make repairs and to clear away foliage, and this right is not, as contended by plaintiff, in any way inconsistent with the grant of an aerial right of way. The judgment, however, did not follow the language of the grant in declaring that defendants are entitled to install and maintain wires and "other appurtenances" for the transmission of electrical energy above plaintiff's land. The grant makes no reference to "other appurtenances," and there is nothing in the record to indicate what devices or fixtures are intended to be covered by these words. There does not appear to be any dispute between the parties with respect to the nature of the wires or lines which may be suspended over plaintiff's property and in the absence of any evidence on this matter, the quoted words should not have been used in declaring the rights of the parties. Paragraph 3 of the judgment is therefore modified by striking the words "and other appurtenances" wherever they appear therein.

As thus modified, the judgment is affirmed. Each party shall bear its own costs on appeal.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



38 Cal.2d 486

STANG et al. v. CITY OF MILL VALLEY et al.

S. F. 18485.

Supreme Court of California, in Bank.

Feb. 21, 1952.

P. A. Stang and another sued the City of Mill Valley and others for damages suffered when their house and personal property were partially destroyed by a fire, allegedly because of clogged condition of a fire hydrant and water lines. The Superior Court, Marin County, Edward I. Butler, J., entered judgment for defendants, and plaintiffs appealed. The Supreme Court, Spence, J., held that the municipality's immunity from tort liability for negligence in the administration of its fire protection had not been waived by the Public Liability Act.

Affirmed.

Carter and Schauer, JJ., dissented.

Prior opinion, 234 P.2d 1015.

1. Municipal Corporations ⇐739(2)

Fire-fighting is a governmental function.

2. Municipal Corporations ⇐724, 745½

In absence of statute, neither municipality nor its officers are liable in tort for failure to discharge duty arising from governmental function.

3. Municipal Corporations ⇐724

A failure of a governmental function involves denial of benefit owing to community as whole, but does not constitute wrong or injury to members thereof so as to give rise to right of individual redress, which right must be predicated upon violation of duty of care owed to injured party.

4. Municipal Corporations ⇐739(2)

A municipal corporation is not responsible for destruction of property within its limits by fire which it did not set, merely because, through negligence or other default of corporation or its employees, members of fire department fail to extinguish fire.

5. Statutes ⇐212.1

It would be presumed, in determining whether Public Liability Act effected waiver of governmental immunity of city in administration of its fire protection, that in enacting statute Legislature had knowledge of prior decisions in State dealing with question of liability of private water companies. Government Code, § 53051.

6. Municipal Corporations ⇐723

The Public Liability Act did not waive municipality's governmental immunity to tort liability for negligence in administration of fire protection. Government Code, § 53051.

Charles Reagh, San Francisco, for appellants.

Thomas C. Nelson, City Atty. of Mill Valley, San Rafael, for respondents.

Ray L. Chesebro, City Atty. of Los Angeles, Gilmore Tillman, Chief Asst. City Atty. for Water and Power, and O. M. Lloyd, Deputy City Atty., Los Angeles, amici curiæ.

SPENCE, Justice.

Plaintiffs brought this action to recover damages suffered as the result of a fire on their property, claiming liability against the city and its officials by reason of their failure to maintain certain fire-fighting equipment in condition for effective use in extinguishing said fire. Public Liability Act, Stats. 1923, ch. 328, § 2, p. 675; Deering's Gen. Laws, Act 5619; now found in Gov. Code, § 53051. Defendants filed a general and special demurrer to the amended complaint. The demurrer was sustained with leave to amend. Plaintiffs declined to plead further and judgment accordingly was entered for defendants, from which plaintiffs appeal. Consideration of the facts alleged compels the conclusion that the cited act does not justify the imposition of liability upon defendants in this case, and that the judgment must be affirmed.

From the amended complaint it appears that plaintiffs, husband and wife, owned certain real property, with a residence thereon, in the city of Mill Valley; and that on August 8, 1946, without their fault, a small fire ignited the roof of their premises. Plaintiffs allege that for more than one year prior to the fire, defendants—the city, the city manager and fire chief—knew that the water lines leading to the fire hydrant adjacent to plaintiffs' property, and the fire hydrant itself, had become clogged with refuse and were incapable of providing sufficient water for effective fire control; that it was the duty of defendants, and city funds were available, to remedy that situation, but nothing was done in that regard; that upon outbreak of the fire on plaintiffs' property, the fire department was called and its fire-fighting apparatus arrived in time, had water been available through the clogged mains and hydrant, to have extinguished the fire before it would have caused damage to exceed $25; that no other source of water was available nor was the fire department equipped with chemical apparatus sufficient to put out a minor fire; that because of the inability of the fire department to secure water from the water mains and hydrant, the fire spread, causing damage to the house and personal property of plaintiffs totalling $9,563.50; that this damage was "the direct and proximate result of the failure of defendants to discharge their duties" and to remedy the "defective condition of said public works and property." In joining the city manager and fire chief as defendants, plaintiffs allege that each had control of the fire-fighting apparatus, and had the authority and duty of maintaining such equipment in usable condition.

[1, 2] The determinative question is whether plaintiffs' allegations constitute a cause of action against defendants. It is conceded that fire-fighting is a governmental function, 63 C.J.S., Municipal Corporations, § 776, page 81, and that in the absence of statute, neither a municipality nor its officers are liable in tort for failure to discharge a duty arising from a governmental function. Miller v. City of Palo Alto, 208 Cal. 74, 75–76, 280 P. 108; see 18 Cal.Jur. § 345, p. 1094, and cases cited; annos. 9 A.L.R. 143, 33 A.L.R. 688, 84 A.L.R. 514. As authority for their action plaintiffs rely on section 2 of the Public Liability Act of 1923, which read: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing * * * board of such county, municipality * * * or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such * * * works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or * * to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition." Stats. 1923, ch. 328, § 2, p. 675.

The ordinary case coming within the terms of this act involves a situation where the injured person is *using* some type of city property that is dangerous or defective, and which he had a legal right to use, such as public streets, Fackrell v. City of San Diego, 26 Cal.2d 196, 157 P.2d 625, 158 A.L.R. 773; highways, McLaughlin v. City of Los Angeles, 60 Cal.App.2d 241, 140 P.2d 416; buildings, Gibson v. County of Mendocino, 16 Cal.2d 80, 105 P.2d 105; bridges, Bosqui v. City of San Bernardino, 2 Cal.2d 747, 43 P.2d 547; school grounds, Bridge v. Board of Education, 2 Cal.App.2d 398, 38 P.2d 199; or other similar property, Bauman v. City and County of San Francisco, 42 Cal.App.2d 144, 108 P.2d 989. Likewise the act sustains the imposition of liability in the situation where the city is *using* the dangerous or defective property and injury was proximately caused thereby: Pittam v. City of Riverside, 128 Cal.App. 57, 16 P.2d 768, and Osborn v. City of Whittier, 103 Cal.App.2d 609, 230 P.2d 132, where the city negligently allowed a fire to spread from a city dump; Durante v. City of Oakland, 19 Cal.App.2d 543, 65 P.2d 1326, where the city used defective sewer pipes, resulting in the flooding of plaintiffs' property; Knight v. City of Los Angeles, 26 Cal.2d 764, 160 P.2d 779, where the city negligently installed and maintained street drainage facilities, causing an overflow on plaintiffs' property with damage to the improvements thereon. But here the city did not create the fire causing the damage to plaintiffs' property; rather the claimed fault lies in defendants' failure to provide the means for remedying a condition otherwise created—a different set of circumstances to which plaintiffs seek to apply the act in support of their action.

[3, 4] Upon analysis, it clearly appears that the gravamen of plaintiffs' complaint is the failure of a governmental function. Such failure involves the denial of a benefit owing to the community as a whole, but it does not constitute a wrong or injury to a member thereof so as to give rise to a right of individual redress, Restatement of Torts, § 288, which right must be predicated upon the violation of a duty of care owed to the injured party. Neuber v. Royal Realty Co., 86 Cal.App.2d 596, 612, 195 P. 2d 501. As the maintenance and operation of a fire department is so distinguished as a governmental function for the public good, it is "well settled that a municipal corporation is not responsible for the destruction of property within its limits by a fire which it did not set, merely because, through the negligence or other default of the corporation or its employees, the members of the fire department failed to extinguish the fire." 38 Am.Jur. § 626, p. 327. This common-law rule of non-liability of a municipality has been specifically applied in cases where the fire loss was due to an insufficient supply of water because of negligence in the upkeep of the city's waterworks system, in that water pipes and hydrants became clogged and fell into disrepair. Anno. 163 A.L.R. 348, 356–357. Therefore it must be determined whether the cited statute, which is the measure of the waiver of governmental immunity, encompasses the liability which plaintiffs seek to impose.

Closely parallel in its facts and legal principles is the case of Steitz v. City of Beacon, 1945, 295 N.Y. 51, 64 N.E.2d 704, 705, 163 A.L.R. 342, where the city was authorized by charter to construct and operate a system of waterworks and to maintain a fire department. A legislative enactment had waived the sovereign immunity of the city, making it liable equally with individuals and private corporations for the wrongs of its officers and employees. Plaintiffs brought an action against the city for damages suffered in the course of a fire which destroyed their property. They predicated the city's liability upon an alleged defective condition in its fire-fighting equipment arising from the failure to keep in repair a "pressure and flow regulating valve" in the water system, with the result that there was provided an insufficient quantity of water to combat effectively the fire. In holding the case to turn on the question of "whether the facts alleged would be sufficient to constitute a cause of action against an individual under the same duties as those imposed upon the city solely because of failure to protect property from destruction by fire which was

started by another", the court, 64 N.E.2d at page 706 succinctly said:

"There was no agreement in this case to put out the fire or make good the loss, and so liability is predicated solely upon the * * * provisions of the city's charter defining its powers of government. Quite obviously these provisions were not in terms designed to protect the personal interest of any individual and clearly were designed to secure the benefits of well ordered municipal government enjoyed by all as members of the community. There was indeed a public duty to maintain a fire department, but that was all, and there was no suggestion that for any omission in keeping hydrants, valves or pipes in repair the people of the city could recover fire damages to their property.

"An intention to impose upon the city the crushing burden of such an obligation should not be imputed to the Legislature in the absence of language clearly designed to have that effect."

As further support for its conclusion as to the city's non-liability under the described circumstances, the court referred to the "controlling" decision in H. R. Moch Co. v. Rensselaer Water Company, 247 N.Y. 160, 159 N.E. 896, 62 A.L.R. 1199 where a private water company, under "a positive statutory duty" to supply water to a city, was charged with the failure "to furnish sufficient water under adequate pressure to extinguish the fire before it reached plaintiff's [property]." As said in the Steitz opinion, 64 N.E.2d at page 707, the court in the Moch case held that "the action could not be maintained for a tort at common law or for a breach of statutory duty because the duty was owing to the city and not to its inhabitants and because the failure to furnish an adequate supply of water was at most the denial of a benefit and was not the commission of a wrong." Accordingly, the court in the Steitz case refused to construe the statutory waiver of sovereign immunity to contemplate the imposition of a greater liability on the city than would exist against an individual or private corporation charged with like negligence for failure to maintain its fire-extinguishing paraphernalia in usable condition.

[5, 6] When the Public Liability Act was enacted in 1923, there were several decisions in this state dealing with the question of the liability of private water companies. Thus it had been held that neither a city, Town of Ukiah City v. Ukiah Water & Improvement Co., 142 Cal. 173, 75 P. 773, 64 L.R.A. 231, nor a private citizen, Niehaus Bros. Co. v. Contra Costa Water Co., 159 Cal. 305, 113 P. 375, 36 L.R.A.,N.S., 1045, could recover damages from a water company for a property loss by fire due to the company's failure to maintain its water system properly. In the light of these decisions, of which the Legislature presumably had knowledge, 23 Cal.Jur. § 159, p. 782; Miller v. McColgan, 17 Cal.2d 432, 439, 110 P.2d 419, 134 A.L.R. 1424, it does not seem reasonable to construe the Public Liability Act as intended to impose a greater liability on the city than would prevail against an individual or a private corporation charged with negligence in the administration of its fire protection. See Watson v. City of Alameda, 219 Cal. 331, 333, 26 P.2d 286; People v. Superior Court, 29 Cal.2d 754, 757, 178 P.2d 1. The "crushing burden of such an obligation" will not be "imputed to the Legislature in the absence of language clearly designed to have that effect." Steitz v. City of Beacon, supra, 64 N.E.2d 704, 706, 707. We find no language clearly designed to have that effect in the cited Public Liability Act of 1923.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS and TRAYNOR, JJ., concur.

CARTER, Justice.

I dissent.

Briefly, the question presented here is whether a municipal corporation is liable under our Public Liability Act, Gov.Code, § 53051, for the destruction by fire of plaintiff's home, by reason of its water main and hydrant used for fire protection becoming clogged, thus making it impossible to obtain

sufficient water to quench the fire. The majority holds that the case does not come within that act. Certain principles are conceded: (1) That the city's fire prevention function is governmental rather than proprietary, and that in the absence of a statute there is no liability for a tort committed in the course of that activity by reason of the doctrine of sovereign immunity; (2) that the liability act includes governmental as well as proprietary activities; (3) that the liability act covers cases where the injured person is *using* the dangerous or defective city property *and also where the city is using its property or works* and injury is proximately caused thereby; (4) that the choked hydrant constituted a dangerous and defective condition in the city's property known by the city to exist; (5) that funds were available to repair said hydrant; (6) and that such condition was the proximate cause of the destruction of plaintiff's house by fire.

How then does the majority reach the conclusion that the case is not covered by the Public Liability Act? The real basis appears to be that to apply it here would impose a "crushing burden" upon the city. Formally the decision is founded upon the reasoning that there was no liability at common law—no duty of care upon one, public or private, supplying water for extinguishing fires, to the inhabitants of the city. That reasoning appears chiefly from the cases of Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704, 163 A.L.R. 342, and H. R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896, 62 A.L.R. 1199, relied upon and quoted in the majority opinion. In the Steitz case the statute involved was *not* a public liability act; it was nothing more than a waiver of sovereign immunity—of the privilege not to be sued. Hence the court could not find a duty imposed upon the city to keep its property reasonably safe, from the mere statutory obligation of a city to supply fire protection, and none flowed from a mere permission to be sued. There is further discussion in the same tenor, emphasis being laid on the governmental character of a city's obligation to furnish protection against fire. That argument is, of course, wholly beside the point, because the obligation is here imposed by the Public Liability Act to maintain *all* city property, *whether used governmentally or not*, in a safe condition.

The complete answer to all that discussion is that it is *not* the obligation of the city to maintain a fire department from which flows the duty to maintain its property in a safe condition. *It is the liability act itself.* This act constitutes more than a mere waiver of sovereign immunity which the court considered in the Steitz case. No exceptions are provided in this act. It says that cities *shall* be liable for any injuries to any person or property resulting from the dangerous or defective condition of its property or works. If there is a liability for such condition, there must necessarily be included therein a *duty* to maintain its property in a safe condition—a duty to *all* persons and to *all* owners of *any* property that may be injured by a breach of that duty, including inhabitants as well as others. The cases have uniformly held that the Public Liability Act *created and imposed a duty* upon the public agencies named to maintain their works and property in a non-dangerous and non-defective condition, which is not affected or controlled by the common law. It is said in the first case decided by this court which considered the act: "The Legislature has removed from the consideration of the case all common-law and archaic obstacles that formerly stood in the way of a citizen recovering from a municipality damages for personal injuries suffered from dangerous and defective conditions of public streets, by adopting, in 1923 (Stats.1923, p. 675), the following act * * * the *obligation* of a city to make its highways reasonably safe for general use cannot be chartered away, even though a municipality should attempt to do so." Rafferty v. City of Marysville, 207 Cal. 657, 660, 280 P. 118, 120. The District Court of Appeal in discussing the title of the act said: "[T]he second part [of the act], as the title also indicates, creates *an entirely new and different liability, to wit, the liability of the county, making the county a legal entity, liable for the negligence of its officers in certain cases.*" (Italics by the court.) Gorman v. County of Sacra-

mento, 92 Cal.App. 656, 668, 268 P. 1083, 1088. In dealing with the then section 1623 of the Political Code imposing liability on school districts for negligence the same as the Public Liability Act, this court said it (section 1623) "*creates* a liability on the part of school districts for damages * * * by reason of the negligence of the school district * * *." Ahern v. Livermore Union High School Dist., 208 Cal. 770, 782, 284 P. 1105, 1110. We said in Fackrell v. City of San Diego, 26 Cal.2d 196, 209, 157 P.2d 625, 632, 158 A.L.R. 773: "Obviously, the city is not being held as an insurer of anything but it is being held to the standard of ordinary care in planning, constructing, and maintaining its streets and sidewalks. Liability for its failure in that regard is not due to the whimsy of court or jury; it is *imposed* by the public liability statute. * * * It now seeks to justify its conduct by announcing for itself a rule that it assumes no responsibility for the condition of the sidewalk and that pedestrians must use the same at their own risk. But its *legal duty* in the premises is defined by general law, Stats.1923, p. 675, Deering's Gen.Laws, 1944, Act 5619, and negligence and liability therefor do not depend upon, and cannot be limited by, self-formulated standards." (Emphasis added.) This court discusses the question in detail in Gibson v. County of Mendocino, 16 Cal. 2d 80, 84, 105 P.2d 105, 107, in determining that the *common law* rules of liability were *not* applicable: "In effect, it has been held that the rules with respect to the measure of care to be exercised by owners of private property toward invitees and licensees *have no application to the duty imposed by the statute* on a county, municipality or school district to maintain public property in a safe condition. Thus, in the case of Castro v. Sutter Creek U[nion] H[igh] S[chool] Dist., 25 Cal.App.2d 372, 377, 77 P.2d 509, 513, where the issues involved the applicability of the same section of the act here concerned, the plaintiff, who had accompanied her two daughters to a dance held at an auditorium belonging to a school district, was shown to have received an injury because of having stepped into a hole as she was 'crossing over' a parkway or strip of land lying between the sidewalk and the curbing adjoining a driveway which extended along the south side of the auditorium, which strip of land was owned by the school district, but was intended to be used only as a lawn plot or place for the planting of trees. In that case, where arguments were directed to the question whether at the time of the accident the injured person was a licensee or an invitee, the court ruled that the answer to that question was immaterial and not determinative of the liability of the defendants. The provisions of the section were there set forth to the effect that a county, municipality or school district is liable for injuries to persons and property resulting proximately from the dangerous or defective condition of public buildings, grounds, etc., in *all cases* where the government or managing board of such school district, county, municipality or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such buildings, grounds, etc., and within a reasonable time after acquiring such knowledge had failed to remedy such condition. The court in that case said that the provisions of the section 'base liability upon any act which leaves a place or condition dangerous or defective and liable to cause some injury to the *general public*', and that the section was 'directed not for the safety, particularly either of licensees or invitees, * * *'".

There being a duty thus established by the liability act, there remains no reason why the act should not apply to this case.

Reliance is placed by the majority, however, on cases decided before the 1923 liability act, which it says hold that neither a city nor an individual could recover from a water company for a property loss by fire due to the company's failure to maintain its water system properly, Town of Ukiah City v. Ukiah Water & Improvement Co., 142 Cal. 173, 75 P. 773, 64 L.R.A. 231; Niehaus Bros. Co. v. Contra Costa Water Co., 159 Cal. 305, 113 P. 375, 36 L.R.A., N.S., 1045, and that the Legislature did not intend to abrogate that rule when it adopted

the Public Liability Act. The latter premise is at least dubious for there are *no exceptions* in the scope of the liability act. It does not say that it is right for the city to maintain dangerous and defective property used for fire fighting. In any event, these cases are clearly wrong. The inaccuracy of those cases is ably pointed out in referring to H. R. Moch Co. v. Rensselaer Water Co., supra, 247 N.Y. 160, 159 N.E. 896: "* * * Cardozo speaks of the failure of the water company as if it were merely a failure to confer a benefit upon the injured householder, and in denying liability relies upon the recognized principle that one is under no duty to confer a benefit upon another. Of course, the plaintiff did not complain of the failure to receive a benefit. His real ground was that, because of reliance upon the undertaking of the water company to maintain an adequate pressure at the hydrants, the city had failed to make other provision for the protection of its citizens, and the plaintiff, among others, being lulled into a false sense of security, had failed individually to take measures to protect his property. In substance, the situation does not differ from that where a train cuts a fire hose or blocks a street, so that the fire department cannot extinguish a fire. In both cases the defendant has prevented a third person from rendering assistance. Where the act is after the beginning of the fire, there is an immediacy of need which does not exist in the waterworks situation, yet since it is well known that fires occur from time to time in any town large enough to afford waterworks, there would seem to be such a substantial risk of harm to the group of which the plaintiff is one as would make such cases directly in point. The risk to the individual plaintiff is less, but the chance of harm to any one of a large number is great. Furthermore, in the Moch case, it was alleged that the defendant had failed to keep up the pressure after knowing of the fire. It had been held before the Moch case, as it has been held since, that the negligent breaking of a water main may be the basis of a cause of action in favor of a householder who had been thereby deprived of the assistance of the fire department in quenching a fire. Analogous are the cases where a railroad has undertaken more than its legal duty in supplying at a railroad crossing a watchman upon whose presence travelers frequently using the crossing have relied, and those where an agent in charge of a building has failed to keep it in repair, as a result of which a third person is injured. In these cases where the wrong consists of a failure to act, the older viewpoint was that since there is mere 'nonfeasance' and no direct obligation to the injured person, there can be no liability to him. The fallacy of this older point of view has been today generally exploded. * * *" Cardozo and the Law of Torts, Professor Warren A. Seavey, 52 Harv.L. Rev., 372, 392. Many more illustrations may be added to those suggested by Professor Seavey. The fire fighting equipment may be maintained in a dangerous and defective condition with full knowledge of the city officials—brakes on the automotive equipment may be defective—fire hoses may be defective and burst when water is run through them under pressure—hydrants may be broken off or burst from freezing and no effort made to repair them until water discharging therefrom damages private property. The liability act was obviously intended to apply to situations such as these. If such dangerous and defective conditions result in loss or damage to property by fire, why should it not be applied to extend protection to a person so damaged? To my mind there is no basis in reason, logic or common sense for the construction placed upon said act by the majority. Under the facts alleged in the complaint and not denied, plaintiffs lost their home as the direct and proximate result of the dangerous, defective and unsafe condition of the fire hydrant which was known by the city officials to exist and they failed to cause said condition to be repaired although funds were available for such purpose.

I would, therefore, reverse the judgment.

SCHAUER, Justice (dissenting).

I concur in the reasoning and conclusion of Justice CARTER.

I think the Public Liability Act (Stats. 1923, ch. 328, § 2, p. 675) covers this case. The majority seek to distinguish the many cases upholding and applying that statute by stating that (240 P.2d 982): "The ordinary case coming within the terms of this act involves a situation where the injured person is *using* some type of city property that is dangerous or defective, and which he had a legal right to use, [citations and illustrations, such as using a defectively engineered or maintained street] * * *. Likewise the act sustains the imposition of liability in the situation where the city is *using* the dangerous or defective property and injury was proximately caused thereby * * * [citations and illustrations, such as negligently using defective sewer pipe and negligently maintaining street drainage facilities, contributing to the flooding of plaintiffs' property]. But here the city did not create the fire causing the damage to plaintiffs' property."

It seems to me that the attempted differentiation is not legally sound or substantial. I would think that a householder is "using" a fire hydrant and water supply when he, by himself or a city employe, attaches a hose to it and runs the water to put out an incipient fire in his house. Surely that is a legal use of a facility for which as a taxpayer he is paying. Likewise, the fire department men, and through them, the city, are "using" that property when they connect the hose and run the water. And the defective condition of the fire hydrant just as surely contributes, under the circumstances shown here, proximately to cause the damage to plaintiffs' property by fire as does defective sewer pipe or drainage facilities contribute to cause damage in time of flood. The majority say "the city did not create the fire causing the damage"; I point out that in the flood cases the city did not create the water which caused the damage, nor even the law of gravity which impels water to seek a lower level by a direct route.

It is just as much a natural result for a fire, not extinguished, to consume a house built of combustible materials as it is for flood waters, not diverted or safely carried away, to damage property, subject to erosion or seepage, which lies in their path. Sewers are maintained to (among other uses) safely carry away flood waters; water mains and fire hydrants are maintained to (among other uses) extinguish fires. A householder in a city pays taxes to obtain, among other things, fire protection as well as flood protection. The Public Liability Act imposes tort liability on the city for negligently maintaining its property in a defective condition when such condition proximately causes damage while the property is being lawfully used for its designed purpose. All the conditions for liability imposed by the statute are met here.

This court has been liberal (sometimes, I have felt, more than liberal) in construing statutes and the common law to advance the outposts of tort liability as against private citizens and private corporations.[1] I think that such liberality of extension—in this case an obviously discretionary interpretation and application of the statute—should more justly be indulged as against the state and municipal corporations than as against private individuals and corporations.

I should reverse the judgment.

1. See e. g.: Hunt v. Authier (1946), 28 Cal.2d 288, 169 P.2d 913, 171 A.L.R. 1379; Johnston v. Long (1947), 30 Cal. 2d 54, 81, 181 P.2d 645; Raber v. Tumin (1951), 36 Cal.2d 654, 226 P.2d 574; Peterson v. Burkhalter (1951), 38 Cal. 2d 107, 237 P.2d 977; see also Rippo v. City of Los Angeles (1942), 50 Cal. App.2d 189, 123 P.2d 47.

109 Cal.App.2d 512

STRUTZEL et al. v. WILLIAMS et al.

Civ. 18553.

District Court of Appeal, Second District, Division 2, California.

Feb. 29, 1952.
Rehearing Denied March 28, 1952.
Hearing Denied April 28, 1952.

John P. Strutzel and Anthony M. Cioffi, doing business as Aircraft Stamping Co., a partnership, and others, brought action against G. N. Williams as trustee of Commodity Trust, and others, for money had and received, predicated upon alleged false representations. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., entered a judgment for plaintiffs, and defendant Wilbert C. Hamilton appealed. The District Court of Appeal, McComb, J., held that evidence supported finding that the appellant made false and fraudulent representations to plaintiffs upon which they relied.

Affirmed.

1. Appeal and Error ⇐931(1)

On defendant's appeal from adverse judgment after trial before court without jury, record would be viewed in light most favorable to plaintiffs.

2. Money Received ⇐18(3)

Evidence that defendant told plaintiffs that certain person was an honorable and honest commodity broker, when in fact that person was on probation for grand theft, a condition of which being that he could not handle moneys belonging to other people, and that plaintiffs invested their money, supported finding of false and fraudulent representations to plaintiffs upon which they relied, in plaintiffs' action for money had and received.

3. Money Received ⇐8

One material misstatement of fact is sufficient to sustain a judgment to recover money paid pursuant to such representation.

4. Money Received ⇐19(3)

In action for money had and received predicated on false representations, finding to the effect that defendants, by false and fraudulent representations to plaintiffs, caused plaintiffs to invest their moneys in a plan or scheme in which both defendants had financial interest and in which they were to share in profits to be earned, constituted a finding that plaintiffs invested money in reliance upon representations made by defendant.

5. Money Received ⇐8

Where defendant entered into a conspiracy to defraud, he was liable for amount of money obtained from plaintiffs even though that defendant did not receive the money directly.

6. Fraud ⇐29

Where defendant made false representations concerning investments to certain party and intended that such representations be repeated to others for purpose of securing additional investors, defendant was liable to plaintiff who relied on representations although defendant had not made representations directly to him.

7. Money Received ⇐1

Where evidence discloses that one party has money which in good conscience he should pay to another, injured party may maintain an action for money had and received.

8. Money Received ⇐8

Where defendant through false representations induced plaintiffs to part with their money, plaintiffs could recover the money on a common count for money had and received.

9. Appeal and Error ⇐1027

Where evidence sustained findings of fact as to one count in a complaint which in turn supported judgment, errors with reference to other counts would not be considered by District Court of Appeal.

S. Y. Allen, J. D. Willard and Wilbert C. Hamilton, Los Angeles, for appellant.

Martin, Hahn & Camusi, by William P. Camusi, Los Angeles, for respondents.

McCOMB, Justice.

Wilbert C. Hamilton, hereinafter referred to as defendant, appeals from an adverse judgment after trial before the court without a jury in an action to recover upon a common count for money had and

received, predicated upon the theory that plaintiffs' money was obtained by defendant through false representations.

[1] *Facts*: The record being viewed in the light most favorable to plaintiffs (respondents) (In re Estate of Isenberg, 63 Cal.App.2d 214, 216, 146 P.2d 424) discloses that plaintiffs Strutzel and Cioffi were partners engaged in the metal parts business. Their partnership agreement had been prepared by defendant Williams who maintained his law office next to defendant Hamilton's. Plaintiffs were referred to defendant by Mr. Williams for the purpose of collecting a note which was due them. Defendant settled plaintiffs' case for $6,500.

On January 30, 1947, at the time plaintiffs went to defendant's office to complete the settlement of their case, he told them he had made a great deal of money in the last three or four months by making investments through a commodity broker, William E. Brunson. He stated Mr. Brunson was a very honorable and honest commodity broker and that defendant had amassed a quarter of a million dollars but did not desire to handle commodities any longer and was going to turn the deal over to defendant Williams. He suggested that plaintiffs see Mr. Williams for the purpose of "getting in on it" and "making a lot of money quick."

The fact was that at the time defendant made such representations defendant Brunson had been convicted of grand theft and placed on probation for ten years, one of the terms of which forbade him to handle other people's money. Likewise defendant did not disclose the fact to plaintiffs that he was to receive 7½ per cent of all profits from moneys invested with defendant Williams.

Relying on the foregoing representations plaintiff Cioffi invested $3,500, of which only $268.89 was returned to him; plaintiff Jack Strutzel invested $2,000, of which he received in return only $149.53; and J. J. Strutzel invested $1,000, of which only $78.58 was returned. The balance of the funds was misappropriated and embezzled.

Questions: First: *Was there substantial evidence to sustain the court's finding that defendant made false and fraudulent representations to plaintiffs upon which they relied?*

Yes. Defendant stated as a fact to plaintiffs John Strutzel and Anthony Cioffi that defendant Brunson was an honorable and honest commodity broker. As a matter of fact at the time he made such statement Mr. Brunson was on probation for grand theft. One of the conditions of his probation was that he could not handle moneys belonging to other people.

[2, 3] There were two misrepresentations in defendant's statement: (1) That Mr. Brunson was honest and honorable and (2) that he was a commodity broker. Therefore since they were false and plaintiffs relied upon them to their detriment substantial evidence supports the judgment against defendant. One material misstatement of fact is sufficient to sustain a judgment to recover money paid pursuant to such representation. (Beeman v. Richardson, 185 Cal. 280, 281 [1], 196 P. 774.)

Second: *Did the trial court make findings that plaintiffs invested money in reliance upon representations made by defendant?*

[4] *Yes.* Finding XXVI reads in part as follows:

"* * * That both B. N. Williams and Wilbert C. Hamilton, by false and fraudulent misrepresentations to their clients Anthony Cioffi and John P. Strutzel, caused the said Cioffi and Strutzel to invest their moneys and the moneys of plaintiff J. J. Strutzel, all as above described, in a plan or scheme in which both defendants G. N. Williams and Hamilton had a financial interest and in which both were to share in profits to be earned. * * *."

Also findings V, VI, VII, XIV and XV specifically find that plaintiffs invested their money on the basis of misrepresentations made by both defendants Williams and Hamilton.

Third: *Was defendant Hamilton liable even though the money was not paid directly to him?*

[5] *Yes.* It is established that where several persons enter into a conspiracy to

defraud, each member of the conspiracy is liable for the amount of money obtained from plaintiff even though he may not have received it directly. (Fink v. Weisman, 129 Cal.App. 305, 317, 18 P.2d 961.)

Fourth: *Was defendant liable to plaintiff J. J. Strutzel although the representations were not made by defendant to him?*

[6] *Yes.* The evidence disclosed the representations which defendant made to plaintiffs John P. Strutzel and Cioffi were intended by him to be repeated to others for the purpose of securing additional investors.

The rule is established that representations made to one person with intention that they will be repeated to another and acted upon by him and which are repeated and acted upon to his injury gives the person so acting the same right to relief as if the representations had been made to him directly. (Crystal Pier Amusement Co. v. Cannan, 219 Cal. 184, 188 [2], 25 P.2d 839, 91 A.L.R. 1357.)

Fifth: *Since there was substantial evidence to sustain the judgment as to one count in the complaint did the trial court commit prejudicial error relative to other counts?*

[7, 8] When the evidence discloses that one party has money which in good conscience he should pay to another, the injured party may maintain an action for money had and received. (Zeller v. Knapp, 115 Cal.App. 486, 489 [3], 1 P.2d 1071.) In the present case as shown above the evidence disclosed that defendant through his false representations had induced plaintiffs to part with their money; therefore he should be required to return it to them. This evidence sustained a judgment on the common count for money had and received.

[9] It is established that where the evidence sustains the findings of fact as to one count in a complaint which in turn supports the judgment, errors with reference to other counts will not be considered by an appellate court. (Martin v. Los Angeles Turf Club, Inc., 39 Cal.App.2d 338, 349 [11], 103 P.2d 188.) Therefore we do not consider alleged errors pertaining to other counts in the complaint since, even though defendant's position might be well taken, it would not change the result.

Affirmed.

MOORE, P. J., concurs.



109 Cal.App.2d 302

In re HURWITZ' ESTATE.

RUBIN v. HURWITZ.

Civ. 18615.

District Court of Appeal, Second District, Division 1, California.

Feb. 18, 1952.

Proceedings in the matter of the estate of Jerome Hurwitz, deceased, in which Harry I. Rubin's petition for distribution under the will of Jerome Hurwitz was opposed by Sam Hurwitz. The Superior Court, Los Angeles County, Newcomb Condee, J., entered order of partial distribution and Sam Hurwitz appealed. The District Court of Appeal, White, P. J., held that testamentary provision leaving entire balance of testator's estate to a charitable organization to be selected by executor created a valid charitable trust.

Order affirmed.

1. Charities ⇨21(2)

Testamentary provision leaving entire balance of testator's estate to a charitable organization to be selected by executor created a valid charitable trust.

2. Charities ⇨21(2)

Statute providing who might take by will has nothing to do with question of validity of a bequest to a charitable organization to be selected by executor, but merely limited executor's choice in selecting the charitable organization. Probate Code, § 27.

3. Charities ⇨21(2)

Testamentary provision whereby testator left entire balance of estate to a charitable organization to be selected by his executor, was not invalid on theory that

testator might have intended charitable bequest to go to an organization not authorized under law to take under a will but executor's choice was fettered only by applicable law and not by anything contained in will, except that bequest should be given to a charitable organization. Probate Code, § 27; Corporations Code, § 10206.

Max Sisenwein, John M. Dvorin, Los Angeles, for appellant.

Louis Elowitt, Joseph Joblin, Los Angeles, for respondent.

WHITE, Presiding Justice.

[1] Appellant, an heir-at-law of Jerome Hurwitz, deceased, seeks reversal of an order of the superior court, sitting in probate, directing partial distribution of the estate of said decedent to certain charities pursuant to the following provision contained in the will of decedent: "The entire balance of my estate I leave to charity and the recipient of this charity shall be designated by my friend Harry I. Rubin of the Associated Bond & Insurance Agency. In other words, H. I. Rubin shall pick out the charity organization that shall receive the balance of my estate after all of the above is taken care of."

The H. I. Rubin referred to is the respondent executor of the will of the decedent.

That a testamentary provision such as the foregoing creates a valid charitable trust is not open to question. In Estate of Bunn, 33 Cal.2d 897, 206 P.2d 635, 636, the Supreme Court had under consideration a direction of the testatrix that her residual estate should be "sold and given to a worthy charity selected by my executors." It was held that no particular words or phrases are necessary for the creation of a trust, and that where a testatrix names a bank as executor and then provides that the residue of her estate, after the death of her husband, shall be sold and the proceeds given to a charity to be selected by her executor, there is an express subject, purpose and beneficiary of the trust in addition to the existence of a trust intent which appears from the nature of the devise, Civ.Code, sec. 2221, and a specific designation of the bank as trustee.

Appellant concedes that "all of the recent cases have upheld trusts created for charity organizations. In the Estate of Bunn, 33 Cal.2d 897, 206 P.2d 635, the court upheld a provision similar to the provision in this will in the case at bar. The recent cases in this state on provisions similar to the one involved in this appeal have all been resolved in favor of upholding the testamentary disposition of the decedent.

"None of the cases have overruled the general principle of law that the beneficiary must be designated with a degree of clarity sufficient to determine the devisee. It would be futile to argue in view of the cases, the proposition that the present provision under discussion is too vague and indefinite to be upheld.

[2] "It is the position of appellant, however, that in the cases decided up to the present time the court failed to take into consideration section 27 of the Probate Code. This section imposes a limitation upon the testamentary right of a testator. There is no way to determine from the four corners of the will that the decedent intended that the bequest should be distributed for the purposes as limited by section 27 of the Probate Code.

"In order for the court to hold that the decedent intended a charitable bequest as limited by section 27 of the Probate Code, it becomes necessary for the court to read into the instrument such conclusion. It is contended that the rule of *cy pres* cannot be invoked since the instrument itself is completely devoid of any language from which a conclusion can be reached as to the purpose intended for the disposition of the residuary estate. * * *

"It is contended that the courts are without power to permit a testamentary disposition which is not authorized by statute.

"In the instant case to hold that it was the intention of the decedent to dispose of his property to a charity authorized by statute requires the court to arbitrarily make such decision."

Section 27 of the Probate Code prescribes who may take by a will, in the following language: "A testamentary disposition may be made to the United States, to any instrumentality of the United States, to the State, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or faternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

See, also, section 10206 of the Corporations Code, providing that corporations formed solely for charitable purposes may take funds by will, gift or otherwise, and that a bequest or gift to such an organization shall not be invalid or fail because of indefiniteness or uncertainty as to the purposes or beneficiaries thereof.

[3] It is manifest that the reason section 27 of the Probate Code was not mentioned by the Supreme Court in its decision in Estate of Bunn, supra, was that the section has nothing to do with the question of the validity of a bequest to a charity to be selected by another. The section merely provides who may take under a will and who may not, and to that extent limits the trustee's choice in selecting a charitable institution. Appellant's argument amounts to no more than a contention that the testatrix might have intended the charitable bequest to go to an organization not authorized under the law to take under a will and that the court may not read into the instrument a contrary intent. The contention is patently without merit. The intention of the testatrix was that the charity to be benefited should be selected by her executor, and his choice in this respect is fettered only by applicable law and not by anything contained in the will, except that the bequest should be given to a charitable organization. We deem it unnecessary to refer to or quote from the authorities and arguments contained in the excellent and exhaustive brief of respondent. We believe that for the purposes of this decision a sufficient answer to appellant's contention is found in the language of the Supreme Court in Estate of Bunn, supra, at pages 901, 903 and 904 of 33 Cal.2d, at page 638, of 206 P.2d, from which we quote in part as follows:

"The basic legal question in the case is whether a bequest to charity in general, with a power in the trustee to select the beneficiary, is too vague and indefinite to be upheld * * *. (Quoting from Bogert on Trusts and Trustees, secs. 371, 1134–1142) 'It is believed that there is no objectionable uncertainty about such a general charitable trust. The trustee of it is under a duty to select any one of the hundreds or thousands of means open to him to benefit mankind in such a way as to bring about a charitable result * * *. The decisions of the courts in England and in this country can be studied and will guide the trustee to a decision as to what is and what is not charitable * * *. There need be no doubt or ambiguity in the trustee's mind as to his duty * * *.'

"Applying the reasoning of Prof. Bogert, which rests upon sound principles of law and a proper regard for generous intentions to help persons in need of a practical expression of brotherhood, the trust established by Mrs. Bunn should be upheld. ' "Courts look with favor upon all attempted charitable donations and will endeavor to carry them into effect if it can be done consistently with the rules of law. A bequest intended as a charity is not void, and there is no authority to construe it to be legally void if it can possibly be made good." In re Estate of Hinckley, 58 Cal. 457; In re Estate of Willey, 128 Cal. 1, 60 P. 471; In re Estate of Merchant, 143 Cal. 537, 77 P. 475.' * * *."

For the reasons stated, the order appealed from is affirmed.

DORAN and DRAPEAU, JJ., concur.

NATURAL SODA PRODUCTS CO. v. CITY OF LOS ANGELES et al.

Civ. 14700.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1952.

Rehearing Denied March 27, 1952.

Hearing Denied Aril 24, 1952.

Action by Natural Soda Products Company against City of Los Angeles, and others, for damages resulting from inundation of lake bed leased by plaintiff, allegedly as result of negligent operation of aqueduct system by defendants. The Superior Court of Alameda County, James R. Agee, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeals, Nourse, P. J., held that evidence sustained finding of trial court, based on duly qualified expert's opinions, that defendants had been guilty of negligent engineering practices.

Judgment affirmed.

1. Evidence ⇐527

Expert testimony is not only proper but is also virtually indispensable in cases in which relation between facts and results may be understood only by those with special skill or training.

2. Evidence ⇐555

An expert's opinion may be based on hypothetical question if that question itself is based upon testimony or other competent evidence sufficient to prove the facts supposed.

3. Evidence ⇐570

It is for the trial court to determine the weight to be given testimony of experts based on hypothetical question.

4. Evidence ⇐571(9)

In action for injury to plaintiff's property as result of flooding of same by alleged mismanagement of defendants' aqueduct system, wherein civil engineers, qualified as experts, testified as to impropriety of engineering practices adopted by defendants, evidence sustained finding that defendants had failed to operate their aqueduct system to its reasonable capacity and that water had thereby been caused to spill onto plaintiff's property.

5. Waters and Water Courses ⇐209

Where lessee of lake bed property brought action against city for damages caused by inundation of lake bed by negligent operation of aqueduct system, although statutory claim might have been filed with city as late as six months from time waters in lake bed dissipated, filing of claim before dissipation of waters did not preclude maintenance of action. City Charter of Los Angeles, § 376, St. 1927, p. 2014.

6. Judgment ⇐720

Finding in prior action between same parties that certain acts complained of constituted negligence was, in absence of circumstances warranting exception to rule of collateral estoppel, conclusive and binding upon court in present action on question whether such acts constituted negligence.

7. Waters and Water Courses ⇐209

Where lessee of lake bed property brought action for damages caused by inundation of lake bed by negligent operation by city of its aqueduct system, finding that city had been guilty of negligent engineering practice in failing to construct sufficient headwater storage was without legal effect when Supreme Court had ruled that city owed no duty to lessee to construct additional headwater surface storage facilities.

8. Judgment ⇐540

The principle of res judicata is not to be applied so rigidly as to defeat ends of justice.

Kenneth Ferguson, San Francisco, Donahue, Richards, Rowell & Gallagher, Oakland, Burdette J. Daniels, Los Angeles, for plaintiff-appellant.

Ray L. Chesebro, City Atty. of City of Los Angeles, Gilmore Tillman, Chief Asst. City Atty. for Water & Power, and Rex B. Goodcell, Jr., Asst. City Atty., Los Angeles, for defendants-appellants.

NOURSE, Presiding Justice.

This case revolves around a flooding of Owens Lake during the period December, 1937 to April, 1939. A previous action was

brought by plaintiff as a result of a similar flooding in early 1937, in which case the Supreme Court considered the relationship of defendants' Owens Valley aqueduct system and Owens Lake. Natural Soda Products Co. v. City of Los Angeles, 23 Cal.2d 193, 143 P.2d 12. The physical situation in this case is the same as there presented.

In 1913 the defendants completed their aqueduct to Owens Valley and, from 1919 to 1937, diverted into it virtually all the flow of the Owens River, which formerly emptied into Owens Lake, a body of salt water without outlet. As a result the lake dried up making available its subsurface brines which were valuable for use in the production of soda products. Plaintiff leased mineral rights in the dry lake bed from the State of California and acquired or built on the shore of the lake two plants for use in its manufacturing process.

Plaintiff's continued operations were dependent on the absence of any substantial flow of Owens River waters into the lake. The extent of the flow was determined primarily by the manner in which defendants operated their aqueduct system which consisted of a vast network of reservoirs, dams, canals, ditches, wells, pumps and spreading grounds. The water which comes within the perimeter of defendants' aqueduct system can be diverted onto two spreading areas in Owens Valley; taken into storage in defendants' reservoirs; transported out of the valley in the aqueduct proper, or diverted into Owens Lake. That part of the total water supply which is transported out of the valley in the aqueduct proper can be used consumptively in the City of Los Angeles; spread onto two lower spreading grounds, or spilled into the Los Angeles or Santa Clara Rivers.

Between the period February 6, 1937 and July 1, 1937, defendants intermittently diverted large amounts of water into Owens Lake, thereby flooding the lake bed to a depth of three or four feet, thus making plaintiff's lake bed properties inaccessible, and forcing a suspension of plaintiff's operations until October, 1937.

Plaintiff brought an action for the injuries to its property and loss of profits resulting from this flooding of 1937 and was awarded damages in the amount of $153,578.85. The Supreme Court affirmed, holding that defendants had, by their long continued diversion of water from Owens River, obligated themselves to continue that diversion within the reasonable capacity of its aqueduct system for the benefit of plaintiff. Natural Soda Products Co. v. City of Los Angeles, supra. That principle, in part, governs the disposition of this case.

Plaintiff was again forced to suspend operations in December, 1937, when defendants diverted additional water into the lake. These diversions continued intermittently until May, 1939, and the property remained inaccessible until late in 1940, when the lake again became dry and plaintiff resumed operations. During this period of flooding defendants diverted altogether approximately 306,000 acre feet of water into the lake.

On June 9, 1938, plaintiff filed with the defendants a claim for $157,859.21 for the damages resulting to it during the period December, 1937, through June 7, 1938, and on June 23, 1940, plaintiff filed with the defendants another claim for $597,564.87 for the damages resulting to it during the period June 7, 1938, through June 21, 1940. Upon rejection of these claims plaintiff filed two actions for damages, one for each of the claims. The actions were transferred to Alameda County and consolidated for trial. By the complaints plaintiff alleged that defendants were negligent in not operating their aqueduct system to its reasonable capacity, and that defendants were negligent in not providing additional headwater surface storage facilities. The trial court, sitting without a jury, found that during the period December, 1937, to April, 1939, only 50,000 acre feet of water would have been diverted into Owens Lake had defendants operated their then existing aqueduct facilities to their reasonable capacity, and that defendants were not negligent in failing to provide additional headwater surface storage facilities for the accommodation of the above mentioned 50,000 acre feet. Judgment was entered awarding plaintiff $288,851.29. Cross-appeals have been taken from this judgment.

We will first consider defendants' appeal. Defendants first contend that the evidence is insufficient, as a matter of law, to support the trial court's finding that defendants failed to operate their aqueduct system to its reasonable capacity.

[1–3] It has long been recognized that expert testimony is not only proper but also virtually indispensable in cases where the relation between the facts and results may be understood only by those with special skill or training. People v. Ellis, 188 Cal. 682, 206 P.2d 753; Vallejo & N. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238; Campbell v. Fong Wan, 60 Cal.App. 2d 553, 141 P.2d 43. It has also been held that an expert's opinion may be based on a hypothetical question, provided, of course, that the question itself is based upon the testimony or other competent evidence sufficient to prove the facts supposed. Estate of Higgins, 156 Cal. 257, 104 P. 6; Perkins v. Sunset Tel. and Tel. Co., 155 Cal. 712, 103 P. 190; Martindale v. Atchison T. & S. F. Ry. Co., 89 Cal.App.2d 400, 201 P.2d 48. And it is for the trial court to determine the weight to be given such testimony. Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P. 2d 1043, 115 A.L.R. 163; Kershaw v. Tilbury, 214 Cal. 679, 8 P.2d 109; Helbing v. Helbing, 89 Cal.App.2d 224, 200 P.2d 560; Maryland Cas. Co. v. Industrial Accident Comm., 64 Cal.App.2d 162, 148 P.2d 95.

[4] In the present case two civil engineers whose backgrounds showed each to have spent in excess of thirty years investigating water supply and conservation problems testified in response to a hypothetical question which accurately embraced the facts of the case as proved by prior testimony and exhibits, that it was poor engineering practice on defendants' part to spill water into the Owens Lake during the period December, 1937, to April, 1939. The record clearly shows that these opinions were arrived at after many days of concentrated study of the circumstances as documented by a multitude of graphs, charts and miscellaneous hydrographic data which were in the chest of evidence and available to the trial court as an aid in reaching its decision. The trial court obviously found the experts' opinions satisfactory and reliable, and this court is concluded thereby.

Defendants also urge that plaintiff's claims were not filed within the time and manner prescribed by law.

Section 376 of the Charter of Los Angeles provides that, "No suit shall be brought on any claim for money or damages against the City of Los Angeles, or any officer or board of the city, until a demand for the same has been presented, as herein provided, and rejected in whole or in part. * * * Except in those cases where a shorter period of time is otherwise provided by law, all claims for damages against the city must be presented within six (6) months after the occurrence from which the damages arose * * *." Stats. 1927, p. 2008, 2014–15.

Two claims were filed in this case. The first claim was for damages accruing from the time the flooding commenced through June 7, 1938, and was filed with defendant on June 9, 1938. The second claim was for damages accruing from June 7, 1938, through June 21, 1940, and was filed with defendants on June 23, 1940. The only question here is whether the claims were filed within six months of the "occurrence from which the damages arose."

Defendants made a similar argument in the case involving the early 1937 flooding. Natural Soda Products Co. v. City of Los Angeles, supra. In that case defendants diverted water into Owens Lake intermittently from February 6, 1937, to June 30, 1937. The water did not entirely disappear until some time in September, and the claim was filed on December 30th. The Supreme Court there said 23 Cal.2d at page 203, 143 P.2d at page 18: "The principal purpose of the requirement that claims be filed is to provide the city with full information concerning rights asserted against it, so that it may settle those of merit without litigation. * * * That purpose is best served if the entire sequence of events giving rise to the injury is regarded as the 'occurrence from which the damage arose,' for damages can be assessed accurately only when the se-

quence is completed and the total injury taken into account. Thus, in the present case the injuries continued to accumulate but were not entirely apparent so long as water remained on the lake bed. * * *"

[5] Defendants contend that under the rule of the above quoted decision the claims here were filed either too early or too late. However, that case holds only that the plaintiff might file its claim as late as six months after the flood waters dissipate. It in no way indicates that claims might not be filed at some earlier time. Just as the whole is the "occurrence", each part thereof may, at the option of the aggrieved party be the "occurrence". As Mr. Justice Shenk observed in his dissenting opinion in that case, "Another very important purpose, in a case of continuing damage, such as the present one, is to give the city an opportunity to provide protection against damage by the continued acts complained of, should it deem itself liable." Natural Soda Products Co. v. City of Los Angeles, supra, 23 Cal.2d at page 205, 143 P.2d at page 20.

By filing the first claim plaintiff formally gave notice to the city of its injuries both past and prospective, and the second claim, as the trial court found, was filed as soon as the total damages could be ascertained with reasonable certainty. The "occurrence" giving rise to the first claim is the series of diversions from December, 1937, through June 7, 1938, and the "occurrence" giving rise to the second claim is the series of diversions from June 7, 1938, through April, 1939. Any other result would mean that had defendants kept on with their flooding of Owens Lake, the plaintiff would never have been able to file its claim for damages, and it is neither reasonable, necessary nor just to so limit the city's charter provision.

Plaintiff has cross-appealed, contending that the trial court erred in finding that defendants were not negligent in failing to construct additional headwater surface storage facilities sufficient to accommodate the 50,000 acre feet of water which would have entered Owens Lake even had defendants operated their then existing aqueduct facilities to reasonable capacity.

The court which tried the action concerning the early 1937 flooding found that defendants were negligent in this regard. The Supreme Court affirmed that judgment on other grounds, saying: "These findings are sufficient to establish liability, and it is therefore unnecessary to consider the additional finding that defendant was negligent in failing to construct sufficient headwater storage." Natural Soda Products Co. v. City of Los Angeles, supra, 23 Cal.2d at page 198, 143 P.2d at page 16.

[6] Plaintiff urges that the trial court in this case should not have permitted the issue to be relitigated as the finding of negligence in the earlier action between the same parties and involving the same issues is now conclusive. That the general rule is as argued by plaintiff is beyond dispute. People v. Skidmore, 27 Cal. 287; Bank of America Nat. Trust & Savings Ass'n v. McLaughlin etc., Co., 40 Cal.App.2d 620, 105 P.2d 607. However, the rule is not without exceptions, and where a finding is unnecessary and immaterial the rule of collateral estoppel does not operate. (15 Cal. Jur. 153 and cases there collected.)

[7] In the present case as well as the prior case the finding in respect to negligence or a lack of it in failing to construct additional headwater surface storage facilities can have no legal bearing on the judgment rendered. In addition to the prior action between these parties, the State, as owner of the lake bed, brought an action for an injunction to define the extent to which the city might release waters into Owens Lake. People v. City of Los Angeles, 34 Cal.2d 695, 698, 214 P.2d 1, 3. In that case the Supreme Court said: "The city contends that its Long Valley Dam, completed since 1937, cannot be considered a part of the aqueduct facilities that it is obligated to devote to the control of Owens Valley waters. With this contention we agree.

"Since the city's ability to divert the flow of the Owens River was limited by the reasonable capacity of the aqueduct, those

who undertook to develop the resources of the lake bed *could not reasonably rely on diversion of water in excess of that capacity.*" (Emphasis added.)

[8] By that language the Supreme Court in effect said that defendants owed no duty to the holders of lake bed properties to construct additional headwater surface storage facilities. Since, as a matter of law, no duty was owed to plaintiff, the finding of negligence is without legal effect. To adopt the language of the Supreme Court in Re Di Carlo's Estate and Guardianship, 3 Cal.2d 225, 44 P.2d 562, 567, 99 A.L.R. 990, the principle of res judicata "is not to be applied so rigidly as to defeat the ends of justice; there are exceptions to it, based upon important reasons of policy, and we think that this case calls for such an exception."

The judgment is affirmed.

DOOLING, J., and JONES, Justice pro tem., concur.

Hearing denied; SHENK, J., dissenting.



109 Cal.App.2d 436

CURTISS v. McGOWAN et ux.

Civ. 4690.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1952.

Action by Lloyd L. Curtiss, against Norvell E. McGowan and wife to recover a balance on a builder's contract. Defendants counterclaimed. The Superior Court, County of San Mateo, A. R. Cotton, J., entered judgment against defendants and they appealed. The District Court of Appeal, Jones, J., pro tem, held that evidence was sufficient to support the findings of the trial court.

Judgment affirmed.

1. Appeal and Error ⇐1010(1)

Where there is substantial evidence in the record to support the findings of fact of the trial court, the appellate court may not upset such findings.

2. Appeal and Error ⇐901

Where defendants appealing from judgment assert that no facts appear in the record sufficient to support the trial court's findings of fact, defendants have the burden to demonstrate wherein the deficiency exists.

3. Appeal and Error ⇐1010(1)

In action to recover balance on a builder's contract, wherein defendants counterclaimed and alleged that contractor had failed to complete his work, and court found that plaintiff builder had fully complied with the terms of the contract, and defendants did not point out wherein the record was deficient to support the trial court's findings of fact, reviewing court would not upset finding of facts and judgment of the trial court must stand.

E. C. Mahoney, Burlingame, for appellant.

Saul N. Ross, San Bruno, for respondent.

JONES, Justice pro tem.

This is an action to recover a balance on a builder's contract. On October 21, 1947 the appellants entered into a contract with the respondent to build a house on a lot which they owned in Millbrae Highlands Terrace in San Mateo County. The lot cost $3000 and the price of the house is fixed by the contract at $16,435. Landscaping and sidewalks are not included in the contract and are expressly excluded therefrom. Work was commenced on October 21, 1947 and completed on June 30, 1948. On July 3, 1948 the owners took possession of the premises, changed the locks on the doors, and deposited in the San Francisco Bank for the account of plaintiff the unpaid balance of the contract price less $1100. In the meantime plaintiff had recorded a lien against the property for $6400. This was the balance due before the deposit was made. This action was then instituted to foreclose the lien. Appellants answered denying that the contract had

been fully performed and counterclaimed for damages in the amount of $1100, the amount withheld. Before the case went to trial plaintiff accepted the deposit made for his account, and the case proceeded upon the theory that the contract had been performed except in the particulars alleged in the counterclaim. See Thomas Haverty Co. v. Jones, 185 Cal. 285, 197 P. 105. The trial court denied damages to the defendants on their counterclaim and from the judgment entered against them they prosecute this appeal.

Eleven particulars are alleged in which it is contended the contractor failed to complete his work, viz.: "1. Sliding doors were not installed in dining room; 2. Shoe racks were left out of closets; 3. Fill was omitted at entrance porch; 4. Lot was not graded properly at outside walls of house; 5. Cement troughs for leader drains were omitted; 6. Plans were not followed in regard to quality and size of lumber; 7. Defendants were prevented from selecting finish hardware; 8. Defendants were prevented from selecting shower doors; 9. Roof was not constructed according to plans; 10. Walk was not constructed according to plans; 11. No mirror was installed in Bath No. 2."

It is further alleged that the contractor refused to correct the claimed deficiencies and that the reasonable value of making the corrections and completing the contract amounts to $1100. The court below found that the sliding doors in the dining room were omitted at the request and direction of the defendants; that the defendants prevented the contractor from supplying the mirror in bathroom No. 2, the shoe racks in the closets, and installing the cement leader drains; and that as to all other matters mentioned in the counterclaim the plaintiff fully complied with the terms of the contract.

[1–3] Appellants urge no other grounds for a reversal of the judgment than that the findings are not supported by the evidence. They concede that an appellate court may not upset findings of fact if there is any substantial evidence in the record to support them, citing E. J. Stanton & Sons v. County of Los Angeles, 78 Cal.App.2d 181, 177 P.2d 804, but they make the argument that no facts appear in the record of sufficient substantiality to support the trial court's findings of fact. When such a contention is made the rule is that it is incumbent upon the appellants to demonstrate wherein the deficiency exists. Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550. The appellants herein have not pointed out wherein the record is deficient as they claim, and the judgment must be affirmed.

The record discloses that the respondent testified positively and adversely with reference to each specification set out in the counterclaim. In meeting the charge that an overhang of two feet in the roof is provided for in the plans and specifications and that the overhang as constructed is something like eighteen inches, he testified:

"Q. What kind of a roof did you put on? A. Number one cedar shakes.

"Q. How much of an overhang was provided for in the plans? A. Well, there was no set overhang there. All of that kind of stuff we had to scale off. I think the roof has an 18 inch overhang.

"Q. Who was the roofing subcontractor? A. El Camino Roofing Company.

"Q. Did you make specifications available to them at all stages of the contract? A. They had the plans and specifications.

"Q. Your testimony is that the plans and specifications were complied with? A. That is right."

The counterclaim charges that the second grade lumber was used in some of the framing and that 10 inch rustic was used instead of 12 inch. With respect to the former the plaintiff testified that once in awhile you will get in a load of five or six thousand feet of lumber a few pieces of number two grade but that it does not matter as long as it is good lumber; that he ordered all lumber in compliance with the contract with respect to grade, size and specification.

As to the rustic he testified:

"Q. Now didn't these plans call for 12 inch rustic on the outside? A. They did.

"Q. Is that what you put in? A. I put in 10 inch.

"Q. Did you consult him on that change? A. I did. If you will remember * * * there was a redwood strike going on that lasted over a year. We were lucky to get any redwood at all * * * Well I obtained 1 by 10 redwood which is only two inches difference in the width, certified dried redwood, clear, which was the only thing obtainable at that time.

"Q. When did you consult Mr. McGowan about that? A. I guess one of the days he was by on the job.

"Q. Did he tell you it was all right with him to go ahead with it? A. Yes."

He also testified that the change in the sliding doors was made pursuant to agreement with the owners.

In the matter of selection of finish hardware and shower doors, item 7, the testimony of the plaintiff is that he paid $25 or $30 more for this hardware than the figure of $100 allowed for these items in the contract and that they were of good quality. As to the shower doors, his testimony is that he told Mr. McGowan to make his selection of these items when he selected his tile and that nothing was done by him. According to the contractor the entrance walk was modified from a curved to a straight walk in order to make it conform to the levels of the house and the sidewalk, the object being to reduce grade in the entrance walk. As he testified "It would have cost no more to put the curve in it than it would have been to put it straight." Built either way the walk would have cost not over $20.

Concerning items 3 and 4, plaintiff testified that he poured the fill soon after the foundation walls were poured and that he graded at the outside walks of the house to the levels specified on the plans.

Installation of the seven cement troughs costing about fifty cents each for leader drains depended upon leveling of the lot in landscaping and when the owners took possession plaintiff was prevented from installing them. He was likewise prevented from installing the shoe racks and mirror by reason of being locked out of the house.

Appellant McGowan testified that the house was built for sale as a $25,000 home. He never occupied it, and within six weeks after possession was taken the property was sold for $23,900. The difference is attributed by appellants to the deficiencies in construction alleged in the counterclaim. However, the lot on which the house was built was never landscaped. From this fact and all of the other evidence in the case the trial court was free to infer that the reduction from the intended price to the actual sales price could as well have been attributable to the lack of landscaping as to the claimed deficiencies in construction.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.



109 Cal.App.2d 510

COONEY et al. v. GROWER–SHIPPER VEGETABLE ASS'N OF CENTRAL CALIFORNIA.

Civ. 14999.

District Court of Appeal, First District, Division 2, California.

Feb. 29, 1952.

Edna Cooney, in representative capacity, for, by and on behalf of Fresh Fruit and Vegetable Workers Union, Local 78, and for Tobacco, Agricultural and Allied Workers Union of America, their officers and members, filed a petition against Grower-Shipper Vegetable Ass'n of Central California and Dodge Packing Co., for an order directing arbitration of dispute as to whether workers in "packaged" celery were included in collective bargaining contract. The Superior Court, County of Monterey, Anthony Brazil, J., entered a judgment ordering the arbitration and respondents appealed. The District Court of Appeal, Nourse, P. J., held that plaintiff was not entitled to maintain the proceedings.

Judgment reversed.

1. Labor Relations ⇐433, 436

Right to demand arbitration rested with local union which was a party to collective bargaining contract, and a person who had been member of such union could not maintain proceedings to compel association with which contract was entered into to arbitrate a dispute under contract. Code Civ.Proc. § 382.

2. Labor Relations ⇐433

Where collective bargaining contract had expired at time of hearing in proceedings to compel association, with which local union had contracted, to arbitrate dispute under contract, and contracting local union was dissolved and new union substituted as bargaining agent by National Labor Relations Board, new union was only qualified bargaining agent competent to demand arbitration on behalf of employees if question remained which was still subject to arbitration under old contract, and former member of old union could not maintain such proceedings.

Church & Abramson, Salinas, for appellants.

No appearance by respondent on appeal.

NOURSE, Presiding Justice.

On January 27, 1950, the Fresh Fruit and Vegetable Workers Union entered into a collective bargaining contract with the employer association, one provision of which called for arbitration of disputes arising out of the contract. On November 24, 1950, petitioner, "as representative" of the members of the union, but not as an employee under the contract, filed her petition asking that the Association be compelled to arbitrate the dispute whether workers in "packaged" celery were included in the contract. A hearing was held on January 8, 1951, and a judgment was entered on January 19, 1951, ordering the arbitration. At that time the contract had expired, the petitioning union had been dissolved, and another union had been certified by the National Labor Relations Board as the bargaining representative.

[1] The judgment or order must be reversed for two reasons—first the petitioner did not sue as a party aggrieved or as a member of a class of parties aggrieved. She was not competent to maintain a representative suit on behalf of the union under section 382, Code of Civil Procedure. The right to demand arbitration under the contract rested with Union Local 78 which was one of the contracting parties. It did not rest with but one of the former members of that union. The element of a community of interest between the party suing and the parties sought to be represented is not present. This brings the case within the rule of Weaver v. Pasadena Tournament of Roses Ass'n, 32 Cal.2d 833, 837, 198 P.2d 514, 517, where the court said: "But in any event and regardless of which of the alternative conditions of the statute is invoked as authorizing a class proceeding, it has been uniformly held that there must be a well-defined 'community of interest' in the questions of law and fact involved as affecting the parties to be represented. Pomeroy, Code Remedies, Fifth Edition, sec. 286, p. 436; Noroian v. Bennett, 179 Cal. 806, 809, 179 P. 158; Batman v. Louisville Gas & Electric Co., 187 Ky. 659, 220 S.W. 318, 319; Notes, 114 A.L.R. 1015; see, also, Blume, The 'Common Questions' Principle in the Code Provisions for Representative Suits, 30 Mich.L.Rev. 878."

[2] Second, at the time of the hearing, and at the time of the judgment, the contract had expired, the contracting union had been dissolved, and a new union had been substituted as bargaining agent by the National Labor Relations Board. Hence, if any question was still subject to arbitration under the old contract, the new union was the only qualified bargaining agent competent to demand an arbitration on behalf of the employees.

The judgment is reversed.

GOODELL, J., and JONES, Justice pro tem., concur.

109 Cal.App.2d 468

In re LYNN'S ESTATE.

LAYOUS v. MONTEREY COUNTY TRUST & SAVINGS BANK.

Civ. 14996.

District Court of Appeal, First District, Division 2, California.

Feb. 27, 1952.

Proceeding in the matter of the estate of Christina Lynn, also known as Mrs. T. M. Lynn, deceased, wherein John Layous filed a petition to determine heirship, and wherein the Monterey County Trust and Savings Bank, executor, filed an answer. The Superior Court of the County of Monterey, H. G. Jorgenson, J., entered an order adverse to John Layous, and he appealed. The District Court of Appeal, Goodell, J., held that executor was not entitled to any fee payable out of estate or from its assets for services in probate court or on appeal in connection with the heirship proceedings.

Order reversed with direction.

1. Wills ⇐807

Where will provided that executor should sell realty and that proceeds should be divided equally among friend of testatrix and her two nieces and that if any person should contest will or object to any provisions thereof such person should receive only $1, and there was not sufficient property in estate to pay claims against estate and expenses of administration without abatement of legacies, the three legacies would be abated equally, and legacy of testatrix' friend would not be first resorted to under statute providing that, unless a different intention is expressed in will, legacies to a spouse or to kindred shall abate only after abatement of legacies to persons not related to testator. Probate Code, § 752.

2. Executors and Administrators ⇐75, 109(1)

Generally, executors and administrators, acting in their representative capacities, are indifferent persons as between real parties in interest and cannot litigate conflicting claims of heirs or legatees at expense of estate. Probate Code, § 1080.

3. Executors and Administrators ⇐75

The executor is the representative of all legatees and devisees, and duty of executor is to stand indifferent to all claimants and not to favor one above the other, until decision becomes final. Probate Code, § 1080.

4. Executors and Administrators ⇐216(2), 494

Where legatee filed petition to determine heirship, and executor appeared and filed a formal, verified answer denying that legatee was entitled to legacy and claiming that legacy was abated, executor was not entitled to any fee payable out of estate or from its assets for services in probate court or on appeal arising out of or in connection with heirship proceedings, or any expenses or costs in connection therewith, and executor's counsel was not entitled to any fee payable out of estate or from its assets. Probate Court, § 1080.

John W. Hutton, King City, for appellant.

Ernest V. Scettrini, Salinas, for respondent.

GOODELL, Justice.

This appeal is from an order determining heirship.

Christina Lynn, a widow aged about 86 years, died testate on November 26, 1949. Her estate consisted of a ranch of 300.19 acres near King City, appraised at $18,500; $669.68 in cash; $300 unpaid rent due her; bank stock valued at $86.75 and household furniture and personal effects valued at $200, making a total estate of $19,756.43 as appraised.

Creditors' claims allowed, approved and paid aggregate $5,848.44, of which $4,638.69 was a debt owed to respondent secured by a deed of trust on the ranch, $279.10 expenses of the last illness, $881.45 funeral expenses, and $49.20 for wood sold and services rendered to the testatrix.

The will, dated April 11, 1941, directed the prompt payment of all just debts and funeral expenses.

The fourth paragraph thereof reads: "I hereby direct that my said Executor sell my said ranch property and that the proceeds therefrom be divided equally among the following named persons: John Layous, a friend, Alma C. Lorentzen, a niece, and Lillian Gianini, a niece."

The fifth paragraph bequeaths the residue of the estate to Alma C. Lorentzen.

The sixth paragraph reads: "I have purposely made no provision for any other person, whether claiming to be an heir of mine or not, and if any person, whether a beneficiary under this will or not mentioned herein, shall contest this will or object to any of the provisions hereof, I give such person so contesting or objecting the sum of one dollar, and no more, in lieu of the provision which I have made or which I might have made herein for such person so contesting or objecting."

The respondent Monterey County Trust and Savings Bank was named as executor, and was appointed and qualified as such.

The ranch was sold as directed and the selling price was $20,005.40, which brought the value of the estate up to about $21,261.83.

Appellant filed a petition to determine heirship alleging "that there is not sufficient property in said estate with which to pay the claims against said estate and the expenses of administration without abatement of the above-mentioned legacies." Therein he stated his position as follows: "That your petitioner is entitled to distribution of one-third of the proceeds from the sale of decedent's ranch property * * * remaining after payment of all claims against said estate and of the expenses of administration thereof."

Notice of the hearing was duly given by posting and mailing, and after the hearing the court filed an opinion holding, on the authority of In re Estate of Buck, 32 Cal. 2d 372, 196 P.2d 769, that since the two nieces were kindred of the testatrix, and petitioner was not, his legacy should abate. The order (from which this appeal was taken) reads in part as follows: "that the legacy to petitioner, John Layous, a friend of, and not related to testatrix, abate wholly, or in part, until all claims, debts, and expenses of administration are paid and discharged, after the application of any residuary estate on hand; and that said legacy to said John Layous be first resorted to, and wholly abate and be fully exhausted, if necessary, before any resort is made, or any abatement is had, in whole or in part, of the legacies of either of the two * * nieces, Alma C. Lorentzen and Lillian Gianini."

[1] Section 752 Probate Code, on which the court relied, provides: "*Unless a different intention is expressed in the will,* abatement takes place in any class only as between legacies of that class, and legacies to a spouse or to kindred shall abate only after abatement of legacies to persons not related to the testator." (Emphasis added.) The court held that no different intention was expressed in the will. With this conclusion we disagree.

The testatrix must have had some reason for writing the one dollar provision into the will, and in our opinion paragraph sixth shows, among other things, that she was determined that the equality provision which she had written into paragraph fourth should not be disturbed under any circumstances. The very fact that appellant was a stranger in blood but was nevertheless placed on a parity with the nieces of the testatrix may have caused her to make assurance doubly sure by the reinforcement which paragraph sixth gave to paragraph fourth. Abatement such as that ordered would completely tear down what the testatrix had seen fit to set up as appellant's one-third share in the proceeds.

It is true that the deficiency of assets made a reduction of the legacies inevitable, and appellant's petition recognized it, but the payment of the creditors' claims and the expenses of administration out of the proceeds of the sale of the ranch would still result in an equal division of what was left, and the intention of the testatrix would thus be carried out to the letter, not thwarted.

It is significant that the nieces elected not to appear in the heirship proceeding, and it is fair to assume that they absented

themselves advisedly and with eyes open to the provisions of paragraph sixth. Appellant's petition was contested, but not by the nieces. The executor appeared and filed a formal, verified answer (although the statute does not require it) wherein the executor denied petitioner's allegation that he was "entitled to distribution of one-third of the proceeds from the sale * * remaining after payment of all claims against said estate and of the expenses of administration * * *" and added thereto a special plea "That the legacy of said petitioner under said last will and testament has totally abated under the provisions of Sections 750, 751, and 752 of the Probate Code * * *." Such a denial or such a plea if made on behalf of the nieces would have placed their legacies in jeopardy under paragraph sixth—and presumably they knew it—for thereby they would have invoked (as the executor did) a technical rule of law (§ 752 Pro. Code) which would have thwarted the intention expressed by their own testatrix in paragraph fourth.

In Re Estate of Hite, 155 Cal. 436, 444, 101 P. 443, 446, 21 L.R.A.,N.S., 953 the court said: "But wherever an opponent uses the appropriate machinery of the law to the thwarting of the testator's expressed wishes, whether he succeed or fail, his action is a contest." In speaking of provisions similar to those in paragraph sixth the court, 155 Cal. at pages 440–441, 101 P. at page 445, said: "The reasons why such provisions are upheld as part of a sound public policy cannot be more aptly stated than in the language of the Supreme Court of the United States in Smithsonian Institution v. Meech, 169 U.S. 398, 18 S.Ct. 396, 42 L.Ed. 793, where the matter was discussed in the following language: 'The propositions thus laid down fully commend themselves to our approval; they are good law and good morals. Experience has shown that, even after the death of a testator, unexpected difficulties arise; technical rules of law are found to have been trespassed upon; contests are commenced wherein, not infrequently, are brought to light matters of private life that ought not to be made public, and in respect to which the voice of the testator cannot be heard, either in explanation or denial, and as a result the manifest purpose of the testator is thwarted. *It is not strange, in view of this, that testators have desired to secure compliance with their dispositions of property, and have sought to incorporate provisions which should operate most powerfully to accomplish that result.* And when a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions, the courts rightly hold that no legatee, without compliance with that condition, shall receive his bounty, or be put in a position to use it in the effort to thwart his expressed purposes.'" (Emphasis added.)

In the Hite case the language was: "If any of my heirs or devisees, or any one else, contests this, my last will and testament, it is my will and desire, and I declare that he, or she, or they, shall receive no part whatever of my estate, and if such an event happens, I hereby revoke any devise or bequest herein made to such contestant or contestants." In the instant case the testatrix did not stop with the words "if any * * * beneficiary * * * shall contest this will" but added *"or object to any of the provisions hereof"* (emphasis added). We are satisfied, as already indicated, that paragraph sixth was sufficient to show a clear intention (see § 752 Pro. Code) that there should be no abatement which would unbalance, upset, or destroy, the clear intent of paragraph fourth that appellant's share thereunder should be no less and no more than that of each of the blood relatives of the testatrix.

When the testatrix said "if any * * * beneficiary * * * shall * * * object to any of the provisions hereof" she thereby, in substance, demanded acquiescence by her beneficiaries in the provisions of the will as such provisions appeared on its face.

Section 1080 Probate Code provides that in an heirship proceeding "Any person may appear and file a written statement setting forth his interest in the estate. No other pleadings are necessary and the allegations of each claimant shall be deemed to be denied by each of the other claimants to the

extent that they conflict with any claim of the latter." The nieces did not even venture to file such simplified pleading. Had they done so and set forth their "interest in the estate" as "claimants" under paragraph fourth, without invoking, as the executor did, an abatement of appellant's legacy (which, of course, would increase their own shares) such action would probably have been interpreted as an acquiescence in appellant's position. We think such acquiescence is shown anyway by their failure to appear.

[2, 3] The failure of the nieces to appear, when contrasted with the executor's role as an active litigant presents a rather puzzling situation. The only parties in interest in a proceeding such as this are the legatees and devisees, styled "claimants" by § 1080. The executor is not a "claimant" but is "a mere officer of the court, holding the estate as a stakeholder * * *." In re Estate of Healy, 137 Cal. 474, 477, 70 P. 455, 456. "It is generally recognized that executors and administrators acting in their representative capacities are indifferent persons as between the real parties in interest and consequently cannot litigate the conflicting claims of heirs or legatees at the expense of the estate", In re Estate of Kessler, 32 Cal.2d 367, 369, 196 P.2d 559, 561, citing numerous cases. The executor is the representative of *all* the legatees and devisees and its "duty was, and doubtless now is, to stand indifferent to all claimants, and not to favor one above the other, until the decision becomes final", 11b Cal.Jur. p. 672, citing Roach v. Coffey, 73 Cal. 281, 14 P. 840, and In re Estate of Friedman, 176 Cal. 226, 168 P. 21.

It is true § 1080 requires notice to be given to an executor, but that apparently is only for the purpose of keeping him informed, 11b Cal.Jur. p. 672. In Re Estate of Friedman, 176 Cal. 226, 228-229, 168 P. 21, 22, the court said: "It is no part of the duty of the executor to participate actively in a proceeding under section 1664 [now § 1080 Pro. Code] to ascertain and determine the succession to the estate. * * * The executor or administrator * * * has no interest in the question to be determined. No answer is required to be filed by him. He has no claim which he can set up in opposition to those of the rival claimants for the estate, and his name is inserted as a party solely for the purpose of giving him information of the proceeding, so that he may be advised as to the judgment therein given, and of the pendency of the proceeding itself. As far as he is concerned, it is in the nature of a notice of *lis pendens*. It follows, therefore, that he has no authority as executor to engage attorneys for either claimant to the estate, or to bind the estate in any manner to pay for services rendered in that behalf. These principles are thoroughly settled by many decisions * * *."

Had the probate court ruled in favor of the present appellant instead of against him, and the present respondent had appealed, its appeal would have been dismissed because it would not have been an aggrieved party. There are numerous cases so holding, among them In re Estate of Babb, 200 Cal. 252, 255, 252 P. 1039.

The answer of the executor did not, and could not, set up any "interest" of its own as a "claimant" (§ 1080 Pro. Code) hence, in our opinion, it raised no issue in the proceeding.

[4] It follows from the numerous authorities cited that the respondent in this case will not be entitled to any fee payable out of the estate or from its assets for services in the probate court or on this appeal arising out of or in connection with the heirship proceedings, or any expenses or costs in connection therewith, nor will its counsel be entitled to any fee payable out of the estate or from its assets, for services rendered to the respondent in connection with its answer filed in the heirship proceeding or in presenting or litigating that matter, or for representing the respondent on this appeal, or for any costs or expenses in connection therewith.

The order appealed from is reversed with the direction to enter an order to the effect that appellant is entitled to distribution of one-third of the proceeds of the sale of the ranch property remaining after the pay-

ment of all claims against the estate and of the expenses of administration, and such other orders as are in accordance with this opinion. Appellant's costs are to be taxed against respondent, but not in its capacity as executor.

NOURSE, P. J., and PATTERSON, Justice pro tem., concur.



WATSON v. WATSON. *

Civ. 18790.

District Court of Appeal, Second District, Division 2, California.

Feb. 18, 1952.

As Corrected on Denial of Rehearing March 4, 1952.

Hearing Granted April 17, 1952.

Action for malicious prosecution. The Superior Court, Los Angeles County, Philbrick McCoy, J., granted motion to dismiss the action, and the plaintiff appealed. The District Court of Appeal, Moore, P. J., held that where purported marriage was void ab initio because of its being bigamous either spouse was at liberty to sue the other for a tort.

Judgment reversed.

1. Marriage ⇐11

Where parties were already married to other persons, the ceremony in which they participated created no more than a reputed marriage which was void ab initio. Civ.Code, § 61.

2. Husband and Wife ⇐205(2)

One lawful spouse may not maintain a tort action against the other for a wrong committed during coverture because such action would violate sound public policy and tend to destroy conjugal and social serenity which is of more importance to society than the public disclosure of the details of a family's life and an occasional just award against a tort-feasor.

* Subsequent opinion 246 P.2d 19.

3. Marriage ⇐11

No family can be founded upon bigamy for the reason that it is a felony and purported marriage is void ab initio because its consummation is against the peace and dignity of the sovereign.

4. Marriage ⇐54

Where parties were participants in a bigamous marriage, purported husband was at liberty to sue purported wife in an action for malicious prosecution, since a valid marriage of the parties never existed. Civ.Code, § 61.

5. Husband and Wife ⇐205(2)

The existence of a valid marital relationship is the foundation of the rule against recovery from a spouse in tort.

6. Husband and Wife ⇐248

A claim for damages in a malicious prosecution action by a purported husband of a bigamous marriage against the purported wife did not constitute community property in which the tort-feasor had an interest.

G. G. Baumen, Los Angeles, for appellant.

Meserve, Mumper & Hughes, by Leo E. Anderson, Los Angeles, for respondent.

MOORE, Presiding Justice.

In March, 1948, in Nevada, appellant and respondent celebrated the conventional forms and outward show of a wedding though appellant was then bound by a valid marriage to another. For a while they dwelled together in nuptial bliss, but before many moons had smiled upon the new alliance they wished for its termination. Pursuant thereto respondent appeared before the chancellor demanding an annulment of the purported marriage on the ground of appellant's bigamy. But before they had successfully regained their marital independence by annulment, in December, 1949 respondent allegedly caused the arrest of appellant for which he instituted this suit for malicious prosecution. The court below granted a motion to dismiss the action

on the ground that it was sham and frivolous and not filed in good faith.

The appeal is grounded upon the propositions that (1) the purported marriage was void *ab initio* and (2) since no marriage existed, a suit for a tort committed subsequently to the rites is a valid cause of action. Respondent counters with the theses that (1) inasmuch as "it was necessary that the trial court set aside and disregard this Nevada decree before the marriage of the parties to this action could be annulled" the marriage was merely voidable and not void; (2) since respondent married appellant in good faith and under all legal presumptions relied upon the Nevada decree of divorce, the purported marriage must be regarded as valid; (3) therefore appellant cannot maintain a suit for malicious prosecution and unlawful arrest committed prior to the annulment; (4) since by the annulment action the community property rights of the parties were disposed of, appellant cannot litigate those rights again; (5) a divorced party who remarries is estopped to assert the invalidity of the decree against his former spouse.

[1] Thus respondent's entire argument proceeds upon the theory that the ceremony in which the parties participated was in effect a valid marriage. Such is not the law. That ceremony created no more than a reputed[1] marriage relationship which continued to, and at the time of, the alleged tort. The question therefore is whether the existence of such marital relationship operates as a bar to appellant's action.

[2-4] It is concededly the established rule that one lawful spouse may not maintain a tort action against the other for a wrong committed during coverture, Cubbison v. Cubbison, 73 Cal.App.2d 437, 438, 166 P.2d 387; Paulus v. Bauder, 106 Cal. App.2d 589, 235 P.2d 422, for the good reason that to permit such actions would violate sound public policy. Such a lawsuit tends to destroy conjugal and social serenity which is of more importance to society than the public disclosure of the details of a family's life and an occasional just award against a tort-feasor. Peters v. Peters, 156 Cal. 32, 35, 103 P. 219, 23 L.R. A.,N.S., 699. But in the action at bar neither the tranquility of the state nor the welfare of a family is at stake. A valid marriage of the parties never existed. Civ. Code, sec. 61; Vickers v. State Bar, 32 Cal.2d 247, 255, 196 P.2d 10. The only approach to a marriage here was the commission of the crime of bigamy. Such a union is void from its inception and is not merely voidable as contended by respondent. The distinction will be accentuated by an illustration. The marriage of a sterile woman who secretes the fact from her fiance is voidable at his option, Aufort v. Aufort, 9 Cal.App.2d 310, 311, 49 P.2d 620, although it might grow into an honorable union never to be adjudicated. But no family can be founded upon bigamy for the reason that it is a felony and the purported marriage is void *ab initio* because its consummation is against the peace and dignity of the sovereign. Therefore, the established rule relating to spouses of a valid marriage has no application where the alliance is bigamous. In such event, either spouse is at liberty to sue the other for a tort. The Supreme Judicial Court of Massachusetts, in holding that the wife of a *voidable* marriage cannot maintain a tort action against her mate took pains to emphasize that its holding did not relate to void marriages and indicated that if such were the case, a contrary result would follow. Callow v. Thomas, 322 Mass. 550, 78 N.E.2d 637.

[5] Respondent argues that since community property rights may flow from a putative relationship, Estate of Krone, 83 Cal.App.2d 766, 189 P.2d 741, it is immaterial whether the purported marriage herein was void or voidable. Such contention assumes that the reason for barring suits between husband and wife is based upon the community property concept that a tort cause of action in either spouse is com-

1. The asserted marriage is referred to as "reputed" rather than "putative" for the reason that it is not clear that either party at the time was innocent of the legal inhibitions.

munity property as the recovery therefrom would be. Such reasoning is incorrect. The existence of a valid marital relationship is the foundation of the rule against recovery from a spouse. Paulus v. Bauder, 106 Cal.App.2d 589, 235 P.2d 422.

Respondent contends that (1) appellant is barred by the doctrine of res judicata from now asserting his tort claim; (2) all community property rights of the parties having been disposed of in the annulment action, appellant may not attempt to litigate such matters in this subsequent suit. Such argument, being grounded on the theory that appellant's cause of action is to be treated as the community property of the parties, would lead to error.

[6] The fact that a right of action by a lawful spouse against a third party for personal injuries is a community asset, Zaragosa v. Craven, 33 Cal.2d 315, 202 P. 2d 73, 6 A.L.R.2d 461, does not justify the conclusion that a claim for damages by a participant in a bigamy against the other constitutes property in which the tort-feasor has an interest. This is nonetheless true where the claim arose out of a wrong committed prior to the annulment of the void marriage.

Judgment reversed.

McCOMB and FOX, JJ., concur.



109 Cal.App.2d 399

FALLERT et ux. v. HAMILTON et ux.

Civ. 4374.

District Court of Appeal, Fourth District, California.

Feb. 25, 1952.

Hearing Denied April 24, 1952.

Action by J. A. Fallert and another against Claude Hamilton and another in ejectment and for damages for wrongful withholding of land. The Superior Court of Tulare County, Frank Laberson, J., entered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Griffin, J., held evidence sustained finding that boundary line between properties of plaintiffs and defendants was that located by survey procured by plaintiffs, and that there had been no boundary fixed by agreement between parties.

Judgment modified and affirmed.

1. Boundaries ⇐37(3, 5)

In action of ejectment wherein plaintiffs claimed that true boundary line between their property and that of defendants was that indicated by survey procured by plaintiff, and defendants contended that circumstances indicated agreement fixing boundary at point at which fence between properties had been located for period of many years, evidence supported finding that true boundary was determined by survey and that circumstances were not such as to show mutual acquiescence and agreement that particular line should thereafter constitute boundary line between properties.

2. Appeal and Error ⇐989

The duty of appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or not, which supports findings of trial court.

3. Trial ⇐139(1), 140(1), 142

Weight to be given testimony, credibility of witnesses, inferences to be drawn, are matters for trier of facts.

4. Ejectment ⇐132

Evidence in ejectment action was sufficient to sustain award of damages to plaintiff of $160 from loss of profits from approximately 4⅘ acres of total land, but was insufficient to sustain award of $307 damages for withholding property, but latter amount must be reduced to $182.

Fuller & Christenson, Porterville, for appellants.

Jamison & Jamison, Porterville, for respondents.

GRIFFIN, Justice.

Action for ejectment and for damages for claimed wrongful withholding of a

strip of land containing approximately 4.6 acres.

Plaintiff J. A. Fallert and wife purchased a tract of land in Tulare County on December 12, 1950, from one Reeves. On the north it adjoined a tract purchased on January 12, 1948, by defendants Claude Hamilton and his wife.

A licensed engineer testified that he was familiar with the various properties involved; that he made a survey of the Reeves property in 1949, and established the north line of it; that in February, 1951, the redwood marker which he had placed there before to establish the line, had been removed but the pipe in which he had set it was still there; that he re-established the line and reset the stakes; that this line ran about 14 feet north of a barbed wire fence running parallel with this line for a distance of about 626 feet.

Plaintiffs claim that the survey line is the proper division line between the two properties. Defendants claim that the fence line is the proper one because it was erected at least 40 years before the survey was made and became the agreed and accepted division line.

Mr. Reeves testified that the present fence line, which was replaced by defendants after Reeves removed the old fence, followed the same line as the old fence which had been erected on that same line; that the old fence was there when he bought the property in 1943, and that he was not acquainted with the land any time prior to that; that there was no dispute between him and the then owner of the Hamilton property as to the location of the fence; that they both used their respective properties up the fence without objection or interference by any one; that he did repair work on it; that he had the property surveyed and it was at that time he discovered the survey line extended 14 feet north of the fence line; that after that time he removed the fence and cultivated the 14-foot strip without objections.

Mr. Fallert testified that when he purchased the property from Reeves there was no fence on the north line; that he plowed, leveled and planted the strip in question; that when he completed the work, Hamilton put up a fence on the former fence line and ordered plaintiffs off of the property just prior to the time of the commencement of this action; that as a result of this he was obliged to extend his pipe line leading from his pump house, around the strip here involved, and across a neighbor's tract, and that the estimated cost to change it to run across the strip here involved would be about $127, plus $15 or $20 in refencing, plus a leveling charge of $25 to $35; that he had a $200–$300 per ton guarantee or promise for his castor bean crop; that the castor beans ran about two and a half tons per acre; that the year before the net profits ran "over $400 per acre".

Defendants denied by answer the allegations of plaintiffs' complaint, alleged that the fence line had been, for over 40 years, considered by the parties and was agreed to be the common dividing line between said properties. In a cross-complaint defendants prayed that judgment be entered accordingly.

In support of these allegations defendants called a Mr. Dunn as a witness. He testified he had resided on or near the Hamilton property for over 20 years; that the fence was in existence on the present fence line during that time and there was no question ever raised or any dispute ever arose about the fence being any place except on the property line; that power poles were erected along the fence line and that the fence continued westerly "practically in a straight line" with the old fence. He testified that for many years prior to the acquisition of the property by plaintiffs that the property was used principally for pasturing cattle.

A Mrs. Murray, who lived on plaintiffs' property for 33 years after 1901, testified there was a fence at the present location during that time; that they kept it up in conjunction with the other owner; that they had cattle and just put up an old fence to hold some of the young cattle; that there was never any survey made of the property as to any line between them and that there was no dispute or controversy as to its location.

Based upon this evidence, the court found that plaintiffs were the owners of the 14-foot strip in question; that while plaintiffs were rightfully in possession of it, defendants, on February 5, 1951, wrongfully entered upon it, ousted and ejected plaintiffs, and accordingly, plaintiffs suffered damage for such ouster in the sum of $307. An additional sum of $160 was allowed for loss of profits, all totaling $467. The court also found that defendants had no right, title or interest in or to said strip and found generally that the allegations pertaining to defendants' claimed defenses were untrue. Judgment was entered accordingly.

Counsel for defendants recognized the limitations placed on the appellate court in passing on the sufficiency of the evidence to support the findings, where there is a conflict, but content themselves with the proposition that the undisputed facts establish, as a matter of law, that an agreed boundary was established on the location of the old fence separating the respective properties of the parties and that such property line is controlling even though a subsequent survey showed a different location according to the calls of the respective deeds. In support of their contentions they cite Young v. Blakeman, 153 Cal. 477, 95 P. 888; Schwab v. Donovan, 165 Cal. 360, 132 P. 447; Mello v. Weaver, 36 Cal.2d 456, 460, 224 P.2d 691; Hannah v. Pogue, 23 Cal.2d 849, 147 P.2d 572; Roberts v. Brae, 5 Cal.2d 356, 359, 54 P.2d 698; and Board of Trustees v. Miller, 54 Cal.App. 102, 201 P. 952.

Defendants' counsel concede, in their brief, that "There is, however, no direct evidence of an agreement between the owners of the coterminous parcels or of a contemporaneous uncertainty or believed uncertainty as to the true location of the dividing line", and state: "The narrow question, then, is whether in the absence of direct evidence, the essential elements of uncertainty as to the true position of the boundary and an agreement to accept a location as fixed by the parties will be implied or presumed under the circumstances evidenced in this case."

In Southern Counties Gas Company v. Eden, 118 Cal.App. 582, 5 P.2d 654, 656, the court held, quoting from the syllabus: "* * * An agreement fixing a boundary need not be shown by direct evidence, but may be inferred from conduct, and especially from long acquiescence. * * *"

And on page 585 of 118 Cal.App., on page 656 of 5 P.2d, the court said: "* * * the mere construction and maintenance of an intervening fence is not sufficient upon which to base a claim of title by agreement." Then the court quotes from Ross v. Burkhard Investment Co., 90 Cal.App. 201, 208, 265 P. 982, 985, where it is said: "It is only when the owners of contiguous tracts of lands * * * are uncertain as to the real boundary line which separates their respective properties, by mutual agreement, either express or implied, consent to accept a specified line as the true boundary, and thenceforth occupy and use their respective properties in accordance therewith for a considerable length of time that the contracting parties and their privies in title will be estopped from repudiating the agreed boundary * * *."

It is then stated in the Southern Counties Gas Company case, that: "A presumption that an agreement formerly was made as to the location of a boundary line may arise from the fact that one or both of the adjoining owners have definitely defined such line by erecting a fence or other monument on it, and that both have treated the same as fixing the boundary between them for such a length of time that neither ought to be allowed to deny the correctness of its location."

In most of the cases cited by defendants, the appellate court upheld the trial court in its finding a pre-existing marked line constituted the boundary line, as opposed to the contention that another line was the proper one. Accordingly, the cases cited by defendants may be thus distinguished or they are factually different.

In Clapp v. Churchill, 164 Cal. 741, 130 P. 1061, which case is factually quite similar to the instant case, the court held that the doctrine of an agreed boundary line and its binding effect upon the coterminous

owners rests fundamentally upon the fact that there is, or is believed by all parties to be, an uncertainty as to the location of the true line; that when that uncertainty exists, or is believed by them to exist, they may, amongst themselves by agreement, fix the boundary line, and that agreement will bind all the consenting parties. It then held that the inference of an agreement arising from acquiescence may support the added inference that the inferred agreement was based on a questioned boundary; that the primary inference is of a valid pre-existing agreement, and to be valid that agreement must have been based upon a doubtful boundary line; that this inference of a doubtful boundary will not prevail against the proved fact to the contrary.

[1] In the instant case the court found, at least inferentially, that there was no dispute as to the boundary line, and that some of the elements or factors of the doctrine necessary to establish a mutual acquiescence and agreement that a particular line should thereafter constitute the boundary line, had not been sufficiently proved. As opposed to this doctrine it specifically found that the true boundary was that determined by the survey. The necessary elements or factors to be established under the doctrine of agreed boundaries are clearly set forth in Mello v. Weaver, supra; Moniz v. Peterman, 220 Cal. 429, 31 P.2d 353; Rast v. Fischer, 107 Cal.App.2d 129, 236 P.2d 393; Huddart v. McGirk, 186 Cal. 386, 388, 199 P. 494; Todd v. Wallace, 25 Cal.App.2d 459, 77 P.2d 877; Talmadge v. Moore, 98 Cal.App. 2d 481, 220 P.2d 588; Phillips v. Hooper, 43 Cal.App.2d 467, 111 P.2d 22; and Pilibos v. Gramas, 104 Cal.App.2d 353, 231 P.2d 502.

[2, 3] It is not our duty to determine whether the evidence might have supported a finding contrary to the one reached by the trial court. It is our conclusion that it cannot be said, as a matter of law, that an agreed boundary line was conclusively established by the evidence. In view of the inferences and deductions that might be allowed to be drawn from the evidence produced, it cannot be said that there is not sufficient evidence to support the court's finding. The duty of an appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or not, which supports the findings. The weight to be given the testimony, the credibility of witnesses and the inferences to be drawn, are matters for the trier of facts. Rast v. Fischer, supra.

[4] The last point involves the question of the sufficiency of the evidence to support the award of damages as indicated. The argument is that the evidence only shows, at most, a damage of $60, rather than $160, for loss of profits, and a maximum of $182, instead of $307 damages, for withholding the property. Counsel for plaintiffs do not, in their answering brief, consider this question or point to any evidence bearing upon it. Since plaintiffs were precluded from planting more than four acres of castor beans, which in a previous year produced a return of approximately $400 per acre, the trial court might well have believed that the loss of profit was at least equal to the amount here allowed. As to the claimed damage for withholding, we have read the record and, as defendant points out, we find no items of claimed damage which would exceed the sum of $182. The judgment therefore, in this respect, must be and is reduced accordingly.

The portion of the judgment awarding damages is modified and reduced to $342. As thus modified, the judgment is affirmed. Plaintiffs to recover costs on appeal.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

KESTER MOTORS, Inc. v. HADDAD et al.

Civ. 4346.

District Court of Appeal, Fourth District, California.

Feb. 19, 1952.

Rehearing Denied March 12, 1952.

Hearing Denied April 17, 1952.

Action by Kester Motors, Inc., against Margaret Haddad and others to recover certain moneys allegedly due. The Superior Court of Kern County, W. L. Bradshaw, J., entered orders refusing to vacate a default, refusing to set aside a default and default judgment, and entered judgment, and the defendants appealed. The District Court of Appeal, Griffin, J., held that the trial court did not abuse its discretion in denying the motions.

Judgment and order refusing to set aside default and default judgment affirmed, and attempted appeal from order refusing to set aside default before judgment rendered dismissed.

1. Appeal and Error ⇐957(1)
Judgment ⇐139

A motion to set aside a default judgment or grant relief therefrom is addressed to the sound discretion of the trial court, and in absence of a clear showing of abuse of discretion a reviewing court will not disturb the order of the court below.

2. Judgment ⇐143(12)

Where plaintiff informed defendant's counsel's secretary that he would take default if defendant did not answer and defendant's counsel obtained without notice to plaintiff an extension of time to answer and alleged failure to plead within extension period was due to mistake of secretary in not noting last day to file on calendar, refusal, after hearing before trial court, to set aside default obtained five days after last day of extension period and default judgment rendered thereon was not an abuse of discretion.

3. Appeal and Error ⇐113(3), 870(2)

No appeal lies from an order denying an application to set aside a default before judgment is rendered although it may be reviewed on appeal from the judgment.

T. R. Claflin, John M. Nairn, Bakersfield, for appellants.

Johnston, Baker & Palmer, Bakersfield, for respondent.

GRIFFIN, Justice.

A complaint in 13 separate causes of action was filed on January 15, 1951, by plaintiff corporation against defendants for money claimed to be due it. The first count is predicated upon a memorandum of agreement between the parties whereby Mrs. George A. Haddad agreed to pay plaintiff $100 per week, commencing November 4, 1950, until $9754.33 had been paid. This amount was for cars purchased by her from plaintiff. A promissory note in the same amount and for like payments was executed in connection therewith. It was alleged that $800 was due thereon. The second cause of action was predicated upon an open account for automobiles delivered to defendants in the same sum and on which it is alleged $1433.50 had been paid. A third count alleges the sale of these same cars at $9754.33, and that $1435.90 had been paid thereon. The fourth to the thirteenth counts, inclusive, alleged that defendants drew various checks on a named bank in various sums in favor of plaintiff; that the checks had been presented to the bank and returned "not sufficient funds" and that the total due thereon is $4781.89. Summons was served on defendants the same day and defendants immediately filed a general demurrer thereto, which came on for hearing on January 22, 1951. It was overruled and defendants were given 15 days to answer. Notice thereof was duly served.

According to the affidavit filed by the attorney for plaintiff, it is alleged that about February 8, 1951, he called the office of counsel for defendants; that the secretary informed him that more time was needed to answer; that he told the secretary that if an answer was not filed within the next day or two he would take default, and told her to so inform counsel for defendants; that instead of filing the past-due answer, counsel for defendants obtained from the court, without notice to

plaintiff, an extension of time to answer until February 15th. No answer was filed within that time and on February 20th default was entered. Counsel for defendants moved to set aside this default, predicated upon the affidavit of the secretary, that through mistake and inadvertence she failed to note the date on the calendar as to the last day to answer and did not discover such error until February 20th; that an answer, containing only a general denial based on information and belief, was offered for filing but was refused, due to the entry of the default. No affidavit of merits was filed with said motion. After a full hearing the motion was denied. Thereafter, a hearing was had, documentary evidence was produced in support of the causes of action and a judgment by default was rendered. After its entry, counsel for defendants moved to set aside the judgment and default entered, upon the same ground and tendered a more voluminous answer in which he admitted due execution and delivery of the instruments sued upon, but denied the other allegations of the complaint and alleged certain claimed duplication of charges and overcharges in certain counts. In connection therewith he filed an affidavit of one of the defendants claiming that he consulted his attorney and was informed that he had a good defense to the causes of action upon the merits; that after service of summons on him he had some undisclosed negotiations with the president of the plaintiff corporation for a settlement of the action and that these negotiations continued until after the default was entered.

Opposed to this is the affidavit of counsel for plaintiff alleging that the demurrer filed herein was a sham or "wooden demurrer" filed for the purpose of delay only; that the first answer was also a "wooden answer" attempted to be filed for the same purpose; that counsel for defendants was fully informed, after his first default in answering, that plaintiff would allow no further time than one or two days; that he waited five days past the time given by the court before entering default; that it was not true that any settlement was being negotiated, nor that it was in prospect or ever had been in prospect between the parties; that defendant George Haddad did come to his office on January 15th and that he informed Haddad that he would not talk to him in the absence of his attorney, and that he told him that the only settlement he would make with him was for him to pay the amount claimed in full; that the only purpose of the application to set aside the default judgment and this appeal is an effort to delay the enforcement of the judgment.

After a full hearing the court denied all motions then pending. This appeal followed and defendants claim abuse of discretion on the part of the trial judge in denying such motions.

[1] While it is the policy of the law that every case should be litigated upon its merits, and that because of this the reviewing courts will scan more closely orders denying relief and are more prone to reverse orders of denial, it is the fundamental rule that an application to set aside a default or grant relief therefrom, rests so largely in the trial court's discretion that it will not be disturbed on appeal unless it shall be made clearly to appear that there was an abuse of discretion, and this general rule has not been relaxed by the rule that a discretion is better exercised when it tends to bring about a decision of the case on its merits. Ingrim v. Epperson, 137 Cal. 370, 372, 70 P. 165; Anglo California Trust Co. v. Kelly, 95 Cal.App. 390, 391, 272 P. 1080; Hughes v. Wright, 64 Cal.App.2d 897, 903, 149 P.2d 392.

In Stub v. Harrison, 35 Cal.App.2d 685, 96 P.2d 979, this court said that a motion to set aside a default judgment is addressed to the sound discretion of the trial court and in the absence of a clear showing of abuse in the exercise thereof, an appellate court will not disturb the order of the court below; and on appeal from an order granting such relief, all presumptions will be indulged in favor of the trial court's action and the burden in all cases is upon the appellant to make it appear that the court's discretion was abused in making the order. See, also, Weinberger v. Manning, 50 Cal.App.2d 494, 123 P.2d 531. As

to any conflict in the allegations of the affidavits, the court was the sole judge. Estate of McCarthy, 23 Cal.App.2d 398, 401, 73 P.2d 914.

In Elms v. Elms, 72 Cal.App.2d 508, 164 P.2d 936, it was stated that the only occasion for the application of Code of Civil Procedure section 473, is where a party is unexpectedly placed in a situation to his injury without fault or negligence of his own, and against which ordinary prudence could not have guarded, and that in addition to showing excusable neglect, he must also show that upon a trial with his forces all present a different judgment would probably ensue.

[2] Many of the cases cited by appellant, such as Beard v. Beard, 16 Cal.2d 645, 107 P.2d 385; Rahn v. Peterson, 63 Cal.App. 199, 218 P. 464; and Waybright v. Anderson, 200 Cal. 374, 253 P. 148, were decisions affirming an order setting aside a default judgment, holding that the trial court did not abuse its discretion. Under the disputed facts presented here, it might well be said that had the trial court granted the motions, this court would not hesitate in holding that it had not abused its discretion. However, that it not the question before us. The parties here had full opportunity to and did present their contradictory positions to the trial court after a complete hearing. We are convinced that the appellants failed to show that the trial court abused its discretion in denying the motions. Placke v. Pinnell, 9 Cal.2d 260, 261, 70 P.2d 618.

In considering the appeal from the default judgment, there is no record before us except the clerk's transcript. The judgment shows on its fact that competent proof was made which sustained the allegations of the complaint, which allegations are sufficient to support the judgment. There were no apparent duplications or overcharges allowed.

In Kreling v. McMullen, 158 Cal. 433, 434, 111 P. 252, the rule is stated to be that on an appeal from a judgment after default, it is the duty of the appellate court to indulge in all reasonable presumptions and intendments in favor of the judgment; and in San Gabriel Valley Bank v. Lake View Town Co., 4 Cal.App. 630, 633, 89 P. 360, it is said that every intendment is indulged in favor of the judgment, and all doubts of construction must be resolved in support thereof. If the complaint can be construed favorably to the upholding of the judgment, such construction shall be adopted.

[3] Although it may be reviewed on appeal from the judgment, no appeal lies from an order denying an application to set aside a default before judgment is rendered. The attempted appeal therefrom should be and is dismissed. Code Civ.Proc. § 963; Higgins v. Mogan, 78 Cal.App. 199, 248 P. 551.

Order refusing to set aside default judgment and to vacate default affirmed. Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



109 Cal.App.2d 508

LAW v. DARTT.

Civ. 14910.

District Court of Appeal, First District, Division 2, California.

Feb. 29, 1952.

Action by Melvin F. Law against Fred Dartt for injuries sustained in the course of his employment by defendant. The Superior Court, Alameda County, S. Victor Wagler, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that the Superior Court was without jurisdiction of plaintiff's action in view of fact that an award of the Industrial Accident Commission granting plaintiff's petition for compensation for his injuries was plaintiff's exclusive remedy for such damage.

Affirmed.

Workmen's Compensation ⇐2107

Where employee received award from Industrial Accident Commission for injuries sustained during the course of his employment, Superior Court was without jurisdiction of employee's subsequent action for damages, based on employer's failure to provide adequate training and supervision during course of employment and for punitive damages based on alleged malicious misconduct of employer in permitting employee to work on a machine without proper instruction or guidance, in view of fact that award was exclusive remedy for such damage. Labor Code, §§ 3600, 3601, 4553.

Douglas A. Pease, San Francisco, for appellant.

Doyle & Clecak, and Henry G. Sanford, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff pleaded two causes of action for damages for personal injuries—the first alleging that he was an employee engaged by defendant under a contract of employment as a "student trainee", the second alleging that he was an employee and praying for punitive damages for the alleged willful misconduct of the employer. Defendant's answer admitted the employment and specially pleaded an award of the Industrial Accident Commission granting plaintiff's petition for compensation for injuries sustained during the course of his employment by defendant; also the payment of said award and the acceptance by plaintiff. These same facts were alleged in plaintiff's second cause of action.

At the commencement of the trial defendant's objection to the introduction of evidence was granted and judgment was entered for the defendant. The appeal is from this judgment.

The first cause of action alleges that "said defendant engaged plaintiff as an employee at said place of business." Then follow allegations that the employment was under the terms of the Federal Act providing for "On The Job Training", that defendant failed to provide adequate instruction and training, and that, while working in that capacity, plaintiff was severely injured. This cause of action is based on a failure of duty to provide adequate training and supervision during the course of the employment.

The answer pleads plaintiff's application for compensation filed with the Industrial Accident Commission, the award of the commission, and payment thereof to plaintiff. That award forecloses any separate action for damages for the same injuries and the superior court was without jurisdiction to entertain this cause of action. § 3601, Labor Code; Buttner v. American Bell Telephone Co., 41 Cal.App.2d 581, 107 P.2d 439; Jackson v. Pacific Gas & Electric Co., 95 Cal.App.2d 204, 207, 212 P.2d 591; Walker v. City & County of San Francisco, 97 Cal.App.2d 901, 908, 219 P.2d 487.

The second cause of action purports to plead a cause based on the alleged malicious misconduct of defendant in permitting plaintiff to work on the machine without proper instruction or guidance. It pleaded the facts of his application filed with the Industrial Accident Commission and the payment of the award. Here, again, plaintiff is foreclosed by the Labor Code. Section 4553 provides: "The amount of compensation otherwise recoverable shall be increased one-half where the employee is injured by reason of the serious and wilful misconduct of * * *. But such increase of award shall in no event exceed $2,500." That this is an exclusive remedy for such damage cannot be doubted in view of sections 3600 and 3601 of the code which provide that the remedies outlined in the code are "in lieu of any other liability whatsoever".

The cases herein before cited are ample authority for this conclusion.

Judgment affirmed.

GOODELL, J., and JONES, Justice pro tem., concur.

109 Cal.App.2d 522

WHITE v. WHITE.

Civ. No. 18680.

District Court of Appeal, Second District, Division 2, California.

Feb. 29, 1952.

Appeal from an order granting custody of minor child of tender years to defendant wife in an interlocutory decree of divorce entered by the Superior Court of Los Angeles County, Eugene P. Fay, J. The District Court of Appeal, McComb, J., held that where both plaintiff and defendant wife were qualified to have custody of child, custody was properly awarded to defendant wife.

Affirmed.

1. Divorce ⇐295

Where temporary order pending trial of divorce action was entered placing custody of minor child with its paternal grandmother, it was not necessary to show change of conditions from time of such order to give trial court jurisdiction to award custody of child to mother in interlocutory decree of divorce.

2. Divorce ⇐298(6)

Where husband and defendant wife in divorce action were both qualified to have custody of their minor child of tender years, custody was properly awarded to wife. Civ. Code § 138(2).

Hugh Culler, Los Angeles, for appellant.

Albert Lee Stephens, Jr., and Joseph J. Burris, Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from the portion of an order in an interlocutory decree of divorce granting the custody of the minor child of the parties to defendant (mother of the child).

Facts: Plaintiff instituted an action for divorce against defendant. Thereafter pursuant to an order to show cause to determine the temporary custody of the minor child of the parties the trial court on September 27, 1950, entered an order placing the physical custody of the child, pendente lite, with the paternal grandmother, Mrs. Myrtle Rhodes.

Thereafter and at the time of the divorce action the trial court made a finding that both parties were fit persons to have custody of the child and awarded custody to defendant (the mother).

Questions: First: *Since there was not any showing of a change in conditions from the time the trial court made its order for the temporary custody of the child to the time that it made the order in the interlocutory decree of divorce awarding the custody of the child to the mother, was the trial court without jurisdiction to make the latter order?*

No. The order of September 27, 1950, was purely a temporary order pending the trial of the action and did not in any way limit the power of the court at the time of trial to make such order as the evidence disclosed at that time was for the best interest of the minor child of the parties.

[1] It was not necessary therefore that defendant introduce any evidence to show there had been a change of conditions from the time the court made its preliminary order for the temporary custody of the child.

Prouty v. Prouty, 16 Cal.2d 190, 105 P.2d 295, and Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719, and similar decisions are applicable to cases where the custody of a child has been fixed in an interlocutory or final decree of divorce. They are not applicable to temporary orders pending the hearing of a divorce action.

Second: *Did the trial court err in awarding the custody of the minor child to the mother (defendant)?*

No. Section 138(2) of the Civil Code reads in part as follows: "As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father."

In the instant case the trial court found that as between plaintiff and defendant they

were both qualified to have the custody of their child. In other words, as pointed out in the quoted section "things were equal between the parties," and therefore the trial court properly followed the policy outlined in such section of awarding the custody of the child, which was of tender years, to her mother.

The order in the interlocutory decree from which an appeal is taken is affirmed. The appeal from the order made July 16, 1951, pendente lite, is dismissed.

MOORE, P. J., and FOX, J., concur.



109 Cal.App.2d 365

BAIRD v. BRADLEY.

Civ. 4334.

District Court of Appeal, Fourth District, California.

Feb. 19, 1952.

Donald E. Baird, as Building Inspector of the City of Porterville, California, brought action against Richard Bradley to enjoin alterations or repairs to building which allegedly exceeded 50 per cent of value of existing building, unless made to conform to requirements for new buildings, and to have building adjudged a nuisance and to abate the nuisance. The Superior Court of Tulare County, Frank Lamberson, J., entered a judgment for the plaintiff, and the defendant appealed. The District Court of Appeal, Barnard, P. J., held that the ordinance and the State Housing Act were reasonable and constitutional.

Judgment affirmed.

1. Health ⇐32

Defendant who was owner and occupant of a frame residence containing two bedrooms, was a "guest", and residence was a "dwelling", within the State Housing Act, and hence residence was subject to provisions of that act requiring that any building which has been damaged by fire to a certain extent must be reconstructed in conformity with requirements of the act. Health and Safety Code, §§ 15006, 15014, 15018, 15019.

See publication Words and Phrases, for other judicial constructions and definitions of "Dwelling" and "Guest".

2. Health ⇐21

Municipal Corporations ⇐601(29)

Provisions of State Housing Act and ordinance preventing repair of building damaged by fire to an extent in excess of 60 per cent of its physical proportions and in excess of 50 per cent of its existing value, unless alterations and repairs would conform to all requirements for new buildings as provided in the act, were valid and constitutional, though city wherein damaged building was located was small. Health and Safety Code, § 15000 et seq.

3. Nuisance ⇐84

In action to enjoin alterations or repairs to building which allegedly exceeded 50 per cent of value of existing building, unless made to conform to requirements for new buildings, and to have building adjudged a nuisance and to abate nuisance, evidence sustained finding that defendant's frame building was damaged by fire in excess of 50 per cent of its existing value and in excess of 60 per cent of its physical proportions. Health and Safety Code, § 15000 et seq.

4. Nuisance ⇐84

In action to enjoin alterations or repairs to building which allegedly exceeded 50 per cent of value of existing building, unless made to conform to requirements for new buildings, and to have building adjudged a nuisance and to abate the nuisance, evidence established that city building inspector had necessary authority to enforce applicable provisions of the State Housing Act and that notices as required by the Health and Safety Code were mailed. Health and Safety Code, § 15000 et seq.

Richard Bradley, in pro. per. Waldo E. Burford, City Atty., Porterville, for respondent.

BARNARD, Presiding Justice.

The defendant owned and occupied a frame residence located within Fire Zone I of the city of Porterville. This building, which was some 50 years old, was damaged by fire on March 20, 1949.

This action was brought to enforce the provisions of a city ordinance prohibiting the erection of frame buildings in this zone, and requiring that alterations or repairs to a building so situated, which exceeded 50% of the value of the existing building, should be made to conform to all of the requirements for new buildings as provided in the city building code adopted by ordinance, and as provided in the State Housing Act. The complaint alleged, among other things, that this building had been damaged by fire in excess of 60% of its physical proportion within the meaning of the State Housing Act, and that the cost of any necessary repairs would exceed 50% of the value of the building; that by reason of the fire the building had become unfit for human habitation; that by reason of its partial destruction the building had become a nuisance within the terms of the State Housing Act, the general law, and the city ordinance; and that the defendant, unless prohibited therefrom, intended to repair and alter this building in such a manner as not to comply with the State Housing Act and the city ordinances referred to in the complaint. The prayer was for a judgment declaring that the building, by reason of the fire, has become unfit for human habitation, is a nuisance and is dangerous to human life and detrimental to health; that the defendant be enjoined from repairing said residence except in compliance with the provisions of the State Housing Act and certain ordinances of the city of Porterville; that the defendant be required to demolish or remove the building and abate the nuisance; and that in the event he fails to do so the plaintiff be authorized to do this at defendant's expense. The answer admitted, by failing to deny, all of the allegations of the complaint except with respect to the damage done by the fire, it being alleged in this connection that the building "was not burned or damaged to exceed 10 to 15% of its cost or extent."

The court found that all of the allegations of the complaint are true, and further found that the defendant had been given the written notices required by the provisions of the State Housing Act and the city ordinances, and that the defendant has failed and refused to remove the remaining portion of the building and abate the nuisance. Judgment was accordingly entered enjoining the defendant from repairing or remodeling the building; determining and adjudging the building to be a nuisance; ordering the defendant to commence the demolition and removal of the building within 30 days, and to have it entirely removed within 90 days; and further ordering the removal of the building by the plaintiff building inspector in the event this should not be done by the defendant. This appeal is from that judgment.

[1] It is first contended that the judgment is erroneous in law as it applies the provisions of the State Housing Act to the structure in question, whereas this structure is not a "building or dwelling" as defined in that act. It is argued that section 15006 of the Health and Safety Code defines a building as "an apartment house, hotel, or dwelling"; that it clearly appears that this is not an apartment house or hotel; that section 15014 of this code defines a "dwelling" as any structure other than an apartment house or hotel containing one or more "guest rooms"; that section 15019 defines a guest room as one designed for occupation by one or more guests; that it was necessary for the respondent to show that this structure contained a room or rooms occupied by one or more guests; and that while it clearly appears that this structure was designed for use, in part, for sleeping purposes there is no evidence that at any time material to this action any room therein was occupied by any guest. This structure contained two bedrooms and was admittedly used by the defendant for residence purposes. While the provisions of the Health

and Safety Code define a dwelling, among other things, as any structure containing one or more guest rooms, and define a guest room as meaning a room designed for occupation by one or more guests they also, in section 15018, define a guest as meaning any person who occupies a room for sleeping purposes. The appellant was a guest, and this structure was a dwelling, within the meaning of these code provisions.

[2] It is next contended that the provisions of the State Housing Act are unconstitutional as applied to the facts in this case, that the evidence here was insufficient to show the existence of a nuisance as defined in the State Housing Act, and that the provisions of the Health and Safety Code and the city ordinances preventing the repair of this building are unconstitutional since they are unreasonable and since they clearly constitute the taking of property without due process of law. It is argued that while these regulatory provisions may be reasonable and constitutional as applied to a large city like San Francisco, they may not reasonably be applied to a small town like Porterville. Regulatory provisions of this nature have been frequently upheld as being within recognized police powers and as being constitutional. Ex parte Fiske, 72 Cal. 125, 13 P. 310; McCloskey v. Kreling, 76 Cal. 511, 18 P. 433; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; Carter v. Stevens, 211 Cal. 281, 295 P. 28; Skinner v. Coy, 13 Cal.2d 407, 90 P.2d 296; Maguire v. Reardon, 41 Cal. App. 596, 183 P. 303. While a necessity for such regulations may be more apparent in larger cities it may also exist in smaller cities, and there is nothing in the evidence to indicate that the provisions here in question are unreasonable or unconstitutional as applied to the city of Porterville.

[3] It is next contended that the evidence is insufficient to support the judgment in that there was no satisfactory showing that this building had been damaged by the fire to an extent in excess of 60% of its physical proportions and in excess of 50% of its existing value. While the appellant testified to the contrary, the findings to this effect are fully supported by the testimony of the city's consulting engineer, the respondent building inspector, the district supervisor for the State District of Housing, the fire chief, and a general building contractor with fourteen years of building experience. Appellant's contention that the testimony of these witnesses is unsatisfactory because they testified in terms of percentages as to amounts of damage and as to values and costs, and failed to testify as to the exact number of square feet of the damaged portions as compared with the number of square feet of the undamaged portions, is without merit. In addition, a number of photographs were introduced in evidence which clearly show extensive fire damage to large portions of the building, including very considerable damage to supporting timbers or lumber. These photographs are sufficient in themselves to sustain these findings.

[4] It is further contended that there is no evidence showing that the respondent had the necessary authority to enforce the provisions of the State Housing Act, and no proper evidence of the mailing of notices as required by the Health and Safety Code. Not only were these matters admitted by the pleadings but they are sufficiently disclosed by the evidence.

We find nothing in the record which would justify a reversal, and the judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

109 Cal.App.2d 447

PEOPLE v. MARQUEZ.
Cr. 4658.

District Court of Appeal, Second District, Division 1, California.
Feb. 26, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Charles W. Fricke, J., of murder and of assault with a deadly weapon with intent to commit murder, and from the judgment and order denying motion for new trial, defendant appealed. The District Court of Appeal, Doran, J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law ⇐1159(2)

On appeal, on ground that evidence is insufficient to sustain conviction, question is whether record reveals substantial evidence to support conclusion reached by trier of fact.

2. Homicide ⇐250, 257(1)

Evidence sustained conviction for murder and for assault with a deadly weapon with intent to commit murder.

Algerdas N. Cheleden, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment and from the order denying a motion for a new trial.

Defendant was charged with murder and assault with a deadly weapon with intent to commit murder. A jury was waived. Defendant was adjudged guilty as charged on both counts. It is contended on appeal that the evidence does not support the judgment of such conviction and that each should be reduced in degree to murder of the second degree and assault with a deadly weapon, respectively.

The victim of the alleged murder was a fourteen-year old youth. The record does not reveal the age of the defendant.

As recited in respondent's brief, "During the day of December 22, 1950, appellant was at work at the Great Western Meat Company, where he was a butcher, being employed to bone beef. One Carmen Romero, who had know appellant for about two weeks, worked with him there. On this particular day they worked until 4:00 p. m., after which there was a company Christmas party at which whiskey was served. Having had a few drinks, they left at about 5:15 p. m. in Carmen's car. The appellant was walking and talking normally at this time but was apparently 'feeling good'. The appellant told Carmen that he wanted to go home. In the car, however, he told Carmen that he wanted to make a phone call. Carmen stopped the car, and appellant went to complete the call. On his return, appellant asked to be taken to a friend's house. They drove to Ruth Terronez's residence, Carmen parking the car on 12th Street near Central Avenue. They got out of the car, walked around the corner and up the back steps to the Terronez apartment. It was now about 6:40 p. m. and was getting dark. In the apartment they met some 'boys'. * * * Sebastian Avila, 14 years of age, Ruth's cousin, a person named Santos, 16 years of age, Josephine Marrujo, a high school girl, David Delgado, 17 years of age, Joe Holguin, Gregory Garcia, age 18, and Joe Garcia, 17 years of age."

Shortly afterward an argument took place which developed into a fight. The record reveals that defendant struck David Delgado in the face when, as recited in respondent's brief, "David's brother, Gregory, who was in another room, heard something fall, came in and saw David on the floor and attempted to assist him. He pulled appellant off David who appeared to be unconscious on the floor. A general altercation followed, but Santos and Sebastian remained out of the fight. The others piled upon appellant who was then on top of Gregory. Gregory had been knocked to the floor and appellant had jumped on him, threatening, 'I am going to kill you'. David, Carmen and Joe Holguin then pulled appellant off Gregory. Joe Garcia was also knocked down in the fight. Appellant re-

sumed his attack upon David; so Gregory obtained a small rifle butt which he had noticed on the back porch and struck appellant who then had David on the floor beating and cursing him. After a few blows of the rifle butt, appellant let David go.

"Carmen took no part in the fight. * * He went to the service porch where he saw the fighting going on. At this time appellant was on the floor. Carmen took hold of appellant and pulled him away. At this point they were on the landing at the top of the rear stairs, and appellant and Carmen made their exit down them. Carmen noticed blood on appellant's face and the back of his head. They went to Carmen's car at a gait described as 'trotting along'. In getting to the car, they went to the Birch Street side of the house, thence to the corner, and finally traveled the fifty yards from the corner to Carmen's car which was parked on 12th Street.

"Carmen entered the driver's side of the vehicle and appellant the passenger's side. Appellant said, 'They are after us.' Appellant reached into his tool box, which he had placed in the back seat of the vehicle after leaving work and withdrew his hand. The tools in the tool box were the various knives used in the butcher's trade, consisting of boning knives and steak knives. * * *

"After taking his hand out of the box, appellant left the car, and Carmen immediately drove away. Appellant did not have a knife in either hand before reaching the car. Carmen saw appellant retrace his steps and return around the corner walking". It was at this point that defendant stabbed the deceased and cut the victim of the assault with a deadly weapon.

It is argued by appellant that in the second offense, "The evidence fails to establish a specific intent to murder Esperanza Sierra". And, in the first offense it is argued that "The evidence is insufficient to establish deliberation and premeditation."

[1, 2] It would serve no purpose to quote from the many decisions on these questions; the law is well established. Obviously, opinions as to matters of degree may differ in any case and the within appeal is no exception. However an appellate tribunal, in such circumstances, is confronted with but one question, namely, does the record reveal substantial evidence to support the conclusion reached by the trier of fact. A careful review of the record shows this to be so hence, the judgment and order must be affirmed.

It is so ordered.

WHITE, P. J., and DRAPEAU, J., concur.



109 Cal.App.2d 498

GIACOMAZZI v. ROWE.

Civ. 14712.

District Court of Appeal, First District, Division 2, California.

Feb. 28, 1952.

Action for declaration of interest in certain real and personal property on theory that property was community. The Superior Court, County of Santa Clara, John D. Foley, J., found that real property was separate property of defendant, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that where wife had stated by allegation in divorce complaint that there was no community property, and had previously represented in letters to husband that she would assert no claim to property, and husband in reliance thereon had permitted divorce to go without contest and had made substantial improvements on property, wife was thereafter estopped from asserting claim.

Judgment affirmed.

1. Husband and Wife ⇐249

The character of property as separate or community is to be determined by its status as of time of its acquisition.

2. Husband and Wife ⇐265½

Where wife had stated by allegation in divorce complaint that there was no community property in which she claimed an interest, and had previously represented

by letters to husband that she would assert no claim to property, and divorce had been granted without contest, and substantial improvements made, in reliance thereon, wife was estopped from thereafter asserting claim to any part of property.

3. Husband and Wife ⇐266

A husband and wife may orally agree to transmute their property from community to separate or from separate to community, and express agreement for such purpose is not necessary when one party has performed all that he promised to perform and other party has accepted all the benefits.

C. W. Ricketts, Los Gatos, for appellant.

Forrest L. Bentzien, Santa Clara, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for a declaration of interest in certain real and personal property asking that an undivided one-half interest therein be awarded her on the theory that said property was community.

The parties were formerly husband and wife having been married in December, 1936. They were divorced by a consent decree entered in the State of Nevada on January 17, 1944. Prior to the marriage the defendant purchased a piece of realty in the County of Santa Clara. The total consideration agreed to be paid was $2,200 of which defendant paid approximately $325 before the marraige. Also before the marriage defendant improved the property to the extent of $700. A deed of trust covering the balance due on the purchase price was renegotiated after the marriage and the balance was paid by the defendant from his earnings while the marriage was still in force. Defendant contended that prior to or pending the divorce proceedings plaintiff urged defendant to permit her to obtain a divorce without contest and promised him in writing that she would make no claim upon the property in suit. In her complaint for divorce she alleged that there was no community property; the answer of the husband admitted that fact and he made no contest. Subsequent to the divorce and in reliance upon this assurance defendant remodeled and improved the property at an approximate cost of $3,000.

The trial court found that the real property was the separate property of the defendant since the character of the property is to be determined by its status as of the time of its acquisition. The court's award to plaintiff of a community interest in certain designated personal property is not contested herein.

[1] The principal question argued upon this appeal is whether the rule relied upon by the trial court that the character of property is to be determined by its status as of the time of its acquisition is applicable here. Respondent relies upon Siberell v. Siberell, 214 Cal. 767, 770, 7 P.2d 1003; In re Miller, 31 Cal.2d 191, 197, 187 P.2d 722; Palen v. Palen, 28 Cal.App.2d 602, 83 P.2d 36; Kenny v. Kenny, 97 Cal.App.2d 60, 65, 217 P.2d 151, and similar cases which support this general statement that the character of property, whether separate or community, is to be determined by the status existing at the time it was acquired. There seems to be a uniformity of decision in support of the rule stated. 11 Am.Jur., p. 187, states the rule supported by numerous citations. There it is said: "The status of property as separate or community property is fixed as of the time when it is acquired. The word 'acquired' contemplates the inception of title, and as a general rule the character of the title depends upon the existence or nonexistence of the marriage at the time of the incipiency of the right by virtue of which the title is finally extended and perfected; the title when so extended and perfected relates back to that time. Stated in another way, the status of title, as belonging to one estate or the other, is determined by the status of the original right, subsequently matured into full title. Under this rule, property to which one spouse has acquired an equitable right before marriage is separate property, though such right is not perfected until after marriage. Thus, property purchased by one spouse before marriage is separate property, though the deed therefor is not executed and delivered until after marriage, and this is true though a part of the pur-

chase price is not paid until after marriage, in the absence of a showing that any part of the balance was paid with community funds; in any event it would be community property only to the extent and in the proportion that the purchase price is contributed by the community. Accordingly, the fact that the title to land owned by a man at the time of his marriage was not perfected by a conveyance from the source of paramount title until after that event does not destroy its character as a separate estate. Property bought before the marriage under a suspensive condition by one of the spouses remains his or her separate property, though the condition is realized after the marriage."

Appellant relies on Vieux v. Vieux, 80 Cal.App. 222, 251 P. 640; Maskuns v. Maskuns, 93 Cal.App. 27, 268 P. 1093; Estate of Ball, 92 Cal.App.2d 93; Berniker v. Berniker, 30 Cal.2d 439, 182 P.2d 557; and similar cases all to the same purport, except the Berniker case, holding that when the husband before marriage had merely an inchoate right, such as a contract to purchase, and during coverture made the purchase out of community funds the property so acquired became community property. In the Berniker case the property was acquired some ten years after the marriage and during coverture at public sale for the benefit of creditors. The holding in that case was that though the father of the husband had taken title at such sale in his name he held as trustee for the community, the wife having testified that she saw her husband hand the purchase price to his father and that such money came from the community earnings. No other authorities are cited which are directly in point, but the fairer rule would appear to be that stated in the paragraph heretofore quoted from American Jurisprudence that, in the absence of a contrary agreement, the community interest runs to the proportion of the purchase price contributed by the community.

[2] However, if we may assume that a community interest was created by the use of community earnings, there remains the question whether such interest was waived by the wife by her express agreement before the divorce, supported by her allegation in the complaint for divorce that she claimed no such interest. By letters addressed to respondent urging him not to contest her action for a divorce she stated that she made no claim to any of the property and would seek no financial award of any kind. In her complaint filed in the Nevada court she alleged that there was no community property.

This issue was well pleaded in defendant's answer where he alleged:

"That plaintiff herein, formerly Florence E. Rowe, requested that defendant, Philip James Rowe, consent to a divorce action so that plaintiff could have her freedom; that said Florence E. Rowe promised defendant, Philip James Rowe, that she would not seek support money and that she would not set forth any claim to any of the property then held by the parties.

"That relying on the representations of plaintiff the defendant consented to the divorce."

The evidence on this issue is not altogether satisfactory but it is sufficient to have supported a finding of estoppel by contract. It is beyond question that the respondent relied on such representations and consented to the divorce because of them. On her first cross-examination the appellant denied that any agreement as to the property was made prior to the divorce. Being recalled she testified:

"Q. Did you ever make a statement to Mr. Rowe, your husband, that you didn't want anything from him at any time, either prior to or after you got the divorce?

* * * * * *

"A. Yes, I did tell him that I didn't want anything.

"Q. When, and where? A. Well, it would be in letters, because I didn't see him; but I don't know when.

"Q. After the divorce? A. No, before the divorce.

"Q. You told him you didn't want anything prior to the time you got the divorce? A. That's right."

Later on, being again recalled for cross-examination, she denied all this testimony.

The respondent testified that he had received from appellant three separate letters urging him not to contest the divorce and assuring him that she would make no claim to property, suit money or counsel fees. A similar letter had been sent by her Nevada attorney urging a default. This was followed by the allegation in appellant's complaint for divorce that there was no community property and respondent's answer admitting that fact. Appellant first testified that she sent such letters to the respondent and later she denied it.

A significant circumstance supporting respondent's claim is that the Nevada divorce was obtained on January 17, 1944; that her complaint in this action was filed on November 7, 1946, and that between those periods the respondent had improved the real property with his separate funds to the extent of $3,000. Manifestly if he had known that appellant was going to assert a claim against that property he could have invested the $3,000 to a much better advantage.

The trial of this issue went upon the wrong course. Counsel for appellant insisted that the issue was whether the Nevada court had jurisdiction to test the question of property rights and the trial court agreed with him. An opinion was filed treating the question of jurisdiction, but no finding was made on the facts relating to the plea of estoppel. Though denying her letters (which she knew had been lost), appellant could not deny the allegations of her complaint and her verification of the fact that "there was no community property." Respondent's answer, admitting that allegation, confirmed a contract between the parties that they held no community property—not merely within the State of Nevada but none at any place.

[3] It is in evidence that the husband's answer in the divorce case was prepared by Nevada counsel unknown to him and so, presumably, at the suggestion of the wife. There can be no question therefore of misunderstanding or overreaching. The parties knew what they wanted and acted accordingly. They followed a rule of law which has been frequently announced in recent decisions—that husband and wife may orally agree to transmute their property from community to separate or from separate to community. The leading case so holding is Tomaier v. Tomaier, 23 Cal.2d 754, 757, 758, 146 P.2d 905, and it has been consistently followed down to Estate of Wieling, 37 Cal.2d 106, 223 P.2d 55.

It was suggested in the oral argument that there was no express agreement of waiver. We cannot follow the suggestion. But, even so an express agreement is not necessary where one party has performed all that he promises to perform and the other accepts all the benefits. In the Wieling case, supra [37 Cal.2d 106, 223 P.2d 56] there was less direct evidence of a contract than there is here. There the husband and wife purchased with community funds seven parcels of realty taking title in the name of the husband alone. Then the wife stated that she was going to purchase additional lots in her own name until she had acquired an equal number (or equal value) then "I am going to have half of it in my name and half in your name, and we each have our own property * * *." To this the husband demurred saying, "Why wasn't it good enough to keep all of it in the community?" Nothing further was said or done by the husband indicating assent to the plan. The wife purchased four new parcels taking title in her own name. Both died at about the same time. In a contest by the heirs, the Supreme Court held that the evidence was sufficient to support the conclusion that the parties had orally agreed to transmute their community property into separate property. The wife's heirs were then held estopped from claiming a community interest in the seven lots first purchased, but they were awarded a judgment holding that the four lots taken in the wife's name were her separate property because of this "agreement."

We are not concerned here with the question of the power of the Nevada court to litigate the property rights in this state. We treat the allegation in the divorce complaint as an affirmance under oath of appellant's former agreement waiving all community interest, and respondent's default as an acceptance of the offer and hence a contract of transmutation or waiver.

The evidence is such that if a finding had been made it should have supported respondent's plea of estoppel. It would not advantage appellant to reverse the judgment for such a finding in view of the court's disposition of the personal property.

Judgment affirmed.

GOODELL, J., and JONES, J. pro tem., concur.



109 Cal.App.2d 450

PEOPLE v. SCHWARTZ.

Cr. 4664.

District Court of Appeal, Second District, Division 1, California.

Feb. 26, 1952.

Rehearing Denied March 10, 1952.

Hearing Denied March 24, 1952.

Defendant was convicted in the Superior Court of Los Angeles County, Orlando S. Rhodes, J., of illegal possession of narcotics in form of morphine, and his motion for new trial was denied, and he appealed. The District Court of Appeal, White, P. J., held that defense of entrapment was not made out when law enforcement officers had merely created opportunity for defendant to apply his trade, and had not lured defendant by trickery, persuasion or fraud into perpetration of offense which defendant would not have otherwise perpetrated.

Order denying new trial affirmed.

1. Criminal Law ⇐37

Entrapment is the conception and planning of offense by officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer.

2. Poisons ⇐9

Evidence sustained conviction for illegal possession of narcotics in form of morphine. Health and Safety Code, § 11500; Pen.Code, § 995.

3. Criminal Law ⇐37

Where officers had been informed by third person of her dealings with defendant, fact that officers located such third person in apartment in order to facilitate delivery of narcotics to her by defendant, did not amount to entrapment when defendant was apprehended in possession of narcotics, since the possession of contraband narcotic and formation of intent and purpose to violate law existed prior to arrangements made by officers.

4. Criminal Law ⇐37

Where accused has pre-existing criminal intent, fact that when solicited by decoy he committed crime raises no inference of unlawful entrapment.

5. Criminal Law ⇐37

In prosecution for illegal possession of narcotics in the form of morphine, wherein it appeared that officers had established third person, who was acquainted with defendant, in apartment, and that such third person had been prompted to contact defendant, and that defendant had thereupon been apprehended as he was delivering narcotics, evidence warranted inference by jury that defendant was not persuaded or lured, but that he willingly committed offense charged against him and assumed chance of apprehension.

6. Criminal Law ⇐330

The defense of entrapment is a positive one and imposes upon accused the burden of showing that he was induced to commit act for which he is on trial.

Morris Levine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In two counts of an information filed by the District Attorney of Los Angeles County, defendant was accused of violating section 11500 of the Health and Safety Code. Count I charged illegal possession of a narcotic in the form of morphine,

while Count II alleged the sale of a quantity of morphine. A motion to dismiss under section 995 of the Penal Code was granted as to Count II and denied as to Count I. Following entry of a plea of not guilty as to Count I, the cause proceeded to trial before a jury which returned a verdict finding defendant guilty as charged.

A motion for a new trial and arrest of judgment was interposed and denied. Proceedings were suspended and defendant was granted conditional probation. This appeal is from the order denying his motion for a new trial.

The ground upon which the appeal herein is predicated makes it necessary to epitomize the factual background surrounding this prosecution. The record reveals that on June 15, 1950, one Bonnie Whitcomb, described by Officer Jones as "known to me as a narcotic user" was confined in the Los Angeles County Jail on "suspicion of narcotic addiction and use". Miss Whitcomb had known the defendant for some two or three years on terms described by her as "hardly" business. She testified, "Sometimes I didn't see him for a long time. Occasionally I saw him once a week or more often than that sometimes".

On June 15, Deputy Sheriff Jones, assigned to the narcotic detail of the Sheriff's office, went to the county jail where Miss Whitcomb was incarcerated as aforesaid. There he held a conference with her which revolved around her association and dealings with defendant. Miss Whitcomb was indebted to the latter in the sum of approximately $200.00. On that evening Officer Jones took Miss Whitcomb from the jail to a cafe on Sunset Boulevard where they had dinner. While at the cafe Miss Whitcomb, in the presence of the officer, telephoned defendant. Upon completion of the telephone call Miss Whitcomb turned to Officer Jones and said that "the deal was on for 2:00 tomorrow afternoon". At the appointed time Officer Jones took Miss Whitcomb from the county jail to the Tropicana Motel in Los Angeles County where she resided in Apartment 121. Assisting and participating in this investigation were Federal Agent Carpenter and Deputy Sheriffs Smith, Farrell, Shelton, and May, the latter being a woman deputy sheriff.

Upon arrival at the motel about two o'clock Miss Whitcomb was immediately taken to her apartment.

It might here be stated that a prosecution was then pending against Miss Whitcomb in the then existing Beverly Hills Justice Court, and according to her testimony, the reason she called defendant and asked him to come to her apartment was that Officer Jones had promised her that if she "could get Mr. Schwartz (defendant) to come over and see you, that he (Officer Jones) would arrange to have a certain case that was pending in the Beverly Hills court against you dismissed".

When Miss Whitcomb was taken to her apartment, as aforesaid, she had in her possession $400 in marked currency given her by the officers. The latter stationed themselves in apartment 120 near a door connecting with Miss Whitcomb's apartment, with the exception of deputies Shelton and Farrell who took up positions outside the motel. The officers in apartment 120 listened at the connecting door while Miss Whitcomb spoke and determined that they could hear conversation in her apartment.

At 2:30 p. m. defendant arrived in an automobile. His approach was witnessed by Deputy Shelton who had taken up a position across the street from the motel. From this position he could see the doors to both of the aforesaid apartments. Defendant drove west on Santa Monica Boulevard, past the motel to Westbourne Drive, the next intersection. He crossed the tracks on Santa Monica Boulevard at that intersection, returning east to La Cienega Boulevard. He again crossed to the opposite side of Santa Monica Boulevard, traveling west until he reached the aforesaid motel, where he stopped. He emerged from the driver's side of his vehicle and entered room 121. At that time he was carrying nothing with him.

From the next room the officers heard defendant's knock. The door opened and the following conversation ensued:

"Miss Whitcomb: You're late, Phil. Defendant Schwartz: I got held up.

"Miss Whitcomb: Did you bring the stuff? Defendant: I could only get a hundred. Have you got the money?

"Miss Whitcomb: Yes, I got the money. Defendant: Well, how about the money that you owe me. It is $170.

"Miss Whitcomb: No, it was $160. Defendant: Well, I will settle for $150. Give me another hundred for the hundred.

"Miss Whitcomb: How about the rest of the stuff? Defendant: Well, I'll get it later. I'll give you a hundred tomorrow. I'll give you the rest later. I'll go get the stuff."

Thereupon, defendant left the room and the door closed behind him. About five minutes had elapsed since he left his car. He then returned to his automobile, opened the front door, and reaching over the front seat lifted out a bound catalog. Defendant shut the vehicle door and returned to Miss Whitcomb's apartment where he was intercepted by Deputy Sheriff Jones. When defendant had left the room he was not carrying anything, but when approached upon his return was carrying the aforesaid catalog under his right arm. The officer told defendant he was under arrest and asked him if he had any narcotics, to which he replied that he did not. A search of his person disclosed $250.00 of the marked bills originally given Miss Whitcomb. A search of the catalog revealed a small white bottle labeled "Saccharine" containing white pills.

Deputy Sheriff Jones asked defendant where he had obtained the saccharin. He told the officers that approximately one week prior to June 16 someone had broken into his automobile; that pills had been scattered throughout his car; that he believed the pills to be saccharin; that he gathered them together and placed them in the bottle. He stated that the bottle contained saccharin which he used as a sample in his capacity as a drug salesman, using the bottle to demonstrate the type of saccharin dispensed by his firm. When asked about the money found in his possession defendant stated that he had received $250 from Miss Whitcomb; that the entire amount was for a debt she owed him.

Defendant told Federal Agent Carpenter that the bottle contained saccharin. When Federal Agent Carpenter remarked that the tablets did not look like saccharin, defendant replied, "Well, it is saccharine".

The aforesaid bottle taken from defendant was initialed by Deputy Sheriff Shelton and Deputy Sheriff Jones placed it in a large white envelope which he sealed and delivered to the criminological laboratory of the sheriff's office. Clifford C. Cromp, a qualified expert forensic chemist, opened the sealed envelope and analyzed five of the 100 tablets contained in the bottle. The five tested were similar in size, shape and appearance to the others therein contained, which were described as small and white. From his analysis, the expert concluded that each of the five contained the narcotic substance morphine.

When again interrogated at the sheriff's substation, defendant repeated the statements made at the scene of his arrest. When asked the purpose of his visit to Miss Whitcomb's apartment he answered that she was a friend, and that he merely dropped in to see her on a social visit.

Defendant did not testify in his own behalf. He offered but one witness, a druggist, who testified that he knew defendant as a drug salesman, and that saccharin came in bottles like the one taken from defendant by the officers.

Called as a witness for the prosecution, Miss Whitcomb testified that she made arrangements for appellant's visit to her in cooperation with the sheriff's office and that she gave defendant the marked money. However, she denied that she knew what defendant was to deliver to her. Her testimony was to the effect that the only conversation between herself and defendant concerned money she owed him, in the sum of $200.00. That this indebtedness grew out of her previous purchase of sun glasses and other items, the nature of which she could not remember. She also testified that she had borrowed money from the defendant. According to her testimony, she was under such a strain during her

part in the transaction aforesaid that she could not remember all that was said between her and defendant.

The sole ground urged by appellant for a reversal of the order denying his motion for a new trial is that his arrest constitutes entrapment as a matter of law and therefore voids the conviction.

Succinctly stated, the situation with which we are here confronted is that law enforcement officers were informed by Bonnie Whitcomb of her dealings with appellant. Upon receipt of this information the officers furnished appellant an opportunity to commit the offense charged. Does this constitute unlawful entrapment as that term is known to the law? We think not.

[1–4] Entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer. In other words, persuasion or allurement must be utilized to entrap. People v. Hall, 133 Cal.App. 40, 45, 23 P.2d 783. In the instant case it appears that the officers merely employed a strategem for the purpose of apprehending a person already engaged in criminal activities. Therefore, no case of unlawful entrapment is made out. In the case now engaging our attention, the possession of a contraband narcotic and the formation of the intent and purpose to violate the law existed before the officers became aware of the situation through the aforesaid Bonnie Whitcomb. The arrangements made by the officers were designed only to apprehend appellant in the furtherance of his criminal enterprise. Stein v. U. S., 9 Cir., 166 F.2d 851. There is ample testimony in the evidentiary narrative hereinbefore set forth to justify the jury in concluding that appellant was a willing seller of narcotics, and his conviction is not vitiated merely because enforcement officers or their agent became the willing buyer and merely created the opportunity for appellant to ply his trade. People v. Cherry, 39 Cal.App.2d 149, 152, 154, 102 P.2d 546. It is not the entrapment of a criminal upon which the law frowns, but the seduction of innocent people into a criminal career by its officers is what is condemned and will not be tolerated. Where an accused has a pre-existing criminal intent, the fact that when solicited by a decoy he committed a crime raises no inference of unlawful entrapment. People v. Lindsey, 91 Cal.App. 2d 914, 916, 918, 205 P.2d 1114; People v. Cherry, supra, 39 Cal.App.2d at pages 152, 154, 102 P.2d 546; People v. Rucker, 121 Cal.App. 361, 364, 8 P.2d 938; People v. Grijalva, 48 Cal.App.2d 690, 121 P.2d 32; People v. Crawford, 105 Cal.App.2d 530, 536, 537, 234 P.2d 181.

[5] "Especially is this true in that class of cases where the offense is one of a kind habitually committed, and the solicitation merely furnishes the evidence of a course of conduct", 16 Corpus Juris, 88, 89, 22 C.J. S., Criminal Law, § 45. The case at bar is barren of evidence of any element of unlawful entrapment. The jury was warranted in inferring that appellant was not *persuaded or lured,* but that he willingly committed the offense charged against him and assumed the chance of apprehension.

Furthermore, the defense of entrapment is a positive defense imposing upon an accused the burden of showing that he was induced to commit the act for which he is on trial. People v. Grijalva, supra, 48 Cal. App.2d at page 694, 121 P.2d 32. To invoke the defense it must necessarily be assumed that the act charged as a public offense was committed. In the instant case, appellant did not take the stand in his own defense. In the court below he made no claim that he committed the crime charged but was induced, lured, persuaded or inveigled into having in his possession the morphine tablets in question. His claim in that regard lacks substance here. People v. Lee, 9 Cal.App.2d 99, 109, 48 P.2d 1003.

For the foregoing reasons, the order denying defendant's motion for a new trial is affirmed.

DORAN and DRAPEAU, JJ., concur

109 Cal.App.2d 388

In re HAYWOOD'S ESTATE.

MASTERS v. HAYWOOD.

Civ. 14997, 14998.

District Court of Appeal, First District, Division 1, California.

Feb. 25, 1952.

Proceeding in the matter of the estate of Clinton Walter Haywood, deceased, on petition filed by Wallace T. Masters to probate decedent's will and contest and petition for letters of administration filed by Howard E. Haywood. The Superior Court, Alameda County, O. D. Hamlin, J., entered judgment admitting the will to probate and an order denying petition for letters of administration and contestant appealed. The District Court of Appeal, Peters, P. J., held that the findings that testator was mentally competent to make will and was not acting under undue influence were supported by the evidence.

Judgment affirmed.

1. Wills ⇐55(1)

Finding that a widower, 79 years of age, was mentally competent to make a will leaving his entire estate to a nephew to the exclusion of testator's son was amply supported by the evidence.

2. Insane Persons ⇐30

A guardian may be appointed of a person fully competent to make a will.

3. Wills ⇐35

A judicial finding in proceeding for appointment of a guardian that respondent was competent to handle his own affairs was at least equivalent to a finding that he was competent to make a will.

4. Wills ⇐55(9, 10)

Evidence that testator understood what he was doing when he executed will and knew the nature and extent of his property and who his relatives were and his relationship to them was sufficient to establish testamentary capacity

5. Wills ⇐31

Mental derangement sufficient to invalidate a will must be either insanity of such broad character as to establish mental incompetency generally or some specific form of insanity under which testator is the victim of some hallucination or delusion which had a direct influence upon the testamentary act so that testator devised or bequeathed his property in a way which, except for such hallucination or delusion, he would not have done.

6. Wills ⇐55(3)

Hallucination that deceased wife had directed testator to disinherit son and evidence that testator believed, probably mistakenly, that son was a drunkard did not compel a finding of want of testamentary capacity, in view of other evidence of ill feeling and misunderstandings between testator and son and testator's lack of confidence in son.

7. Wills ⇐400

In will contest, all questions of the weight of the evidence and the credibility of witnesses are for jury and trial court, and a finding or verdict supported by substantial evidence cannot be set aside by reviewing court, though such court might believe the great preponderance of the evidence was the other way.

8. Wills ⇐400

Where the evidence and reasonable inferences therefrom were conflicting on the issue of testamentary capacity, trial court's determination that testator was mentally competent to make will was conclusive on appeal.

9. Wills ⇐155(1)

To constitute "undue influence", the evidence must show that the person charged exercised such control over testator that his mind and will were subjugated to the will of the person unduly benefiting from provisions of will.

See publication Words and Phrases, for other judicial constructions and definitions of "Undue Influence".

10. Wills ⇐324(3)

Evidence that person charged with exercising undue influence had an opportunity to control testamentary act, that testator's condition was such as to permit of a subversion of his freedom of will, that

there was activity by person charged with exercising undue influence and that such person unduly profited as beneficiary under will is required in will contest to raise a question of fact as to undue influence.

11. Wills ⇐166(1)

In will contest, evidence of undue influence must show that pressure was brought to bear directly upon the testamentary act.

12. Wills ⇐166(1)

Record in will contest amply supported finding that testator had independent legal advice in drafting will.

13. Wills ⇐166(8)

In will contest, evidence, though sufficient to support a finding that testator's mental and physical condition was such as to permit subversion of his will, did not compel the conclusion that his will was in fact subverted.

14. Wills ⇐166(2)

Evidence was sufficient to repel presumption of undue influence arising from any confidential relationship existing between testator and sole beneficiary under will and amply supported finding that will was not the result of undue influence.

Price, Macdonald & Knox and Allen Grimes, all of Oakland, for appellant.

Paul D. Morse, Oakland, for respondent.

PETERS, Presiding Justice.

Clinton W. Haywood died on July 6, 1950. By a will executed on August 7, 1947, he left his entire estate, valued at about $7,000, to Wallace T. Masters, his nephew, and disinherited his son, Howard E. Haywood. Howard filed a petition alleging that his father had died intestate and requesting letters of administration. A few days later Wallace filed a petition to probate the will of August 7, 1947, and also filed opposition to Howard's petition for letters of administration. Howard filed a contest to Wallace's petition, alleging lack of testamentary capacity and undue influence. The court admitted the questioned will to probate, appointed Wallace executor, and denied the petition of Howard. Howard appeals from the judgment admitting the will to probate and granting letters of administration to Masters, and from the order denying Howard's petition for letters of administration. The two appeals have been consolidated. The basic contention made is that the evidence is insufficient to support the findings.

The Pertinent Facts.

The decedent, aged about 82, died on July 6, 1950, he then being a widower, his wife having died in December of 1946. He left an estate consisting primarily of a house and lot. At the time of his death he had four heirs, one being his son Howard, the appellant, and three nephews, one of whom is Wallace Masters, the respondent.

The decedent, then about 79, executed two wills in 1947, in both of which Masters was named sole beneficiary, and Howard was disinherited. In 1947, Howard was 52 years of age. The evidence shows that prior to 1947 there had been a long period of friction between the decedent and his son. Howard had left home to join the army when he was but 17 years of age, and this was done against the wishes of his father. Upon his return from the war Howard lived with his parents, but there were differences and disagreements with his father. In 1928, Howard married. His father did not approve of this marriage, and did not like Howard's wife—a dislike which became increasingly intense. In 1946, or early 1947, Howard and his wife separated. He was then unemployed because of a strike, and asked his father if he could come and live with him. The father consented, on condition that Howard would pay one-half the expenses of the household. At that time decedent was living in his own home, attended by a housekeeper, and his sole income was a $60 a month old age pension.

Wallace Masters, the respondent, and nephew of decedent, testified that he and his wife did not particularly like decedent's wife, so that in 1945 and 1946 he visited decedent only a few times, and the decedent did not visit him at all. But after the

death of decedent's wife in December, 1946, and during 1947, the visits of Masters became more frequent and occasionally decedent visited the Masters' home. The relationship became increasingly friendly, and the decedent depended upon Wallace to handle his few business affairs. Thus Wallace, after the death of Mrs. Haywood, filed the necessary papers with a fraternal organization to secure the insurance benefits; he secured for decedent an attorney to terminate the joint tenancy in the family home; he supervised the securing of a fire insurance policy; he looked out for the taxes; and paid one or two accounts. The decedent clearly had trust and confidence in Wallace and his judgment, and had no such trust and confidence in his son.

The decedent executed two wills, one on May 13, 1947, and the second on August 7, 1947. Both were drafted by attorneys. They are substantially the same in that in both Masters is bequeathed the entire estate. In the first will Howard is completely disinherited; in the second he is bequeathed $1.00.

The first will was drafted by attorney Meinhold. Meinhold was selected by Masters, was his attorney, and drafted the will from instructions given to him by Masters. He never saw or consulted with the testator. Masters testified that he had these services performed at the request of the decedent; that late in March or early in April, 1947, he visited decedent, at his request; that decedent stated that he wanted to draft a will in which he wanted Howard to get nothing. The decedent gave as reasons for wanting to disinherit his son that he felt that Howard would waste anything received on drink, and that Howard was not able to handle financial matters. The decedent at first said nothing about a beneficiary. Masters called this omission to his attention, telling him that he could leave his property to anyone he wanted, and suggested leaving it to a union that decedent had once helped to organize, or to the state, or to charity. The decedent replied that he wanted to leave his property to Masters. Masters told the decedent to think it over, and no decision was then made. A short time later, in early April, 1947, the decedent called Masters and insisted that a will be drawn naming Masters as beneficiary. When Masters asked the decedent about an attorney, the decedent told him to take care of it. Masters then had Meinhold prepare the will, and mailed it to the decedent, together with instructions for its execution. This will must have been received by the decedent towards the end of April, 1947. The decedent kept the will unexecuted for several weeks, and then telephoned to Masters and requested him to supervise its execution. Masters thereupon called on the decedent and the two then visited the Arnetts, neighbors, and asked them to witness it. The Arnetts first read the will aloud to the decedent and he stated that he understood its provisions, and then the Arnetts signed it as witnesses. The decedent then turned the will over to Masters, together with some other documents, and requested him to keep them in his, Masters', safe.

Howard, who was then living with his father, saw the will on his father's dressing table and read it. It was then unexecuted. Prior to this, he had seen and read the letter of instructions sent by Masters. Howard did not mention the will to his father, but on April 28, 1947, almost immediately after reading the will, filed a petition for letters of guardianship of the person and estate of his father on the ground of incompetency. The decedent filed opposition to this petition in which he denied his incompetency and alleged that Howard was not a fit and proper person to be guardian and that Masters was such a person. Hearings were had on June 19th, and August 6, 1947. At the conclusion of the last hearing the trial judge denied Howard's petition from the bench, stating that he found that the decedent was not incompetent. The trial judge also stated that he did not think the will that had been executed on May 13, 1947, would stand up in the face of a contest. Findings were waived and a formal order denying the petition was entered August 26, 1947.

During the first hearing of this guardianship proceeding held on June 19, 1947, the decedent was asked if he had signed the first will. He replied that he had not.

Masters was apparently not in court when this testimony was given, although his wife was then present.

On August 7, 1947, the day after the conclusion of the guardianship proceedings, the second will was executed. This will was drafted by Blaine, then an attorney, now a judge of the Municipal Court. Blaine testified that the decedent came to his office alone, told him that he wanted a will drafted, and how he wanted to leave his property. The will was then drafted and executed in Blaine's office, Blaine and his secretary acting as witnesses. Blaine did not know the decedent before he came into the office on August 7, 1947, but early that morning, or late the night before, he had received a telephone call from attorney Morse, decedent's attorney in the guardianship proceeding and Masters' attorney in this proceeding, and that Morse had told him that his client, Clinton Haywood, wanted to draw a will and that he, Morse, felt he should not draft it, and requested Blaine to do so. Blaine agreed. He testified that it was his best recollection that Morse did not mention the name of Masters in this telephone conversation. He also testified that when he drafted the second will he knew nothing about the first will. Blaine could not remember what the decedent told him about the reason why he was cutting off his son, but had a general impression that the decedent gave him some good reasons.

Masters testified that after the hearing on August 6th, he accompanied the decedent and attorney Morse and his associate to lunch, and then took the decedent home. Masters knew nothing about the proposed visit to Blaine's office, arranged by Morse, and had nothing to do with those arrangements. He received a copy of the second will about three or four days after it was executed, but did not see the original, which had been kept by Blaine, until after decedent's death.

On the issue of mental competency, Blaine and his secretary testified that, in their opinion, the testator was competent to make the will of August 7, 1947. Masters and his wife testified that the testator knew the nature of his property and who were the natural objects of his bounty. It was their opinion that he was sane on August 7, 1947. Olive Lawrence, the financial secretary of a fraternal order, had known the Haywoods for twenty years. She had seen the testator up to December, 1946, about once a month, but thereafter saw him only twice, once in February, 1947, and sometime in 1950. In her opinion, the testator was "very alert" and mentally competent.

As opposed to this testimony, there is much evidence that would have supported a finding, had it been made, that the testator was mentally incompetent. Dr. Adams so testified. On August 5, 1947, he had given the testator a psychiatric examination, apparently in preparation to testify at the guardianship hearing. His examination convinced him that the testator was then of unsound mind; that he was suffering from general and cerebral arteriosclerosis, was confused, his memory was impaired, and he was suspicious, including a paranoid reaction. He was definitely of the opinion that on August 5, 1947, the testator was not competent to make a will. The doctor admitted, however, that the testator then knew his relatives, knew that he had a son and nephew, and knew that he owned the house where he lived. He told the doctor that he intended to disinherit his son because he was not sure of his son's business judgment, and because he was drinking too much.

Several practical nurses, who had worked for the testator before and after he executed the second will, gave it as their opinions that the testator was not competent. They testified as to some filthy and untidy personal habits of the testator, as to accusations made by him against neighbors, and others, that were false, as to false accusations made by him against Howard, and as to other peculiarities. All of these witnesses, however, admitted that the testator was never confused as to who his relatives, friends and neighbors were, and that he knew that he owned the house. There is substantial evidence that the accusation made by the testator that his son drank to excess was false.

There is also evidence to the effect that on two occasions the testator made statements indicating that he had delusions. On August 6, 1947, at the conclusion of the guardianship hearing, Howard asked his father why he wanted to disinherit him. His father replied: "I was dreaming about Mattie [his deceased wife], and she told me to give it to Wallace, because you had been cheating me." This was testified to by Howard and by a third person who was present. Dr. Adams testified that on August 5, 1947, during the psychiatric examination, the testator told him that at some undisclosed time in the past, while he was walking on a road, a headless animal resembling a wolf appeared and then suddenly disappeared. This hallucination was not related to the will in any way.

The evidence is clear that for many years the testator did not like his son, and frequently expressed this disapproval to many persons.

The Findings.

On this evidence the trial court found, so far as the points raised on this appeal are concerned, that on August 7, 1947, the decedent was of sound mind, was not acting under any fraud, duress, menace, or undue influence of Wallace Masters or any other person, and was fully competent to dispose of his estate by will; that Blaine was not the attorney for Masters, and did not know or meet him until after the death of decedent.

The Finding of Mental Competency is Supported by the Evidence.

[1–5] The finding that the decedent had sufficient competency to make the will of August 7, 1947, is amply supported. The record shows a judicial finding of competency as of August 6, 1947, in the guardianship proceeding. This was the day before the will was executed. That was a finding that a guardian should not be appointed and that the testator, as of that date, was competent to handle his own affairs. A guardian might be appointed of a person fully competent to make a will, so that a finding that the testator was competent to handle his own affairs is certainly equivalent to a finding that he was then competent to make a will. In addition, although the evidence is highly conflicting on the issue, there is ample, substantial and credible evidence that the testator understood what he was doing when he executed the will, knew the nature and extent of his property, and knew who his relatives were, and his relationship to them. That is all that is required. In Re Estate of Smith, 200 Cal. 152, 158, 252 P. 325, 328, the proper rule is stated as follows: "A testator is of sound and disposing mind and memory, if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument. [Citing cases.]" The converse, namely, what is required to show that the testator was of unsound mind, was set forth in Re Estate of Perkins, 195 Cal. 699, 703, 235 P. 45, 47: "Mental derangement sufficient to invalidate a will must be insanity in one of two forms: (1) Insanity of such broad character as to establish mental incompetency generally; or (2) some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion. Even in the latter class of cases, it is not sufficient merely to establish that a testator was the victim of some hallucination or delusion. The evidence must establish that the will itself was the creature or product of such hallucination or delusion; that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument. The evidence must establish, in addition to the fact of the existence of the hallucinations or delusions, the fact that by reason of these hallucinations or delusions the testatrix devised or bequeathed her property in a way which, except for the existence of such delusions, she would not have done. In short, the abnormality of mind must have had a direct influence upon the testamentary act. [Citing cases.]"

Appellant, in his reply brief, concedes that on the issue of general competency the evidence is conflicting, and that the finding of competency in this sense is supported. It should be pointed out here that even the witnesses who testified that the decedent was incompetent admitted that he knew the extent and nature of his property and the objects of his bounty. Appellant's main argument on this point is that the will was the result of insane delusions. In this connection he emphasizes the testimony of Dr. Adams and the housekeepers, the testimony relating to the two hallucinations, and the evidence that shows that the testator labored under the apparently mistaken belief that his son was a drunkard.

[6–8] The evidence relating to the "headless" wolf delusion was in no way related to the making of the will. The hallucination that his deceased wife had directed that the son be excluded, and the evidence that the decedent believed, probably mistakenly, that his son was a drunkard, might support a finding in favor of appellant had such a finding been made, but it does not compel such a finding. Here there is ample evidence of other factors that motivated the testator in making the will. The evidence shows a long period of ill feeling between the father and his son, based not only on the probably mistaken belief that his son was a drunkard, but upon other factors as well. The misunderstandings between the two started when the son left home without consent, followed by a disapproved marriage. In addition, the father felt that his son was unable to manage his own affairs. The disinheriting of the son, in the instant case, is not unexplained. This serves to distinguish the cases cited by appellant. One of the main cases relied upon is In re Estate of Sandman, 121 Cal.App. 9, 8 P.2d 499. The facts of that case are somewhat similar to those here involved, except that in that case, unlike the instant one, the relationship between the decedent and his disinherited daughter had been harmonious. There, the *trial court* found that the testator was of unsound mind. This was *affirmed* by the appellate court. In so affirming, the appellate court stated the rule to be, 121 Cal.App. at page 13, 8 P.2d at page 501: "As was said in Re Estate of Snowball, 157 Cal. 301, 107 P. 598, 'The rule is the same in will contests as in other proceedings,' that all questions of the weight of the evidence and the credibility of the witnesses are for the jury and the trial court; and, if there be any substantial evidence to support the finding or verdict, it cannot be set aside by the reviewing court, although such court might believe the great preponderance of the evidence was the other way." That rule is equally applicable to the instant case. The evidence and the reasonable inferences therefrom are conflicting on the issue, and for that reason the determination of the trial court is conclusive.

The Finding of No Undue Influence is Supported.

[9–11] To constitute undue influence the evidence must show that the person charged exercised such control over the decedent that the latter's mind and will were subjugated to the will of the person unduly benefiting from the provisions of the will. In re Estate of Smith, 200 Cal. 152, 252 P. 325. In Re Estate of Llewellyn, 83 Cal.App.2d 534, 562, 189 P.2d 822, 839, 191 P.2d 419, the factors tending to show undue influence are summarized as follows: "Before there is imposed upon the proponent of a will the obligation of presenting evidence of volition, and before the question as to undue influence becomes one of fact for determination by a jury, there must be evidence, the probative force of which establishes (1) the relations between the one charged with exercising the undue influence and the decedent affording the former an opportunity to control the testamentary act; (2) that the decedent's condition was such as to permit of a subversion of his freedom of will; (3) that there was activity on the part of the person charged with exercising undue influence; and (4) that such person unduly profited as beneficiary under the will. [Citing cases.] It is also the law that evidence must be produced that pressure was brought to bear directly upon the testa-

mentary act. [Citing a case.]" None of these factors alone will create a presumption of invalidity, but in combination they make the question one of fact. In re Estate of Graves, 202 Cal. 258, 259 P. 935.

[12] In the instant case the evidence does not compel a conclusion that these factors were present. The evidence supports the implied finding that Masters was not active in the securing of the second will. If we were considering the first will of May 13, 1947, a very strong showing of activity on the part of Masters could be made. That will was drafted by the attorney for Masters, at Masters' dictation, and without the attorney ever seeing or consulting with the testator. In that respect, the case is factually similar to In re Estate of Chesney, 102 Cal.App.2d 708, 228 P.2d 46, where the trial court found undue influence based upon similar facts. But the will here under consideration is the will of August 7, 1947. That will was drafted by attorney Blaine at the request of the decedent. The decedent was alone with Blaine when the will was drafted, and discussed with Blaine the provisions of the will. Blaine did not know of the existence of the first will, and did not know Masters. The record shows that Masters did not know that the decedent was going to draft a second will, or that decedent intended to ask Blaine to draft it. Appellant points out that Blaine was recommended to the decedent by Morse, who was Masters' attorney, and that Morse telephoned to Blaine to ask him to draft the will for decedent. Morse had been secured by Masters for the decedent to terminate the joint tenancy after the death of the wife of decedent, and had represented decedent in the guardianship proceeding. He represents Masters in the instant case. But the record shows that Morse was very careful not to suggest to Blaine what the will was to contain, and told him none of the background. The record amply supports the finding that Blaine was not the attorney for Masters, and that decedent had independent legal advice in drafting the will.

Nor are the provisions of the will unnatural under the facts. The evidence shows a long standing feeling of antagonism on the part of the father toward his son, and a long standing feeling of friendship toward Masters. It is not at all surprising that after appellant unsuccessfully sought to secure control of his father's property, by having himself appointed guardian, and after seeking to have his father declared incompetent, that the decedent would feel some resentment and would continue in his desire to disinherit his son. While it is true that a nephew may not be, from the relationship alone, a natural object of the bounty of an uncle where there are children. In re Estate of Chesney, 102 Cal.App.2d 708, 711, 228 P.2d 46; In re Estate of Nolan, 25 Cal.App.2d 738, 742, 78 P.2d 456, here the relationship does not stand alone. The evidence shows that Masters was very friendly with the old man and performed many services for him, services which the father would not permit his son to perform.

[13] While the evidence would have supported a finding, had it been made, that the decedent's mental and physical condition was such as to permit the subversion of his will, it does not compel the conclusion that his will was in fact subverted. The evidence shows a stubborn, strong-willed old man who had been unfriendly with his son for many years. It also shows that for many months the decedent continuously intended and had a fixed desire to disinherit his son.

[14] There was no finding as to whether a confidential relationship in fact existed between Masters and decedent. Undoubtedly the evidence would have supported such a finding had it been made. In re Estate of Johnson, 31 Cal.App.2d 251, 87 P.2d 900; In re Estate of Chesney, 102 Cal.App.2d 708, 228 P.2d 46; In re Estate of Payne, 94 Cal.App.2d 504, 210 P.2d 916. But even if such a relationship existed, and therefore a presumption of undue influence arose, the record shows that respondent offered ample evidence to repel the presumption. The finding of no undue influence is amply supported.

The judgment appealed from is affirmed.

BRAY, and FRED B. WOOD, JJ., concur.

109 Cal.App.2d 504

PEOPLE v. ONE 1947 CADILLAC 4-DOOR SEDAN, etc., et al.

Civ. 18474.

District Court of Appeal, Second District, Division 3, California.

Feb. 28, 1952.

Hearing Denied April 24, 1952.

The People of the State sued for forfeiture of a 1947 Cadillac four-door sedan on the ground of its use for unlawful transportation of heroin. From an order of the Superior Court of Los Angeles County, Philbrick McCoy, J., granting plaintiff's motion for a new trial after a judgment directing release of the automobile to the owner thereof, he appealed. The District Court of Appeals, Parker Wood, J., held that the trial court did not abuse its discretion in granting the motion on the ground of insufficiency of the evidence to sustain the judgment, though the trial judge stated, just before announcing his original decision, that he did not believe the police officers called as witnesses by plaintiff.

Order affirmed.

1. New Trial ⇐41(2)

In state's action to forfeit automobile as used in unlawfully transporting heroin, where trial judge stated, at hearing of plaintiff's motion for new trial after judgment for automobile owner, that judge erred at original trial, in rejecting deputy attorney general's offer in evidence of certified copy of judgment on conviction of owner for violating Federal Narcotics Act because appeal therefrom was pending, and received such copy in evidence pursuant to stipulation, trial court did not abuse its discretion in granting motion, though trial judge stated, just before announcing original decision, that he did not believe plaintiff's witnesses. Health and Safety Code, § 11611.

2. New Trial ⇐69, 72

On hearing of motion for new trial on ground that judgment was contrary to evidence, trial court is empowered and required to reconsider and reweigh all evidence before it at trial and may correct his error in judging witnesses' credibility by granting new trial.

3. New Trial ⇐68

The fact that jury cannot change its verdict does not preclude trial judge, who decides facts, from changing his unequivocally expressed decision as to facts, as judge, not jury, is authorized by statute to grant a new trial.

4. New Trial ⇐6, 159

A trial court has large discretionary power in deciding motion for new trial, and in considering evidence thereon, may draw inferences therefrom opposed to those drawn on trial, if not unreasonable.

5. Appeal and Error ⇐354(6)

The District Court of Appeal must uphold trial court's order granting new trial, if any ground on which it might have been granted is supported by record.

A. Brigham Rose, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Stanford D. Herlick, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Action for the forfeiture of an automobile to the state. The Notice of Seizure and Intended Forfeiture Proceedings, filed by the attorney general, alleged that the automobile was seized on October 17, 1949, by the Division of Narcotic Enforcement pursuant to section 11611 of the Health and Safety Code; that the automobile was used to unlawfully transport heroin.

In a trial without a jury, the court found that the automobile was owned by Milton T. Shafer, and that the automobile was not used unlawfully as charged. Judgment was that the automobile be released to said Shafer.

Plaintiff made a motion for a new trial upon the grounds that the judgment is contrary to the evidence and the law, and that the court committed error in the exclusion of evidence. On March 31, 1950, as shown by a minute order of that date, the motion for a new trial was granted upon the ground that the judgment is contrary to the evidence. On April 4, 1950, the trial judge

signed and filed an order which specified in part that plaintiff's motion for a new trial "is hereby granted upon the ground of the insufficiency of the evidence to sustain the judgment." Shafer appeals from the order granting the motion for a new trial.

[1] Appellant contends that the court abused its discretion in granting a new trial. At the trial, and just preceding the announcement of the decision in favor of Shafer, the trial judge said that he did not believe the three police officers who were called as witnesses by the plaintiff. Appellant argues that since the trial judge "in the pronouncement of the reasons for his decision" made it clear that he did not believe the witnesses produced by the plaintiff, he did not have the right, upon the hearing of the motion for a new trial, to change his original conclusions in the absence of a clear "augmentation by way of evidentiary matter." On cross-examination, the deputy attorney general asked Shafer if he had been convicted of a felony, and he replied that he had not been so convicted. Thereupon the deputy attorney general offered in evidence a certified copy of "a judgment of conviction" in the United States District Court. Shafer's counsel objected to the offer upon the ground that it did not appear that the judgment was final. Upon voir dire examination of Shafer, by his counsel, Shafer testified that he had been involved in a proceeding in the United States District Court and that after "the pronouncement" by the court in that case he had taken an appeal. The said objection was sustained, and the certified copy was marked Exhibit 4 for identification. At the hearing of the motion for a new trial the deputy attorney general argued that the court erred in not receiving Exhibit 4 for identification in evidence, and he then offered to stipulate that said exhibit for identification be introduced in evidence—as long as it appears in the record that it was a conviction under the Federal Narcotics Act, 21 U.S.C.A. § 171 et seq. The judge said that he was in error in rejecting the said offer on the ground that an appeal was pending. Counsel for Shafer accepted the stipulation offered by the deputy attorney general. Thereupon Exhibit 4 for identification was received in evidence. It thus appears that there was additional evidence to be considered in determining whether there should be a forfeiture of the automobile.

[2–5] Irrespective, however, of whether there was additional evidence, the trial court was empowered and required, upon the hearing of the motion for a new trial, to reconsider and reweigh all the evidence which was before the court at the trial. Even if a trial judge should say, at the time of deciding a case, that he did not believe certain witnesses, he might conclude, upon reviewing all the evidence upon a motion for a new trial, aided by references to the reporter's transcript or by other methods of refreshing memory, that by reason of his inadvertence or misunderstanding of testimony he had erred in judging the credibility of witnesses. Under such circumstances, the judge is afforded an opportunity in the exercise of sound discretion to correct the error by granting a new trial. Counsel for Shafer argues, however, to the effect that since a jury cannot change its verdict, a judge who decides the facts should not be permitted to change his unequivocally expressed decision as to the facts. It is the judge, and not the jury, who is authorized by statute to grant a new trial. In Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 451, 168 P. 1033, wherein the trial was without a jury, there was a finding that certain bonds were not fraudulently issued, which finding was contrary to the contention of the Kern Valley Bank. A motion for a new trial therein was granted, and on appeal the court said, 176 Cal. at page 456, 168 P. at page 1035: "In deciding a motion for a new trial the court below has large discretionary power. * * * In considering the evidence upon such motion that court has power to draw inferences from the evidence opposed to those which were drawn by it upon the trial, provided they are not unreasonable. * * * This court must uphold the order if any ground upon which it might have been granted is supported by the record. We are therefore bound to assume that the court, upon its last consideration of the evidence, believed

that the inferences in favor of the Kern Valley Bank should prevail, rather than those against it, and we cannot say that this was an abuse of discretion."

The principles of law applicable to an appeal from an order granting a motion for a new trial are stated in Sweeley v. Leake, 87 Cal.App.2d 636, 640, 197 P.2d 401. The trial court herein did not abuse its discretion.

The order granting a new trial is affirmed.

SHINN, P. J., and VALLEE, J., concur.



109 Cal.App.2d 475

BROOKS et al. v. INDEPENDENT EXPLORATION CO. et al.

DAVIS et al. v. CITIZENS TITLE CO. et al.

Civ. 18162, 18163.

District Court of Appeal, Second District, Division 3, California.

Feb. 27, 1952.

Rehearing Denied March 18, 1952.

Hearing Denied April 24, 1952.

S. M. Brooks and another brought action against the Independent Exploration Company and others to obtain judgment that plaintiffs were entitled to possession of certain realty as lessees under oil lease and to oil produced from oil well thereon, and Ellen E. Davis and others brought action against the Citizens Title Company, the Independent Exploration Company, and others to compel trustee to execute partial reconveyance of mineral rights. The Superior Court of Los Angeles County, William J. Palmer, J., entered judgments adverse to plaintiffs, and they appealed. The District Court of Appeal, Wood, J., held that substitution of trustee under trust deed was valid, and that mineral deeds of plaintiffs were subject to trust deed.

Judgments affirmed.

1. Husband and Wife ⇐267(6)

Where beneficiary of trust deed executed by husband and wife, original trustee, and husband agreed on substitution of trustee and evidenced their agreement by writings which constituted a written agreement to substitute trustee, and realty involved was community property of which husband was manager, and all parties to trust deed acted under and recognized substitution of trustee for many years, substitution of trustee was valid and deed executed by the substituted trustee on default under trust deed was valid. Civ.Code, §§ 172a, 2934a.

2. Mines and Minerals ⇐54½

Where agreements to sell mineral rights were made after trust deed was recorded, and agreements recited that they were subject to conditions, restrictions, rights, and rights-of-way of record, and statement by real estate commissioner on reverse side of agreements recited that land was encumbered by trust deed, and mineral deeds recited that they were subject to rights and rights-of-way of record, mineral deeds were subject to trust deed.

Eugene L. Wolver, Arthur G. Baker, Arthur C. Miller, and Harold E. Prudhon, Los Angeles, for appellants.

O'Melveny & Myers, Sidney H. Wall, Philip F. Westbrook, Jr., Bennett W. Priest, Lawrence L. Otis and James F. Healey, Jr., Los Angeles, and Walter L. Rowse, Bakersfield, for respondents.

PARKER WOOD, Justice.

These two actions were consolidated for trial. Plaintiff Brooks commenced the first action above mentioned and sought to obtain a judgment that he is entitled to possession of 1¼ acres of land, as lessee under an oil lease, and to oil produced from an oil well thereon. Thereafter plaintiff Davis joined as a party plaintiff in that action and alleged that she is the owner of and entitled to the mineral rights in said land, subject to said oil lease held by Brooks as lessee.

In the second action above mentioned, plaintiffs Davis, Wood, Jackson, Miller, Wolver, Marks and Brooks sought to compel the trustee, under a trust deed, to exe-

cute partial reconveyances of mineral rights in four 1¼-acre parcels of land. (One of these parcels is the parcel referred to in the first action.) In both actions, the plaintiffs sought a declaration by the court as to whether there had been a legal substitution of trustee under the trust deed.

Judgment in the first action was that neither plaintiff had any interest in said 1¼ acres of land; and that defendants Independent Exploration Company and Rothschild Oil Company are the owners of the exclusive right to remove oil from said land. Judgment in the second action was that none of the plaintiffs is entitled to any reconveyance of any part of said four parcels of land; that none of the plaintiffs has any interest in said land; and that defendants Moore are owners of and entitled to possession of all said four parcels of land, subject to the exclusive right of defendants Independent Exploration Company and Rothschild Oil Company to remove oil therefrom. Plaintiffs appeal from the judgments.

In 1938 Mr. and Mrs. T. M. Frew, Jr., conveyed by grant deed about 211 acres of land to LeRoy Harrod for the agreed price of $3,000. At the time of said transaction, and as security for the payment of $2,900, the unpaid balance of the purchase price, Mr. Harrod and his wife executed a trust deed covering said land, which deed was recorded on August 31, 1938. Under that trust deed, the Harrods were the trustors, T. M. Frew, Jr., was the beneficiary, and the Citizens Title Company was the trustee. The land was community property of the Harrods.

Harrod divided the land into 1¼-acre parcels and thereafter made written agreements for the sale of the mineral rights in 44 of those parcels. The agreements provided that when the buyer had complied with all the terms of his agreement (including payment in full) the seller would deliver to him a mineral deed conveying to him the mineral rights in the parcel sold, "subject to conditions, restrictions, rights and rights-of-way of record." On the reverse side of the agreement there is a printed statement, made by the real estate commissioner for the information of the public, which recites in part that the land is encumbered by said trust deed. In 1939 Harrod made such an agreement with plaintiffs Jackson for the sale of one parcel, with plaintiff Wood for two parcels, and with Mr. Fordahl (plaintiff Davis' predecessor in interest) for one parcel. Thereafter in 1939 Harrod and wife executed mineral deeds in favor of the Jacksons and Wood. In 1940 Harrod executed a mineral deed in favor of the Royal Land Corporation conveying all the mineral rights in said subdivided acreage not theretofore conveyed. (It appears that said corporation was owned by Harrod and A. J. Rankin.) Thereafter in 1940 the said corporation executed a mineral deed in favor of Fordahl.

The trust deed, above referred to, provided in part as follows: "It is expressly agreed that Citizens Title Company, Trustee, herein, shall be and is hereby authorized at any time during the life of this Deed of Trust, provided no default shall have been declared thereunder, to execute and deliver to the parties entitled thereto, Partial Reconveyances of the property hereinabove described in parcels of five (5) or more acres, the same to be reconveyed upon payment of $17.50 per acre." In February, May, June and August, 1939, the trustee executed partial reconveyances of the land described in the trust deed.

On November 4, 1939, Mr. Frew, the beneficiary under the trust deed, signed a document which is as follows:

"Substitution of Trustee

"Whereas, A Trust Deed was executed on August 25, 1938, naming the Citizens Title Company, a California Corporation, as Trustee, and LeRoy Harrod and Ruth H. Harrod, husband and wife, as Trustors, and T. M. Frew, Jr., as Beneficiary, which Trust Deed was recorded in Book 16033 at Page 105 of Official Records of Los Angeles County;

"Now Therefore, A. J. Rankin, is hereby substituted for said Citizens Title Company, a California Corporation, as Trustee in said Trust Deed.

"This substitution is made pursuant to the provisions of Section 2934A of the Civil Code.

"In Witness Whereof the said T. M. Frew, Jr., the Beneficiary under said Trust Deed has caused his name to be affixed hereto this 4th day of November, 1939.

"T. M. Frew Jr.

"T. M. Frew, Jr."

On said November 4th Mr. Frew acknowledged before a notary public that he executed said document. Mr. Frew testified that after he signed the document he apparently handed it back to Harrod; before he signed the document Harrod had called him and said that they would have to make a substitution of trustee, that it would be to their benefit to do it, that something was wrong in the trustee company; and he (Frew) agreed that they "would make A. J. Rankin—that it would be in his name." Harrod testified that on December 13, 1939, he took said document to the Citizens Title Company, the trustee named in the trust deed; that when he requested the trustee to sign the substitution he delivered to the trustee a letter, signed by him, which was as follows (Exhibit F):

"December 13, 1939

"Citizens Title Company,
"354 South Spring Street,
"Los Angeles, California.

"Gentlemen:

"We enclose herewith Substitution of Trustee in duplicate in the Frew matter, which please have the proper officers of your company sign on the page marked, 'receipt,' and return one copy to us.

"Thank you.

"Very truly yours,
"LeRoy Harrod"

He testified further that after the trustee had signed the substitution he took the original document to his (Harrod's) office and delivered it to Rankin; that on December 18, 1939, he sent the said document, by mail, to the county recorder for recording. Attached to said document, entitled "Substitution of Trustee," there is another document entitled "Receipt" which was signed by the trustee. The said receipt is as follows:

"Receipt

"Receipt of a copy of the attached Substitution of Trustee is hereby acknowledged and we hereby consent thereto.

"Dated: Dec. 13th, 1939.

"Citizens Title Company
"By L. A. Troutman
"Secretary."

"(Seal of Citizens
Title Company)

The "Substitution of Trustee," with the trustee's receipt attached, was recorded on December 27, 1939, in the office of the Recorder of Los Angeles County. Harrod testified that he asked Frew if he would agree to substitute a trustee in place of the Citizens Title Company; he (Harrod) suggested that A. J. Rankin be made the trustee; Frew said that was agreeable to him; he (Harrod) then prepared said document herein referred to as a substitution of trustee; he took it to Frew, who was at Newhall, and Frew signed it; then Frew handed it to him and asked that he follow the necessary procedure to complete the substitution.

A. J. Rankin, who was named in the substitution of trustee, testified that in 1939 he was general manager of Harrod's real estate office; he was requested by Harrod to act as substituted trustee under the trust deed; on December 13 or 14, 1939, he (Rankin) mailed, by registered mail, copies of the substitution of trustee to Mr. and Mrs. Harrod; on March 26, 1941, in compliance with a written request by Mr. and Mrs. Frew, he executed a reconveyance of approximately 35 acres of land.

The court found that between November 4 and December 27, 1939, A. J. Rankin was duly substituted as trustee under the deed of trust.

Mr. Frew testified that in April, 1948, when he heard that oil had been discovered in Placerita, he notified Harrod that he wanted his money on the note and trust deed. Harrod then told Rankin that he was trying to obtain money with which to buy the trust deed. Rankin told Harrod that he would speak to Bishop Moore about the matter.

On May 26, 1948, Mr. and Mrs. Frew transferred the said note (which was then in default) and trust deed to Bishop Moore for $1,750. At the time of such transfer, payments required to be made on the note were delinquent. The trust deed provided that no deficiency judgment should be taken against the makers of the trust deed (the Harrods).

On June 23, 1948, Mr. and Mrs. Moore, as lessors, and Independent Exploration Company, as lessee, entered into an oil lease covering about 158 acres of the land described in the trust deed. The land so leased included the four parcels of land involved herein. (On June 29, 1948, Mr. and Mrs. Moore acknowledged before a notary public that they executed the oil lease. On December 28, 1948, the vice-president and the assistant secretary of the Independent Exploration Company acknowledged before a notary public that said corporation executed the oil lease.)

On June 28, 1948, a notice of default and election to sell under the trust deed, signed by Moore, was recorded at his request. On November 6, 1948, Rankin, as trustee, sold the property to Moore, and on November 9, 1948, the said trustee delivered his trustee's deed to Moore. Said deed was recorded on January 11, 1949. On May 16, 1949, the Independent Exploration Company started to drill the first oil well on the leased property. The well, which was completed on May 30, 1949, produced 660 barrels of oil per day. Thereafter said company drilled other oil producing wells on the property. On September 15, 1949, the Independent Exploration Company assigned an undivided 40 per cent of its interest in the oil lease to the Rothschild Oil Company. On September 25, 1949, those companies started to drill an oil well on the 1¼-acre parcel of land as to which a mineral deed had been executed in favor of Fordahl.

Fordahl died, and his interest in said parcel of land was distributed by a decree of distribution to plaintiff Davis. The decree was recorded on September 28, 1949. On October 14, 1949, plaintiff Davis, as lessor, and plaintiff Miller, as lessee, entered into an oil lease covering the parcel of land to which plaintiff Davis held a mineral deed. On October 17, 1949, plaintiff Miller assigned a one-third interest in said oil lease to plaintiff Marks and a one-third interest to plaintiff Wolver. On October 20, 1949, plaintiff Wood, as lessor, and plaintiffs Miller, Wolver and Marks, as lessees, entered into an oil lease covering the two parcels of land to which plaintiff Wood held a mineral deed. On September 27, 1949, plaintiffs Jackson, as lessors, and plaintiff Marks, as lessee, entered into an oil lease covering the parcel of land to which plaintiffs Jackson held a mineral deed. On October 17, 1949, Marks assigned a one-third interest in the last-mentioned oil lease to plaintiff Miller and a one-third interest to plaintiff Wolver. On October 22, 1949, plaintiffs Miller, Marks and Wolver assigned their interests in the three oil leases (covering the four parcels involved here) to plaintiff Brooks, but reserved certain royalties to themselves.

Lessee Brooks, preparatory to drilling for oil upon the land to which Davis held a mineral deed, caused a survey to be made of that land on the morning of said October 22nd, and at that time he placed a stake thereon indicating the location of the proposed well. In the afternoon on said day, it appears that some of the defendants erected a gate across the road which Brooks had used in going to said parcel of land. On October 25, 1949, Brooks, with drilling equipment, sought to enter upon said land by using that road, but a guard refused to open the gate. Thereafter Brooks made demands upon defendants that he be permitted to use said road and to go upon the land, but the demands were refused. The Brooks action herein was commenced on November 1, 1949, and the Davis action was commenced the following day.

Appellants contend that the statute (section 2934a of the Civil Code) authorizing the substitution of a trustee is not applicable to the trust deed involved herein; that the purported substitution of A. J. Rankin as trustee was not made in compliance with the provisions of the statute; and that the sale to Bishop Moore by said purported trustee was void. That section provides in part: "The trustee under a

trust deed upon real property given to secure an obligation to pay money and conferring no other duties upon the trustee than those which are incidental to the exercise of the power of sale therein conferred, may be substituted by the recording in the county in which the property is located of a substitution executed and acknowledged by all of the beneficiaries under such trust deed, or their successors in interest." Appellants argue that the trust deed herein confers a duty upon the trustee which is not incidental to the exercise of the power of sale conferred therein, in that, the trustee is authorized to make partial reconveyances of the property in parcels of five or more acres upon the payment of a certain amount of money. They also argue that the purported substitution of trustee was not made in compliance with said section 2934a, in that, no affidavit of service of notice of substitution of trustee was attached to said substitution. Said section provides in part: "* * * beneficiaries who elect to substitute trustees hereunder shall cause a copy of such substitution to be mailed, prior to the recording thereof, * * * to all persons to whom a copy of the notice of default would be required to be mailed * * *. The substitution must contain * * * affidavit attached to said substitution to the effect that notice has been given to the persons and in the manner above required." The persons entitled to such notice were Mr. and Mrs. Harrod. As above shown, Rankin testified that he mailed, by registered mail, copies of the substitution of trustee to Mr. and Mrs. Harrod. It is not necessary to decide whether the method of substitution of a trustee as provided in said section 2934a is applicable to the trust deed herein, or to decide whether the failure to attach an affidavit of service of notice to the substitution rendered the substitution ineffectual. In Pacific States Savings & Loan Co. v. North American, etc., Co., 37 Cal.App.2d 307, 99 P.2d 355, the plaintiff, who had purchased real property from a substituted trustee under a trust deed, sought to quiet title against the original trustee. The successor of the original beneficiary and the successor of the original trustor therein jointly executed and recorded a document entitled "Substitution of Trustee" and complied with the requirements of said section 2934a for the purpose of substituting the new trustee. The original trustee therein asserted that the substitution of trustee was invalid. The court therein held that the substitution was made by the joint action of the successor of the beneficiary and the successor of the lender, that it was not dependent on said section 2934a for its validity, and that the substitution was valid. The court said, 37 Cal. App.2d at page 310, 99 P.2d at page 356: "In other words, we are of the view that the principal parties to the transaction, to-wit, the trustor and the lender, or the successors of said parties, may by appropriate joint action revoke the trust entirely leaving the title to the property in the trustor or his successor free of any trust or encumbrance; that they may by appropriate joint action convey title to a third person free of any trust or encumbrance; and that they may by appropriate joint action substitute a new trustee in the place of the original trustee named in the deed of trust. * * * We conclude that the substitution jointly executed and recorded by the successor of the trustor and the successor of the lender was valid and that it effectively revoked the powers of the defendant trustee and terminated any interest of the defendant trustee in the property." As above stated, the court in the present case found that Rankin was duly substituted for Citizens Title Company as trustee under the trust deed. It also found that about November 4, 1939, it was agreed between the Harrods, as trustors, and Mr. Frew, as beneficiary, that Rankin would be substituted as trustee; that about said date and pursuant to the express request of said trustors, the said Mr. Frew, as beneficiary, executed a substitution of trustee in writing which provided that Rankin was thereby substituted for Citizens Title Company as trustee; that about December 13, 1939, and pursuant to the express written request of said trustors, the Citizens Title Company endorsed on said substitution of trustee its consent in writing to the substitution; that said beneficiary caused a copy of the substitution to

be mailed about December 13, 1939, by registered mail, to each of the trustors, Mr. and Mrs. Harrod, at the address specified in the trust deed for the mailing of a copy of any notice of default and sale; that the substitution was recorded on December 27, 1939; that the agreement that Rankin would be substituted in place of the Citizens Title Company as trustee was, on or before April 17, 1941, fully executed and recognized by all persons who were parties to the trust deed at the time of said substitution.

[1] The substitution of trustee was made about 9 years before the land was sold by the substituted trustee. (The substitution was made in December, 1939, and the sale made in November, 1948.) About a year after the trustee's sale, and about 5 months after oil had been discovered by the defendant oil companies on the 158 acres of land described in the trust deed, the appellants Miller, Wolver, Marks and Brooks entered into oil leases with the appellants Davis, Wood and Jackson (who held mineral deeds), or became assignees of oil leases made by them, covering the 5 acres of land involved herein. Within a few weeks after becoming such lessees, the appellants commenced these actions alleging invalidity of the substitution of the trustee. The evidence shows that the new trustee accepted the substitution; that the original trustee consented in writing to the substitution; that the beneficiary stated in writing that he substituted a new trustee; that LeRoy Harrod, one of the trustors and the husband of the other trustor, prepared the document referred to as the substitution of trustee, personally presented it to the beneficiary for execution by him, personally presented it to the original trustee and requested in writing that the trustee endorse thereon that it had received a copy thereof and consented to the substitution; that Harrod then delivered it to the new trustee and caused it to be recorded; that the new trustee acted under the substitution and issued partial reconveyances at the request of the beneficiary. It thus appears from all the evidence that the beneficiary, the original trustee, and a trustor (husband of the other trustor) agreed upon the substitution of the trustee and that they evidenced their agreement by writings which, when considered together and in connection with the circumstances under which the writings were made, constitute a written agreement by them to substitute a trustee. The beneficiary stated in writing that he substituted A. J. Rankin as trustee. The original trustee stated in writing (on a document attached to said writing of the beneficiary) that it consented to the substitution. Harrod, the trustor husband, stated in his letter to the original trustee that, "We enclose herewith Substitution of Trustee in duplicate in the Frew matter, which please have the proper officers of your company sign on the page marked 'receipt,' and return one copy to us." (On the page so marked, the original trustee stated that it consented to the substitution.) Although Mrs. Harrod, one of the trustors, did not sign any instrument in connection with the substitution, it appears that the land was community property and, under the circumstances here, it was not necessary that she sign such an instrument. The husband has the management and control of the community real property (Civ.Code, sec. 172a) and the wife is not required to join with him in executing an instrument pertaining to the property except when it "is leased for a longer period than one year, or is sold, conveyed, or encumbered." The substitution of the trustee under the trust deed herein was not within the exceptions mentioned. The evidence shows, as found by the court, that the agreement that Rankin would be substituted as trustee was fully executed and recognized by the persons who were parties to the trust deed at the time the substitution was made. Harrod wrote to Frew on March 26, 1941 (over a year after the substitution), and asked him for a reconveyance of 35 acres of the land. Frew wrote to Rankin, the substituted trustee, and requested him to make the reconveyance. On April 17, 1941, Rankin executed such a reconveyance. No one who was a party to the trust deed at the time the substitution was made is objecting herein, or asserting any invalidity, regarding the substitution of trustee. In the case of Pacific States Savings & Loan Co. v. North American, etc., Co., supra, 37 Cal.App.2d 307, it was the original trustee who asserted

the alleged invalidity of the substitution of a trustee, but it was held, as above stated, that under the circumstances therein the beneficiary and trustor had made a valid substitution of trustee. In the present case, all the parties to the trust deed acted under and recognized the substitution of trustee for many years prior to the time appellants (as lessees, or assignees of lessees, of the holders of mineral deeds) commenced these actions. The evidence supports the finding of the trial court that the substitution of trustee was valid.

[2] Appellants also assert that the Harrods were obligated to deliver a marketable title to the mineral rights. The agreements to sell mineral rights were made after the trust deed was recorded on August 31, 1938, and they recited that they were subject to conditions, restrictions, rights, and rights-of-way of record. Also, as above shown, the statement by the real estate commissioner on the reverse side of the agreements recited that the land was encumbered by the trust deed. The mineral deeds recited that they were subject to "Rights and/or Rights-of-way of record." The evidence was sufficient to support the finding that none of the appellants had any interest in the land. The court also found that there was no collusive agreement by Harrod, Rankin, or Moore for the purpose or with the intent of depriving any of the appellants of his interest in the land. It appears that the evidence was sufficient to support that finding.

Appellants also contend that the defendant oil companies were not bona fide purchasers of the oil lease from the Moores without notice of the rights of the purchasers of the mineral rights. The court found, upon sufficient evidence, that the oil companies purchased the oil lease without notice of any equity claimed by any of the appellants.

By reason of the above conclusions, it is not necessary to discuss the other contentions of appellants.

The judgments are affirmed.

VALLÉE, J., and VICKERS, J., pro tem., concur.

109 Cal.App.2d 516

BLAIR v. WILLIAMS.

Civ. 18573.

District Court of Appeal, Second District, Division 2, California.

Feb. 29, 1952.

Action by Don H. Blair against Frank D. Williams to recover damages for malicious prosecution. The Superior Court of Los Angeles County, Paul Nourse, J., rendered judgment in favor of plaintiff and defendant appealed. The District Court of Appeal, McComb, J., held that in absence of showing that defendant requested instructions on effect of advice of counsel in malicious prosecution action or that trial court refused to give such instruction, failure to give such instruction was not prejudicial error.

Judgment affirmed, purported appeal from order denying defendant's motion for mistrial dismissed and purported appeal from order denying motion for new trial also dismissed.

1. Malicious Prosecution ⇐64(1)

In action for damages for malicious prosecution, evidence that defendant accused plaintiff of alleged theft of three checks totaling $8,500, and alleged theft of a check for $9,300 and that plaintiff was acquitted of such charges and plaintiff's testimony that checks were given to him by defendant as compensation for services which plaintiff had rendered defendant, sustained verdict for plaintiff.

2. Appeal and Error ⇐499(4)

Before alleged error in refusal to give an instruction will be reviewed on appeal, record must show a proper request for such instruction, and ruling of trial court refusing to give requested instruction.

3. Appeal and Error ⇐499(4)

In action for damages for malicious prosecution, where record failed to disclose either that defendant requested instructions on effect of advice of counsel in a malicious prosecution action, or that trial court refused to give such instruction, defendant failed to sustain burden of showing that error had been committed by trial court.

4. Appeal and Error ⇐1170(6)

In action for damages for malicious prosecution, where one of jurors claimed that during recess of court a spectator in courtroom left at same time as jurors and made a statement to juror which allegedly constituted jury tampering and it was alleged that two other jurors heard remark, but, all three of those jurors voted for defendant, prejudice did not result to defendant from remark and therefore such alleged error would be disregarded. Const. art. 6, § 4½.

5. Appeal and Error ⇐1005(2)
New Trial ⇐72

It was duty of trial judge on motion for new trial to reweigh evidence and determine which portions, if any, of testimony of witnesses was to be believed and which was not to be believed and having performed that duty and there being substantial evidence to sustain his findings, trial court's finding was conclusive on appeal.

6. New Trial ⇐76(2)

In action for damages for malicious prosecution, fact that trial court reduced the amount of judgment did not require that he grant defendant's motion for new trial.

7. New Trial ⇐162(1)

Where trial court requires as condition to its order denying new trial that portion of award be remitted, order does not indicate that trial court was dissatisfied with verdict on facts or on other grounds urged by defendant in support of his motion for new trial and trial court is not duty bound to grant a new trial irrespective of amount of award.

8. Appeal and Error ⇐1060(2)

In action for malicious prosecution, where plaintiff's attorney offered in evidence judgment in another action in favor of plaintiff and against defendant for amount of money which defendant accused plaintiff of stealing and first time judgment was offered in presence of jury there was no statement as to who was successful or in whose favor judgment was entered and objection was sustained to offer, no prejudice resulted to defendant.

9. Trial ⇐344

Verdict may not be impeached by affidavits of jurors as to occurrences after impanelment of jury except where such affidavits show verdict was reached by resort to determination of chance.

10. New Trial ⇐143(2)

Defendant's motion for new trial based on misconduct on part of jury as allegedly shown by affidavits of three jurors who voted in favor of defendant was properly denied.

11. Appeal and Error ⇐1004(1)

Jury's verdict will not be set aside on appeal on ground that damages are excessive, unless verdict is so outrageously excessive as to suggest, at first blush, passion, prejudice or corruption.

12. Malicious Prosecution ⇐69

Award of $22,500 as damages sustained as result of alleged malicious prosecution where evidence disclosed that plaintiff's special damages occasioned by malicious prosecution action amounted to $7,500 and it was shown that peptic ulcer was aggravated to such extent plaintiff was still suffering from it at time of malicious prosecution trial approximately two years after his arrest, that various newspaper articles appeared in daily papers telling of his arrest and that plaintiff had held a responsible position at one of major motion picture studios, was not excessive.

13. Appeal and Error ⇐106, 782

Order denying defendant's motion for mistrial was not an "appealable order" and purported appeal from such order would be dismissed. Code Civ.Proc. § 963.

See publication Words and Phrases, for other judicial constructions and definitions of "Appealable Order".

14. Appeal and Error ⇐110, 782

Order denying defendant's motion for new trial was not an "appealable order" and purported appeal from such order would be dismissed.

S. Ward Sullivan and David Welts, Los Angeles, for appellant.

Walter H. Young, Los Angeles, for respondent.

McCOMB, Justice.

Defendant appeals from a judgment in favor of plaintiff after trial before a jury in an action to recover damages for malicious prosecution. There are also purported appeals from (a) the order denying defendant's motion for a mistrial, and (b) the order denying defendant's motion for a new trial.

Facts: In May, 1948, defendant signed a criminal complaint charging plaintiff with grand theft. Based on this complaint plaintiff was arrested and subsequently tried and acquitted by a jury.

Thereafter plaintiff filed the present action against defendant for malicious prosecution and a jury returned a verdict in favor of plaintiff in the sum of $20,000 compensatory damages and $15,000 punitive damages.

The court denied defendant's motion for a new trial "provided that plaintiff files written consent that the judgment heretofore entered November 9, 1950 in this action be reduced to the sum of $22,500 on or before the 12th day of January, 1951." Pursuant to said order plaintiff filed his consent to the remission of the judgment from $35,000 to $22,500 and an order was entered denying defendant's motion for a new trial.

Questions: First: *Was the evidence sufficient to sustain a verdict upon which the judgment was predicated?*

[1] *Yes.* The evidence was undisputed that defendant accused plaintiff of alleged theft of three checks totaling $8,500, an alleged theft of a check for $9,300 and that plaintiff was acquitted of such charges. Plaintiff testified the four checks were complete and regular upon their face naming him as payee at the time they were signed by defendant. He further testified the checks were given to him by defendant as compensation for services which plaintiff had rendered defendant.

This evidence, apparently believed by the jury, constitutes substantial evidence to sustain the jury's verdict. It would serve no useful purpose to detail other corroborative evidence. (Thatch v. Livingston, 13 Cal. App.2d 202, 203, 56 P.2d 549.) Likewise we must disregard contrary evidence. (Estate of Isenberg, 63 Cal.App.2d 214, 217, 146 P. 2d 424.)

Second: *Did the trial court commit prejudicial error in failing to give the jury an instruction on the law relative to the effect of a defendant, in a malicious prosecution case, relying upon the advice of counsel in instituting the criminal action upon which the malicious prosecution suit was predicated?*

[2] *No.* Before alleged error in the refusal to give an instruction will be reviewed on appeal, the record must show, (1) a proper request for such instruction, and (2) the ruling of the trial court refusing to give the requested instruction. (Alexander v. McDonald, 86 Cal.App.2d 670, 671 [2], 195 P.2d 24; Peckham v. Warner Bros. Inc., 42 Cal.App.2d 187, 189 [2], 108 P.2d 699. See also cases cited in 6 West's California Digest, 1951, Appeal and Error, ⚷928(4), page 397.)

[3] In the present case the record fails to disclose either that defendant requested instructions upon the effect "of advice of counsel" in a malicious prosecution action, or that the trial court refused to give such instructions. The burden is upon defendant (appellant) to show that error has been committed in the trial court. Defendant in the present case has not met this duty.

Third: *Did the trial court commit prejudicial error in denying defendant's motion for a mistrial?*

No. During the course of the trial one of the jurors claimed that during a recess of court a spectator in the courtroom left at the same time as the jurors and said to juror Hunter, "I have been following this dumb cluck around and he has lost every one of his cases."

[4] Defendant claims this constituted jury tampering and the trial judge should have declared a mistrial. It is alleged that two other jurors, Langdon and Kagy heard this remark. Since all three of these jurors voted for defendant it is obvious that prejudice did not result to him from the remark and therefore under the mandate of

Article VI, section 4½ of the Constitution of the State of California such alleged error must be disregarded.

Fourth: *Did the trial court err in denying defendant's motion for a new trial?*

No. Defendant argues that the trial judge indicated he believed plaintiff had not told the truth and the fact that he reduced the judgment as a condition for denying the motion for a new trial supports this conclusion.

[5] Such may have been the case, however it was the duty of the trial judge on the motion for a new trial to reweigh the evidence and determine which portions, if any, of the testimony of witnesses was to be believed and which was not to be believed. Having performed this duty, and there being substantial evidence to sustain his findings, the trial court's finding is conclusive upon appeal.

[6, 7] The fact that the trial court reduced the amount of the judgment did not require that he grant a motion for a new trial. Where the trial court requires as a condition to its order denying a new trial that a portion of the award be remitted, there is no merit in the claim that the order indicated the trial court was dissatisfied with the verdict upon the facts or on other grounds urged by defendant in support of his motion for a new trial, and that the trial court was in duty bound to grant a new trial irrespective of the amount of the award. (Whicker v. Crescent Auto Co., 20 Cal.App.2d 240, 245 [6], 66 P.2d 749; see also Estate of Duncan, 9 Cal.2d 207, 217, 70 P.2d 174.

Fifth: *Was plaintiff's attorney guilty of prejudicial misconduct?*

[8] *No.* During the course of the trial plaintiff's attorney offered in evidence a judgment in another action in favor of plaintiff and against defendant for the amount of money which defendant accused plaintiff of stealing. The first time the judgment was offered in the presence of the jury there was no statement as to who was successful or in whose favor the judgment was. The only thing expressed in the presence of the jury was an offer in evidence of the judgment in a specified action. Objection was sustained to the offer. Clearly no prejudice resulted to defendant.

The same condition obtained when the judgment was offered a second time and an objection sustained to its reception in evidence.

Sixth: *Was the trial jury guilty of misconduct?*

No. Defendant on the motion for a new trial introduced the affidavits of three jurors who voted in favor of defendant purporting to show misconduct upon the part of the jury in reaching its verdict.

[9, 10] It is settled that a verdict may not be impeached by affidavits of jurors as to occurrences after impanelment of a jury except where such affidavits show the verdict was reached by a resort to the determination of chance. (Mish v. Brockus, 97 Cal.App.2d 770, 776, 218 P.2d 849; McWilliams v. Los Angeles Transit Lines, 100 Cal.App.2d 27, 29 [1], 222 P.2d 953. See also cases cited in 43 West's California Digest, 1951, Trial, ⚷344, page 36.)

It is evident therefore that there was no competent evidence before the trial court to show misconduct of the jury.

Seventh: *Were the damages awarded plaintiff excessive?*

[11] *No.* A jury's verdict will not be set aside upon appeal on the ground that damages are excessive, unless the verdict is so outrageously excessive as to suggest, at first blush, passion, prejudice or corruption. (Junge v. Midland Counties etc. Corp., 38 Cal.App.2d 154, 160 [5], 100 P.2d 1073.)

[12] In the present case the amount of the award does not fall within this category. An examination of the evidence discloses plaintiff's special damages occasioned by the malicious prosecution action amounted to $7,500. In addition it was shown that a peptic ulcer was aggravated to such an extent plaintiff was still suffering from it at the time of the malicious prosecution trial approximately two years after his arrest; and that various newspaper articles appeared in the daily papers of Los Angeles telling of his arrest. The evidence also disclosed plaintiff had held a responsible position at one of the major motion picture

studios in Los Angeles. Such evidence clearly sustains the judgment in favor of plaintiff as reduced by the trial court.

(1) The judgment is affirmed;

[13] (2) The purported appeal from the order denying defendant's motion for a mistrial is dismissed, since such order is nonappealable because it is not listed in appealable orders set forth in section 963 of the Code of Civil Procedure; and

[14] (3) The purported appeal from the order denying the motion for a new trial is dismissed, since such order is likewise nonappealable. (See cases cited in 6 West's California Digest, 1951, Appeal and Error, ⚖782, page 78.)

MOORE, P. J., concurs.

Mr. Justice FOX, deeming himself disqualified, did not participate in the foregoing decision.



109 Cal.App.2d 425

MacINTYRE v. ANGEL et al.

Civ. 14818.

District Court of Appeal, First District, Division 1, California.

Feb. 26, 1952.

Hearing Denied April 24, 1952.

B. S. MacIntyre brought an action against Peter T. Angel, and others, doing business as the Derby Restaurant, a copartnership, and others, to recover balance allegedly due to plaintiff upon written and oral agreements for work done in the remodeling and decorating of a restaurant. The Superior Court, City and County of San Francisco, Preston Devine, J., rendered a judgment adverse to the defendants and the defendants appealed. The District Court of Appeal, Fred B. Wood, J., held that extrinsic evidence was admissible as an aid to interpretation of the written contract.

Judgment affirmed.

1. Licenses ⚖39.43

Where plaintiff performed work in remodeling and decorating restaurant pursuant to written contract signed by plaintiff and mural painter, and plaintiff held state building contractor's license but mural painter did not, and plaintiff and mural painter had no joint license covering the venture, plaintiff could not recover for work done if contract was joint and several obligation of plaintiff and mural painter. Business and Professions Code, §§ 7028–7031.

2. Evidence ⚖448

Where parties to contract disagreed as to meaning of contract, and court could not to a certainty and with sureness determine which was correct interpretation by mere reading of contract, extrinsic evidence was admissible as aid to interpretation.

3. Contracts ⚖143, 147(1) 152

Fundamental canon of construction which is applicable to contracts generally is ascertainment of intention of parties and language of contract, if clear and explicit and not conducive to absurd results, must govern its interpretation, but whole of contract is to be taken together so as to give effect to every other part, if reasonably practical, each clause helping to interpret the other, and only a portion of contract, although it is clear and explicit, may not be selected as furnishing evidence of intention of parties.

4. Contracts ⚖169

As aid in discovering intent of parties to contract court may look to circumstances surrounding making of contract, including subject matter and object matter of contract, and preliminary negotiations, and thus place itself in same situation in which parties found themselves at time of contracting.

5. Contracts ⚖170(1)

Where contract is ambiguous a construction given to it by acts and conduct of parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight

and will, when reasonable, be adopted and enforced by court.

6. Evidence ⇐384
Trial ⇐105(5)

Parol evidence rule is a rule of substantive law, not of evidence, and if extrinsic evidence is not properly admissible, as in absence of ambiguity in a writing, it must be ignored even though admitted without objection.

7. Contracts ⇐175(3)

In action brought by contractor to recover balance due plaintiff upon written contract for work done in remodeling and decorating restaurant owned by defendant, wherein defense was that contract was joint and several obligation of plaintiff and mural painter who signed contract and who had no contractor's license, so as to preclude recovery under statute, evidence sustained implied finding that person who represented defendants in negotiating and signing contract had instructed mural painter to include his fee in payments to be collected by plaintiff, and had instructed plaintiff to place mural painter's contract in contract signed by plaintiff and mural painter, and that parties intended two separate contracts. Business and Professions Code, §§ 7028–7031.

8. Appeal and Error ⇐193(4)
Pleading ⇐207

Where action was brought to recover balance due plaintiff upon written contract for work done in remodeling and decorating of restaurant owned by defendants, and controverted defense was that contract was joint and several obligation of plaintiff and mural painter who signed contract and who had no contractor's license, so as to preclude recovery under statute, statement in complaint that a certain sum of money became due to plaintiff and mural painter from defendants at most created uncertainty in pleading making it susceptible to special demurrer, and objection to such uncertainty came too late where made for first time on appeal. Business and Professions Code, §§ 7028–7031.

9. Trial ⇐199

In action to recover balance allegedly due plaintiff upon written contract for work done in remodeling and decorating restaurant owned by defendants, wherein controverted defense was that contract was joint and several obligation of plaintiff and mural painter who signed contract and who had no contractor's license, so as to preclude recovery under statute, complained of instruction merely told jury how and where to proceed if they found to be true portions of extrinsic evidence introduced as aid to interpretation of contract, and instruction was not objectionable as delegating to jury determination of question of law as to whether contract imported a complete legal obligation. Business and Professions Code §§ 7028–7031.

10. Contracts ⇐176(3)

When meaning of written contract is uncertain or doubtful and parol evidence is introduced in aid of its interpretation, question of its meaning is fact question, and if facts thus adduced were undisputed it would be function of court rather than jury to consider writing in light of such facts, but where such facts are evidenced by conflicting testimony, and meaning of contract is to be determined one way according to one view of facts and another way in accordance with the other view of facts, determination of disputed fact is for jury.

Philander Brooks Beadle and Morton L. Silvers, all of San Francisco, for appellants.

Franklin C. Stark, Raymond J. Salisbury, Oakland (Stark & Champlin, Oakland, of counsel), for respondent.

FRED B. WOOD, Justice.

Defendants appeal from a judgment rendered against them for $2,000 as the balance due plaintiff upon a written agreement and $4,050 as the balance due him upon an oral agreement for work done in the remodeling and decorating of a restaurant owned by the defendants as copartners. Not having discussed the $4,050 portion of the judgement, defendants may be deemed to have abandoned that phase of their appeal.

In respect to the $2,000 recovery upon the written agreement, appellants assign as error: (1) the admission of extrinsic evidence tending to show that the written agreement was not the joint and several obligation of respondent MacIntyre and one John Oshanna, an unlicensed person who also signed the agreement; and (2) the giving of a certain instruction whereby the trial court assertedly delegated to the jury the determination of a question of law, the question whether or not the written agreement imported a complete legal obligation.

[1] (1.) *The interpretation of the document, and the admissibility of extrinsic evidence in aid of its interpretation, became important* at the trial because if it were the joint and several obligation of respondent and Oshanna, respondent could not recover. Respondent held a state building contractor's license but Oshanna did not. Nor did they have a joint license covering this venture. See Bus. & Prof. Code, sections 7028–7031, and Loving & Evans v. Blick, 33 Cal.2d 603, 204 P.2d 23. Our inquiry starts with a reading of the document.

Dated June 9, 1947, written upon the letterhead of respondent MacIntyre, addressed to the "Derby Restaurant," it reads as follows:

"Gentlemen:

"We agree to do the following installation and decoration in your Restaurant:

"*Exterior*

"1. To remove the existing canopy over the entrance.

"2. To remodel the existing front of both the Restaurant and the cocktail room as shown on plan No. 2 * * * [Certain details thereof, and materials to be used, are specified.].

"*Interior*

"3. To build a checkroom and foyer as shown on plan. Walls of these two rooms to be 10 ft high * * * [Certain details thereof, described.].

"4. To open the floor over the existing stairs leading down to the washrooms. To frame in a railing around the stairs from existing panels on the premises. All other work in repairing and plumbing below shall be figured later under separate agreement.

"5. To install double exit doors as shown on plan to conform with the requirements of the Fire Department.

"6. To install a maple hardwood dance floor on sleepers on the existing cement floor. Floor now to be approximately 1800 square ft. * * * [Platform for music, installation of mirrors, etc.].

"All other construction such as moving the bar to new location, revamping the booths to fit along new locations and any other work will be figured aside from this agreement.

"*Decoration*

"7. To drape the ceiling with panels of four pastel toned glass fibre cloth, plus full length wall drapes from the ceiling to the base of the band stand and as wide as the length of the band stand.

"8. To paint the walls and ceiling under the mezzanine in flat oil paint, and walls of the main room in the same manner with color scheme to be mutually agreed on. The walls will be decorated in continental peasant type dance figures in a colorful, attractive manner.

"*Electrical*

"9. To install 14 light fixtures on the ceiling from the existing outlets * * * [These are described; wiring and circuits specified.].

"The above agreement does not include carpet or any plumbing.

"We will make every effort to complete this work within six weeks of signing of this agreement and start of work. This job will be subject to permits by the Dept. of Public Works and C. P. A. Authority.

"The above job will cost $15,500.00 and payable as follows:

$3000.00 on signing of this agreement and start of work.

$7000.00 payed [sic] progressively as the work continues to completion.

$3000.00 Two weeks after completion.
$2500.00 Thirty five days after completion.

"[signed] John Oshanna
John Oshanna, Designer-Decorator

[signed] B. S. MacIntyre
B. Stuart MacIntyre, Contractor.

"We accept the above
agreement
The Derby Restaurant
By, [signed] Dr. P. Angel"

Appellants claim that this document clearly shows upon its face, without any ambiguity, that it is a single agreement, the joint and several obligation of MacIntyre and of Oshanna. They direct attention to the fact that it begins with the words "We agree to do the following installation and decoration in your Restaurant" and toward the end declares that "We will make every effort to complete this work within six weeks * * *," emphasizing the "We"; was signed both by Oshanna and by MacIntyre, thus characterizing themselves as "We"; and lumps the construction work and the decorating work together, as one job, for a single price.

Respondent directs attention to the fact that respondent signed as "Contractor," but Oshanna signed as "Designer-Decorator." These words (coupled with the absence of a designation, such as "first party" or other group term commonly used to indicate a joint undertaking by two or more persons), respondent says, are not mere *descriptio personae;* that these words are functional and indicate the kind of work respondent and Oshanna respectively and separately, not jointly, undertook to do; that these words are a part of the writing and provide the key to the portions of the work (constructional and decorative, separately described in the document) which respondent and Oshanna respectively and separately obligated themselves to perform; that, at the very least, there is an ambiguity which appears upon the face of the writing and is a part of it, one which requires the use of extrinsic evidence to ascertain the true intention of the parties signatory; and that such use of extrinsic evidence is for the purpose of interpreting the words used in the writing, not to vary the terms of the document.

Thus it appears that the parties are in disagreement as to the meaning of the writing which they signed, as was the case in Wachs v. Wachs, 11 Cal.2d 322, 325, 79 P.2d 1085; Woodbine v. Van Horn, 29 Cal.2d 95, 104, 173 P.2d 17, and Union Oil Co. v. Union Sugar Co., 31 Cal.2d 300, 305, 188 P.2d 470. As in each of those cases, the writing seems susceptible to either of the interpretations respectively urged by the parties. We cannot to a certainty and with sureness, by a mere reading of the document, determine which is the correct interpretation.

[2, 3] In such a situation, extrinsic evidence becomes admissible as an aid to interpretation, upon the principle, variously stated, as follows: "The fundamental canon of construction which is applicable to contracts generally is the ascertainment of the intention of the parties (Civ.Code, § 1636), and in accordance with section 1638 of the Civil Code, the language of the agreement, if clear and explicit and not conducive to an absurd result, must govern its interpretation. But this does not mean that a portion only of a written instrument, although it is clear and explicit, may be selected as furnishing conclusive evidence of the intentions of the parties. Section 1641 of the Civil Code embraces the true rule in providing that 'The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.'" Universal Sales Corp. v. Cal. Etc., Mfg. Co., 20 Cal.2d 751, 760, 128 P. 2d 665, 671; "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if this can be done without violating the intention of the parties. Civ.Code, sections 1643, 3541; see, Rest., Contracts, § 236(a). When the language employed is fairly susceptible of either one of two constructions contended for, extrinsic evidence may be resorted to for the purpose of explaining the intention of the parties." Woodbine v. Van Horn,

supra, 29 Cal.2d 95, 104, 173 P.2d 17, 22; "Once something has to be read into a contract to make it clear, it can hardly be said to be susceptible of only one interpretation. It would have been error for the trial court to read something into the contract by straining 'to find a clear meaning in an ambiguous document, and having done so exclude the extrinsic evidence on the ground that as so construed no ambiguity exists.' [Citation.]" Union Oil Co. v. Union Sugar Co., supra, 31 Cal.2d 300, 306, 188 P.2d 470, 473.

Ours is not unlike the cases in which extrinsic evidence was admitted to determine whether or not an individual signed a "We promise to pay" note solely in a representative capacity, the signature being "Pioneer Mining Company, John E. Mason, Sup't.", Bean v. Pioneer Mining Co., 66 Cal. 451, 453, 6 P. 86, 87; or whether a person signed a contract in his individual as well as his representative capacity, when he signed as the president of a company and also as "stockholder", Lynch v. McDonald, 155 Cal. 704, 102 P. 918; or which type of agreement was intended when a person signed an "Owner Member" marketing agreement form but the designation "Renter Member" was written on the cover of the agreement, California Canning Peach Growers v. Williams, 11 Cal.2d 221, 228–229, 78 P.2d 1154; or in what capacity a person signed when he wrote his name under his company's name, without prefixing any qualifying word such as "by". Carlesimo v. Schwebel, 87 Cal.App.2d 482, 197 P.2d 167.

[4, 5] In such a case what are the aids to interpretation? We find them expressed in Universal Sales Corp. v. Cal. Etc., Mfg. Co., supra, 20 Cal.2d 751 at page 761, 128 P.2d at page 671: "As an aid in discovering the all-important element of intent of the parties to the contract, the trial court may look to the circumstances surrounding the making of the agreement [Citations], including the object, nature and subject matter of the writing [Citations], and the preliminary negotiations between the parties [Citations], and thus place itself in the same situation in which the parties found themselves at the time of contracting. [Citations.] Also applicable here is the familiar rule that when a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court. [Citations.] The reason underlying the rule is that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract, and a practical construction placed by the parties upon the instrument is the best evidence of their intention. [Citations.]" See also Woodbine v. Van Horn, supra, 29 Cal.2d 95, 96, 104, 173 P.2d 17, and Union Oil Co. v. Union Sugar Co., supra, 31 Cal.2d 300, 306, 188 P.2d 470.

The trial judge properly admitted extrinsic evidence on this issue, and instructed the jury as to its use. That evidence supports the finding which is implied from the rendition of the verdict for respondent.

[6] It happened that before appellants interposed any objection upon the ground of varying the terms of the document,[1] respondent MacIntyre testified: "In late April or May, 1947, I was contacted by Oshanna with respect to some renovation, decorating and construction work to be done at this restaurant; he introduced me to Dr. Angel (one of the appellants) and told him I was the contractor whom Oshanna had recommended to Angel; Angel then said he wanted to remodel the building there; they wanted to put on a new front, a new dance floor, decorate the ceiling, and some mural work on the walls; Dr.

1. The failure to object did not of itself make such evidence available for interpretation of the agreement. The parol evidence rule is a rule of substantive law, not of evidence. Estate of Gaines, 15 Cal.2d 255, 264–265, 100 P.2d 1055. If extrinsic evidence is not properly admissible (as in the absence of an ambiguity in a writing), it must be ignored even though admitted without objection. Lifton v. Harshman, 80 Cal.App.2d 422, 432, 182 P.2d 222.

Angel said he would like an estimate of approximately what it would cost. He had had Oshanna prepare the preliminary drawing on the work; at this interview I was furnished with a copy of that drawing; Dr. Angel said Oshanna was going to do the designing and decorating work; Oshanna had already told Dr. Angel what his fee was, but I was to include it in my lump sum agreement, which I did; his fee was a little over $4,000. There were several papers typed by Oshanna in connection with this matter which were discussed between the three of us and then finally a paper was typed which was signed (the document under consideration). This document was typed by Oshanna. He is not a lawyer. I am not a lawyer, nor have I had any legal training. Oshanna prepared the plan mentioned in the agreement, and an architect prepared blue prints for the main and mezzanine floors. Oshanna painted his murals in the room there, work that Dr. Angel ordered him to do; the ceiling was draped with spun glass drapery; back of the bandstand it was draped with fireproof drapery materials. I paid Oshanna in full the amount he quoted at the outset as being his fee for doing the murals and design work. All of the amounts paid [by appellants] on this work were paid to me by checks made payable to my order in response to bills submitted by me, on my letterhead, addressed to appellants under the name 'Derby Restaurant,' each personally delivered by me to Dr. Angel. Those checks I cashed. In performing the written agreement I paid out $11,945.71 to subcontractors and for materials purchased, $646.47 for materials from my shop, and $1,143.63 to workmen employed by me."

Oshanna testified, without objection: "My business is designing and painting murals, that is pictures; in late April or early May, 1947, I had a conversation with Dr. Angel in which he told me that he and his partners wanted the place dolled up; at first the thought was just as to decorating so he asked me to work out some designs and I said I would; I did, and brought them back to Dr. Angel; after I had the second plan he asked me if I knew a reliable contractor and on about the third trip I introduced MacIntyre to the doctor and the doctor asked and MacIntyre gave him an estimate after he had taken the blue prints home and studied them; I typed up the document which was signed; I typed that up for Mr. MacIntyre."

Oshanna was then asked if there had been any discussion prior to the time this document was signed with respect to what Oshanna was to do and what his fee was to be for doing it. Appellants objected upon the ground it would vary the terms of the written agreement. The objection was overruled. The witness answered that there had been a discussion with Dr. Angel, whereupon appellants asked that it be understood that their objection would go to all of this testimony, and the court so ruled. Thereupon Oshanna testified: "I had a conversation with Dr. Angel before MacIntyre came in, at which time I told the doctor I would plan and design and there would be a percentage for supervision on the work, and so much for murals; and I furnished and installed a lot of draperies; as to the fee, I preferred Angel to pay me directly and told him so and that it would be around $4,000, whereupon the doctor said he wanted it all bulked up on one bill, on one piece of paper with the contractor's fee. Angel said, 'I want you to incorporate them right with the general contractor's, so they can pay that one amount, and he in turn can pay you.' I told Dr. Angel it didn't make any difference, that all I was interested in was my design and the murals and I did not care who did the construction. MacIntyre paid me in connection with the work I did, the amount which I had quoted to Dr. Angel. I do not do contracting. I do murals. I mean, the designers and mural painters and artists are not required to have a license. I did not have a painter's or decorator's license, nor a contractor's license. I signed this document of June 9, 1947, and also put on my title, Designer and Decorator. I typed those words under my name, not as a contractor; I did that at the behest of Dr. Angel. He wanted to see that I supervised that work, according to his words. I had no joint bank account with respondent at any time. I let no sub-contracts, orally or in writing, on this work,—neither with the electrician, nor with the painter, nor with anyone else.

I did not employ or pay the general painters. I bought the materials for the drapery, and had no men working for me except the drapery men I had to hang the material, and my assistant artists."

Appellants introduced evidence tending to show that this was a joint venture upon the part of respondent and Oshanna. That but produced a conflict in the evidence which it was the function of the jury to resolve. Dr. Angel did testify that no payments were made to Oshanna by the witness or any of the people connected with the Derby Restaurant, in connection with the work involved in this suit. Appellants stipulated that all of the money was paid to respondent.

[7] It is apparent that the extrinsic evidence amply supports the implied finding of the jury that Dr. Angel instructed Oshanna to include his fee in the payment to be collected by MacIntyre and instructed MacIntyre to place the Oshanna contract in the document of June 9, 1947, and that the parties intended two separate contracts, one by appellants with Oshanna, the other by appellants with respondent.

[8] Appellants, in their opening brief, directed attention to the fact that in one of the paragraphs of the first cause of action in respondents' complaint, the statement was made that "there became due to plaintiff and Oshanna from the defendants * * the total sum of $15,500.00 * * *." Oshanna is not mentioned elsewhere in the body of the complaint. Nor is he mentioned in the caption or the prayer of the complaint. It is not clear what or how much significance appellants attach to the quoted recital. Respondents replied that this recital at most created an uncertainty in the pleading, making it susceptible to special demurrer; that appellants failed to object to this uncertainty when their special demurrer was filed; that the objection comes too late upon appeal; also that appellants, upon the trial, brought this recital (as a statement of the respondent inconsistent with his testimony) to the attention of the jury, and the jury resolved the issue of fact in favor of respondent and against the appellants. We deem respondent's reply a complete answer to appellants' contention on this point.

Respondents urge that the extrinsic evidence was admissible for the additional reason that the "validity of the agreement" was "the fact in dispute", invoking subdivision 2 of section 1856 of the Code of Civil Procedure. We deem it unnecessary to consider this point in view of our conclusion that such evidence was admissible to resolve an ambiguity in the document.

(2) *By one of the instructions, appellants claim, the trial court delegated to the jury the determination of a question of law,* the question whether or not the written agreement imported a complete legal obligation. Appellants are mistaken. That instruction gave the jury questions of fact, not of law, to decide. The instruction read as follows:

"If you find from all the evidence that the contract was intended by the parties to be one between the Derby Restaurant on one hand and Mr. MacIntyre alone on the other hand, and that Mr. Oshanna's relation to such parties was intended to be solely that of a—strike that last. If you find from all the evidence that it was not intended by the parties that the relationship should be a signed [single?] contract, but, rather, if you find that there were two separate contracts, one by the Derby Restaurant with Oshanna, and the other made by MacIntyre with the Derby Restaurant, and that the Derby Restaurant instructed MacIntyre to place the Oshanna contract in the memorandum of June 9, 1947, then the defense of illegality would not be good. That is to say, you have contradictory evidence here, which is your duty to resolve.

"As a matter of fact, you have testimony that the Derby Restaurant by and through Dr. Angel instructed Oshanna to include his fee in the payment to be collected by MacIntyre. You have contradictory evidence to that from Dr. Angel that he did not know the sum agreed on by Oshanna, and that he did not separately agree with Oshanna by denying work to be done. You will determine that contradiction under the rules that I have given you as to the credibility of witnesses, and as to the weight of evidence."

[9] Appellants misconceive the clear import of this instruction. The court had already decided that the writing was ambiguous; that extrinsic evidence was admissible to resolve the ambiguity; and had admitted extrinsic evidence for that purpose. That evidence was conflicting. By this instruction, the judge told the jury how and where to proceed if they found this or that portion of the conflicting extrinsic evidence true. That was the submission to them of questions of fact.

[10] As was said in Walsh v. Walsh, 18 Cal.2d 439, at page 444, 116 P.2d 62, at page 65: "'When the meaning of the language of a contract is uncertain or doubtful and parol evidence is introduced in aid of its interpretation, *the question of its meaning is one of fact* * * *.'" If the facts thus adduced were undisputed, it would be the function of the court, not the jury, to consider the writing in the light of such facts, but where (as in the instant case) those facts are in dispute (evidence by testimony which is in conflict), "'and the meaning of the contract is to be determined one way according to one view of the facts and another way in accordance with the other view of the facts, then the determination of the disputed fact must be left to the jury.'" Coats v. General Motors Corp., 3 Cal.App. 2d 340, 355, 39 P.2d 838, 845. The judgment should be affirmed.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.



109 Cal.App.2d Supp. 925

SINAI v. SCHIFFMAN.

Civ. 36.

Appellate Department, Superior Court, Alameda County, California.

Jan. 29, 1952.

Action by Joseph Sinai against Philip Schiffman for rent under written lease of premises vacated by defendant. The Municipal Court, City of Oakland, County of Alameda, William J. McGuiness, J., rendered judgment for plaintiff. Plaintiff appealed from part of that judgment. The Superior Court held that landlord's re-entering and re-renting leased premises did not operate as termination of lease and tenant was liable for rent lost.

Judgment reversed.

1. Landlord and Tenant ⇦195(2)

Where lease provided that if premises were vacated, landlord could re-enter and re-rent them and tenant was to pay any loss in rent for balance of term, but that lease could be terminated only upon ten days written notice, landlord's re-entering and re-renting leased premises after tenant had abandoned them did not operate as termination of lease and tenant was liable for rent lost.

2. Evidence ⇦589

In action by landlord against tenant who had vacated premises, uncontradicted, but unconvincing, testimony of landlord as to his expenses in making premises rentable again was not binding on trial court and court's rejection thereof was not arbitrary.

Robert W. Sinai, San Francisco, for appellant.

Carl B. Munck and Phillips, Munck & Niemand, all of Oakland, for respondents.

PER CURIAM.

The plaintiff appeals from that portion of a judgment of the Municipal Court of the City of Oakland which limits his damages under a lease contract to the recovery of attorney's fees and three months' rent at the rate of $100 per month. Pertinent provisions of the lease are as follows:

Paragraph 12

"In the event of any default by lessee under any provision of this lease, lessor may at his option terminate this lease. This lease shall not be terminated, however, by reason of any default other than in payment of rent, except after ten days written notice from lessor to lessee

of such default, within which ten day period lessee may cure such default, if he is able to do so."

Paragraph 13

"If lessee vacates the leased premises before the expiration of the term, lessor may enter the leased premises, place all removable property therein in storage for the account and at the expense of lessee, and re-rent the premises upon such terms as to the lessor may seem proper; and the lessee agrees to pay to the lessor all sums thereby expended, including the cost of re-renting, and any difference between the sums if any received from the new tenant as rent during the unexpired portion of the term and for the rent and other sums herein provided to be paid by lessee."

The Trial Court found that the defendant paid the rent due under the lease through the month of May, 1950 and abandoned the premises during the month of August, 1950; that thereupon the plaintiff took possession and released the premises to one Mrs. Rourke, as of October 1st, 1950 for a period beyond the term of the original lease *without notice to the defendant.* These findings are supported by the evidence.

The evidence also showed without conflict that the plaintiff collected rent from Mrs. Rourke for the months of October and November and that she thereafter abandoned the premises and her whereabouts was at the time of trial unknown.

From the foregoing facts the Trial Court drew the conclusion of law that the re-letting of the premises by the landlord without notice to the tenant that same was being done on his behalf and that he would continue to hold the tenant liable, constituted a termination of the lease by operation of law and a release of the tenant from any further liability for rent.

[1] This conclusion is erroneous. Respondent relies upon three cases which he contends support the conclusion of the Trial Court. Welcome v. Hess, 90 Cal. 507, 27 P. 369; Rehkopf v. Wirz, 31 Cal.App. 695, 161 P. 285, 286, and Bradbury v. Higginson, 162 Cal. 602, 123 P. 797. None of these cases involved a lease which contained a provision similar to paragraph 13 above quoted. All of the cases hold that to constitute a release of the tenant, the conduct of the landlord must be "inconsistent with the continuing force of the original lease." Welcome v. Hess, supra, Rehkopf v. Wirz, supra, Bradbury v. Higginson, supra, Rognier v. Harnett, 45 Cal.App.2d 570, 114 P.2d 654; De Hart v. Allen, 26 Cal.2d 829, 161 P.2d 453; Yates v. Reid, 36 Cal.2d 383, 224 P.2d 8, 9.

It is true that in the case of Yates v. Reid, supra, the lease contained a further provision that the lessor might "without notice" re-enter and take possession, and that no re-entry should be construed as an election to terminate "unless written notice to that effect" were delivered to the lessee. Such a provision in the present lease no doubt would have eliminated the present controversy, and it is for that reason no doubt a desirable and wise provision. Such a provision, however, is by no means necessary to make the other provisions of the lease effective.

In the present case the re-taking of possession by the plaintiff landlord and his re-letting of the premises was authorized by the provisions of paragraph 13, to which the defendant had expressly agreed. The conduct of the plaintiff was therefore consistent with the terms of the lease, with the continuation of the lease contract and with the rights of the tenant thereunder. Such re-letting therefore did not operate as a termination of the lease and the release of the tenant from further liability for rent.

The plaintiff and appellant is therefore entitled to recover rents for the months of September and December, 1950, and for the first three months of 1951, the term remaining under the lease.

[2] Plaintiff also complains of the Trial Court's refusal to allow damages in the amount of $25, allegedly expended in cleaning the premises prior to re-letting. The testimony regarding this expenditure appears to have been unconvincing, and although defendant offered none to overcome

it the Trial Court was not bound to accept it. Provided he does not act arbitrarily, the Trial Judge may reject in toto the testimony of a witness, even though the witness is uncontradicted. Hicks v. Reis, 21 Cal.2d 654, 134 P.2d 788; Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868; Davis v. Judson, 159 Cal. 121, 113 P.147; Watwood v. Steur, 89 Cal.App.2d 620, 201 P.2d 460.

The judgment is reversed and the Trial Court is directed to enter judgment in favor of the plaintiff for five additional months' rent at the rate of $100 per month or for the total sum of $800 plus counsel fees as previously ordered, and costs.

WAGLER, P. J., and LEDWICH and HOYT, JJ., concur.



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